No. A23-0620

STATE OF MINNESOTA

IN COURT OF APPEALS

Dr. Jane Doe, Mary Moe, et al.,

Plaintiffs-Respondents,

vs.

State of Minnesota, et al.,

Defendants-Respondents,

and

Mothers Offering Maternal Support ("MOMS"),

Proposed Intervenor-Appellant.

BRIEF OF DEFENDANTS-RESPONDENTS

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LEGAL ISSUES

1. Should this appeal be dismissed based on mootness or Appellant's lack of standing?

These issues of appellate jurisdiction are properly first raised here, as they are only now relevant.

Apposite authorities:
Minn. R. Civ. App. P. 104.01, subd. 1
Minn. R. Civ. App. P. 126.02
United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995)
Marzitelli v. City of Little Canada, 582 N.W.2d 904 (Minn. 1998)
In re Custody of D.T.R., 796 N.W.2d 509 (Minn. 2011)

2. Did Appellant meet its burden to demonstrate each of the four factors required for intervention as of right under Minnesota Rule of Civil Procedure 24.01?

This issue was raised by Appellant's motion to intervene and Defendants' opposition. (Index Nos. 413, 414.) The district court held that Appellant was not entitled to intervene under Minnesota Rule of Civil Procedure 24.01. (Index No. 431.)

Apposite authorities:
Minn. R. Civ. P. 24.01
SST, Inc. v. City of Minneapolis, 288 N.W.2d 225 (Minn. 1979)
Schroeder v. Minn. Sec'y of State Steve Simon, 950 N.W.2d 70 (Minn. Ct. App. 2020), *review dismissed* (Nov. 25, 2020)
N.D. ex rel. Stenehjem v. United States, 787 F.3d 918 (8th Cir. 2015)

3. Is the district court's order denying Appellant's motion for permissive intervention appealable?

This issue was raised by Appellant's principal appeal brief.

Apposite authorities:
State v. Deal, 740 N.W.2d 755 (Minn. 2007)
Norman v. Refsland, 383 N.W.2d 673 (Minn. 1986)

4. If the order denying the motion for permissive intervention is appealable, did the district court abuse its discretion in denying permissive intervention under Minnesota Rule of Civil Procedure 24.02?

This issue was raised by Appellant's motion to intervene. (Index Nos. 413, 414.) The district court held that Appellant was not entitled to intervene under Minnesota Rule of Civil Procedure 24.02. (Index No. 431.)

Apposite authorities:
Minn. R. Civ. P. 24.02
Omegon, Inc. v. City of Minnetonka, 346 N.W.2d 684 (Minn. Ct. App. 1984)
North Dakota v. Heydinger, 288 F.R.D. 423 (D. Minn. 2012), report and recommendation adopted, No. 11-CV-3232 SRN/SER, 2013 WL 593898 (D. Minn. Feb. 15, 2013)

STATEMENT OF THE CASE

This appeal presents four narrow and straightforward issues: (1) whether this appeal should be dismissed for jurisdictional flaws, (2) whether Appellant satisfies the requirements for intervention as of right under Minnesota Rule of Civil Procedure 24.01, (2) whether the district court's order denying Appellant's motion for permissive intervention is appealable, and (3) if it is appealable, whether Appellant established that permissive intervention is appropriate under Minnesota Rule of Civil Procedure 24.02.[1] Application of precedent requires either dismissal or affirmance.

The underlying case was a constitutional challenge to more than a dozen statutes and regulations pertaining to abortion. (Index No. 347.) It was filed in June of 2019. All claims were brought under the Minnesota Constitution. The Plaintiffs were (1) Dr. Jane Doe, an anonymous doctor, (2) Mary Moe, an anonymous midwife, (3) Our Justice, a provider of abortion funding, and (4) First Unitarian Society of Minneapolis. They sued (1) the Governor, (2) the Attorney General, (3) the Commissioner of the Department of Health, (4) the Board of Medical Practice, and (5) the Board of Nursing.[2]

On June 13, 2022, in resolution of Defendants' interlocutory appeal based on jurisdictional defenses, Plaintiffs agreed to dismiss their claims regarding Minnesota

[1] Appellant's statement of legal issues appears to include a request for changes in Minnesota law (for example, different rules for intervention when constitutional rights are allegedly at issue), but it did not brief those arguments or raise them below. Defendants are not responding to any forfeited arguments.

[2] The claims against the State of Minnesota were dismissed at summary judgment. (Index No. 227.)

Statutes section 617.28, the sexually transmitted infection statute, and to dismiss First Unitarian Society as a plaintiff. (Index No. 346.) As part of this agreement, they filed a Second Amended Complaint, removing the dismissed claims.[3] (Index No. 348.) Other than removing the name of the First Unitarian Society from them, Plaintiffs' claims regarding Minnesota Statutes section 144.343, the Two-Parent Notification Law at issue in this appeal, were unchanged in the Second Amended Complaint. (*See id.* at ¶¶ 236-255.)

On July 11, 2022 Ramsey County District Court Judge Thomas Gilligan issued an order resolving all outstanding claims (the "Final Order"). (MOMS Add. 36.) The Final Order concluded that multiple state statutes, including the Two-Parent Notification Law, violated the privacy rights of Plaintiffs and/or their patients and clients. It declared those statutes unconstitutional and enjoined them. Judgment was entered on July 13. (Index No. 358.)

On July 28, the Attorney General informed the public that he and the Defendants would not appeal the July 11 Order. (*Attorney General Ellison, Co-Defendants will not Appeal Doe v. Minnesota*, The Office of Minnesota Attorney General Keith Ellison (July 28, 2022).)[4] On September 12, the last day to appeal the Final Order, MOMS filed

[3] MOMS incorrectly states that Our Justice was added as a Plaintiff with the filing of the Second Amended Complaint in 2022. (MOMS Br., at 9.) Our Justice was added as Plaintiff with the filing of the First Amended Complaint in July of 2019. (*See* Index Nos. 47, 348.)

[4] *Available at* https://www.ag.state.mn.us/Office/Communications/2022/07/28_Doe.asp.

a Notice of Intervention at 5:56 p.m., which both Plaintiffs and Defendants opposed. (Index No. 386.) After hearing argument on January 5, 2023, the district court denied MOMS's request on March 14, finding that MOMS had not satisfied any of the four requirements necessary to establish intervention as of right under Minnesota Rule of Civil Procedure 24.01 and that it was not entitled to permissive intervention under Minnesota Rule of Civil Procedure 24.02. (Index No. 431.) On April 28, MOMS filed a notice of appeal of the district court's order denying intervention.

STATEMENT OF FACTS

This is the fourth intervention attempt in this case. The district court denied all four attempts, and when two previous proposed intervenors appealed the district court's denials, this Court affirmed both decisions. *See Doe v. State*, Case No. A22-1265, 2023 WL 2763167 (Minn. Ct. App. Apr. 3, 2023); *Doe v. State*, Case No. A20-0273, 2020 WL 6011443 (Minn. Ct. App. Oct. 12, 2020), *review denied* (Dec. 29, 2020). (*See* Index Nos. 95, 159, 382, 431.) Most recently, the district court denied an August 4, 2022 intervention attempt as untimely. (Index No. 382.) This Court affirmed that decision on April 3, 2023, finding that the intervenor failed to demonstrate an interest warranting intervention as of right. *Doe*, Case No. A22-1265, 2023 WL 2763167.[5]

The facts relevant to this appeal are summarized below.

[5] The unsuccessful intervenor in that appeal, Traverse County Attorney Matthew Franzese, sought further review from the Minnesota Supreme Court on May 3, 2023, identifying legal issues regarding the appealability of permissive intervention. Defendants opposed his petition. On July 18, 2023, the supreme court issued an order denying the petition for further review.

I. DEFENDANTS VIGOROUSLY DEFEND THIS LAWSUIT.

In defending this lawsuit, Defendants filed a motion to dismiss, participated in extensive discovery including the exchange of nearly 15,000 pages of documents and 16 depositions, moved to exclude Plaintiffs' experts, and prepared three summary judgment motions. (Decl. of Jennifer Olson (Index No. 416) ¶ 2.) Twice, they prepared and submitted briefing to the Minnesota Court of Appeals, and also submitted briefing to the Minnesota Supreme Court. (*Id.*) The State spent over $600,000 and 4,000 hours defending this case over the course of three years. (*Id.*)

Because of the expansive scope of Plaintiffs' claims, the district court agreed to serial summary judgment briefing. (Index No. 166.) The parties first submitted briefing on issues of standing, proper parties, and justiciability. (*Id.*) Then Defendants submitted two summary judgment briefs on the merits of Plaintiffs' claims—half of the claims were addressed on November 30, 2021 and the second half on January 4, 2022. (Index Nos. 166, 238, 265.) The brief submitted on November 30 covered the Two-Parent Notification Law, the reporting requirements, the felony penalties related to regulatory infractions, and the hospitalization requirements. (*See* Index Nos. 166, 238.) The brief submitted on January 4 covered the mandatory disclosure requirements, the mandatory delay requirement, the felony penalties related to informed consent, the ban on advertising STI treatments, and the fetal tissue disposition requirement. (*See* Index Nos. 166, 265.)

In general on these cross-motions, Defendants argued that Plaintiffs had not met their burden of proof. In defending the statutes at summary judgment, Defendants submitted more than 100 pages of briefing and hundreds of pages of exhibits, including evidence from experts Dr. Donald Wothe and Dr. Jason Lindo, the American College of Obstetricians and Gynecologists, the Guttmacher Institute, and evidence of the legislative history of many statutes. (See Index Nos. 238, 265.)

II. DEFENDANTS' SUMMARY JUDGMENT ARGUMENT RECOGNIZED PARENTS' INTERESTS AND RELIES ON EXPERT REPORTS.

As with most statutes, Defendants argued that Plaintiffs had not presented sufficient facts to trigger a strict scrutiny review of the Two-Parent Notification Law. Defendants' initial memorandum opposing summary judgment summarized the genuine factual disputes about the impact of the Two-Parent Notification Law:

> Plaintiffs must affirmatively show that their fundamental right to choose to have an abortion is being infringed upon by the two-parent notification requirements before the Court is obligated to engage in a strict scrutiny analysis. *See Schroeder*, 962 N.W.2d at 484. Plaintiffs' summary judgment brief contains no argument that the two-parent notification requirements are infringing their privacy rights.
>
> There are genuine factual disputes at issue in this case regarding whether Plaintiffs can meet their burden in showing an infringement created by the two-parent notification requirements. Defendants have presented empirical evidence that Minnesota's two-parent notification requirement law resulted in no measurable reduction in abortions within the State. . . . Defendants have also shown that the two-parent requirements have not caused higher patient costs or lowered provider availability. . . . Conversely, Plaintiffs have provided no empirical evidence and only minimal anecdotal evidence.

(Index No. 238, at 30, with internal record cites omitted.)

In support of their argument that Plaintiffs had not met their burden to show the Two-Parent Notification Law was substantially infringing on their right to privacy, Defendants submitted expert reports from Dr. Jason Lindo. (Index No. 240, Ex. 3; Index No. 247, Ex. O.) Dr. Lindo has a Ph.D. in Economics and is an economics professor. (Index No. 240, Ex. D ¶¶ 1-2.) As of the date of Defendants' summary judgment brief, he had published 20 research articles in peer-reviewed economics journals and was a Specialized Co-editor of Economic Inquiry handling papers in the areas of health economics, public economics, and policy evaluation. (*Id.* ¶ 3.) His research includes health economics and issues concerning youth, including the effects of abortion and contraceptive policies. (*Id.* ¶ 5.) Dr. Lindo concluded that parental notification laws did not substantially reduce abortion rates. (Index No. 247, Ex. O ¶¶ 9, 15.) Dr. Lindo also found there is evidence parental notification laws reduce the number of unwanted pregnancies. (*Id.* ¶ 15.)

In addition to their argument that Plaintiffs had not put forward sufficient evidence to trigger strict scrutiny, Defendants made an alternative argument that the statutes survived strict scrutiny. Defendants argued that "parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children." (Index No. 238, at xxvi (*quoting Hodgson v. State*, 853 F.2d 1452, 1460 (8th Cir. 1988) (cleaned up).)[6] Defendants recognized that encouraging discussion

[6] Appellant's repeated suggestion that Defendants should have adjusted their defense after the *Dobbs* decision in June of 2022 is meritless. (MOMS Br., at 6, 25-26.) The (Footnote Continued on Next Page.)

between parents and children regarding abortion "was intended to allow parents to provide emotional support and guidance and forestall irrational and emotional decision-making." (*Id.*) They also recognized the important role parents play in medical care for their children, stating that "[p]arents can also provide information concerning the minor's medical history of which the minor may be unaware, authorize the release of medical data, and supervise/provide post-abortion care." (*Id.*) Defendants also pointed out that parents have a role in supporting a minor's psychological well-being and mitigating any adverse psychological consequences. (*Id.*)

III. THE DEFENDANTS DECIDE NOT TO APPEAL THE FINAL ORDER.

The district court issued an order resolving all outstanding claims on July 11, 2022. (July 11, 2022 Final Order, Index No. 357). The Final Order concluded that multiple state statutes, including the Two-Parent Notification Law, violated the privacy rights of Plaintiffs and/or their patients and clients. It declared those statutes unconstitutional and enjoined them.

On July 28, after careful consideration, the Attorney General informed the public that he and the Defendants would not appeal the Final Order. (*Attorney General Ellison,*

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decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), related exclusively to the scope of the privacy right in the federal constitution. The Plaintiffs' claims in this case related exclusively to the scope of the privacy right in the Minnesota Constitution, which the Minnesota Supreme Court had already concluded was broader than the federal right. *Doe v. Gomez*, 542 N.W.2d 17, 30 (Minn. 1995). Further, Defendants' cites to the *Hodgson* decision from the Eighth Circuit were to its helpful summary of the legislative purpose behind the Two-Parent Notification Law, and to the recognized interests of parents, neither of which was altered by the *Dobbs* decision.

Co-Defendants will not Appeal Doe v. Minnesota, The Office of Minnesota Attorney General Keith Ellison (July 28, 2022).)[7] The statement explained that, in making the decision not to appeal, the Defendants considered the broad public interest. As part of this consideration, one factor was the low likelihood of obtaining a different result through appeal. Another was the significant amount of state resources that it would take to appeal a case that had already cost the state over $600,000 (and 4,000 hours) to defend. But maybe the most important was finality:

> The organizations providing abortion care need to know what the law is. The people who work or are considering working for organizations that provide abortion care need to know what the law is. Pregnant Minnesotans need to know what the law is. But a costly appeal that is unlikely to succeed will serve only to further delay the finality that all Minnesotans need and deserve. Allowing this decision to stand promotes that finality, especially as it is effective in every county of our state.

Id.

The deadline to appeal the Final Order was September 12, 2022. No party sought to appeal the order before the deadline expired.[8]

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[7] *Available at* https://www.ag.state.mn.us/Office/Communications/2022/07/28_Doe.asp.

[8] Traverse County Attorney Matthew Franzese filed a Notice of Intervention on August 4, 2022. (Index No. 361.) After hearing argument on August 19, the district court denied Franzese's request on September 6, finding that he had not satisfied any of the four requirements necessary to establish intervention as of right under Minnesota Rule of Civil Procedure 24.01 and that he was not entitled to permissive intervention under Minnesota Rule of Civil Procedure 24.02. (Index No. 382.) On September 9, Franzese filed a notice of appeal of not only the denial of his intervention motion, but also of the Final Order, to which he was not a party. (Index No. 384.) On April 3, 2023, this Court affirmed the district court's denial and dismissed Franzese's appeal of the Final Order. (Footnote Continued on Next Page.)

IV. MOMS MOVES TO INTERVENE.

On September 12, 2022, the final day to appeal the Final Order, MOMS filed its notice of intervention after the close of business. (Index No. 386.) It sought both intervention as a matter of right, as well as permissive intervention.

MOMS is an unincorporated association of Minnesota mothers who currently have at least one minor daughter. (Decl. of Jessica Chastek on Behalf of Mothers Offering Maternal Support ("Chastek Decl."), Add. 32 ¶ 2.) MOMS indicates it has an interest in protecting the constitutional rights of its members to direct the care and upbringing of their minor children. (*See* MOMS Br., at 5.) MOMS does not indicate whether any of its members has a daughter who is considering or has considered obtaining an abortion, or who decided to obtain an abortion, who chose not to disclose the plans to their parents, and who chose not to seek a judicial bypass. (*See* Chastek Decl., Add. 32-34.)

If MOMS were allowed to intervene, the litigation would be extended for years. MOMS made clear it would seek to vacate the Final Order (and resulting judgment), reopen discovery (including submitting numerous reports from alleged experts), seek to prevail on dispositive motions or at trial in their defense of the statute, and pursue any appeal if it were not successful. (Add. 8-9.)

Doe v. State, Case No. A22-1265, 2023 WL 2763167 (Minn. Ct. App. Apr. 3, 2023); *Doe v. State*, Case No. A22-1265, Order (Minn. Ct. App. Apr. 3, 2023). As noted above, *supra* note 5, Franzese sought additional review from the supreme court, which the court denied on July 18.

V. THE DISTRICT COURT DENIES INTERVENTION AND MOMS APPEALS.

The district court denied MOMS's motion to intervene, finding that it had not satisfied any of the four requirements necessary to establish intervention as of right under Minnesota Rule of Civil Procedure 24.01. (Add. 27.) First, the court concluded the motion was untimely because MOMS failed to seek intervention until after the Final Order, even though at least some of MOMS's members were aware of the litigation from the day after Plaintiffs' Complaint was filed and MOMS should have been aware Defendants were not submitting their favored evidence by 2022. (*Id.* at 11-19.)

Second, the court found that the purported interest of MOMS's members in directing the health care decisions of their minor daughters was not sufficient to warrant intervention as of right. (*Id.* at 19-21.) The court also found that the members' purported interest based on their status as "designated beneficiaries" of the Two-Parent Notification Law was too remote and hypothetical to satisfy Rule 24.01. (*Id.* at 21-22.) Third, the court found that because MOMS lacked an interest in the subject of the action, it also lacked an interest which is subject to protection. (*Id.* at 23.)

Finally, the court concluded—for the fourth time—that Defendants adequately defended the lawsuit. (*Id.* at 24-26.) In finding that Defendants' representation was adequate, the court cited Defendants' summary judgment briefing and observed that "it was quite clear to the court that Defendants were advocating for the consideration of parents' rights[.]" (*Id.* at 25.) The court went on to find that "[f]rom 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's members, was adequate." (*Id.* at 27.)

The district court also concluded that MOMS was not entitled to permissive intervention under Minnesota Rule of Civil Procedure 24.02. (*Id.* at 31.) The court concluded that MOMS's motion was untimely (*id.* at 29), and that its last-minute intervention would significantly prejudice the rights of the existing parties (*id.* at 30). The court further found that while the motion contained a question of law and fact in common with the case, permissive intervention was inappropriate. (*Id.*) Finally, the district court concluded that judicial economy would not be served by granting MOMS's request for permissive intervention. (*Id.* at 31.)

On April 28, 2023 MOMS filed a notice of appeal of the district court's order denying intervention.

VI. THE LEGISLATURE REPEALS MANY OF THE STATUTES AT ISSUE IN THIS LITIGATION.

During the 2023 legislative session, many of the statutes at issue in this litigation were repealed, including some of the statutes MOMS claimed advanced its interests. Specifically, and as relevant to MOMS's motion (*see* Index No. 414, at 2), Minnesota Statutes sections 145.412 and 145.4242(a)-(c) were repealed.[9] *See* S.F. 2995, 4th

[9] Minnesota Statutes sections 145.413, subd. 2-3, 145.4132, 145.4246, and Minnesota Rule 4615.3600, which were at issue in the litigation but which MOMS did not expressly rely upon in support of its interests (*see* Index No. 414, at 2), were also repealed.

Engrossment, 93rd Leg. (Minn. 2023). Although the district court found subdivisions 2 through 6 unconstitutional, the Two-Parent Notification Law was not repealed. *See id.*

STANDARD OF REVIEW

The key issues in this appeal are subject to *de novo* review. This Court reviews appellate standing and mootness *de novo*. *Dunham v. Roer*, 708 N.W.2d 552, 563 (Minn. Ct. App. 2006). In addition, whether the district court correctly denied MOMS's motion to intervene as of right is subject to *de novo* review. *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn. Ct. App. 2005). Although this Court generally does not review decisions on permissive intervention, when it does so it uses an abuse-of-discretion standard. *State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007).

ARGUMENT

This appeal is about the district court's denial of a motion for intervention, and whether MOMS satisfied the requirements of Rule 24.01. The Court need not reach the merits of Rule 24.01, however, because no party filed a timely appeal of the Final Order and that order ended the case. As a result, MOMS cannot now seek reconsideration of or appeal the Final Order, which is its stated goal in district court. Its appeal from the intervention denial should thus be dismissed as moot. Additionally, MOMS cannot demonstrate a concrete, actual, or imminent harm. Because it has not suffered a concrete, actual, or imminent harm, MOMS lacks standing. Its lack of standing is fatal, and its appeal should be dismissed.

But even if the Court reaches the merits of the appeal, the district court's order should be affirmed because MOMS cannot meet any of the four requirements for intervention as of right. As the district court correctly held, MOMS failed to establish that its intervention is timely. It was clear that Defendants did not intend to submit MOMS's favored evidence by November 2021, when Defendants publicly filed their summary judgment briefing. Nonetheless, MOMS waited nearly an entire additional year and only sought to intervene after the district court issued a decision on the merits. Minnesota courts do not allow intervenors to take this wait-and-see approach.

Additionally, MOMS cannot demonstrate a cognizable interest in the abortion statutes at issue. MOMS's stated interest is a familial, speculative, and generalized interest in the enforceability of the statutes, an interest that does not warrant intervention as of right. Finally, Defendants presented an adequate defense throughout this litigation and advocated for the same parental rights MOMS seeks to advance. Because the denial of permissive intervention is not appealable, and MOMS does not meet any of the four requirements for intervention as of right, the district court's decision should be affirmed.

I. THIS APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION.

A. The Final Order Ends the Case, and MOMS Cannot Now Assert Rights the Parties Have Foregone.

"[A] tardy intervenor cannot breathe life into rights already forgone." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1162 (8th Cir. 1995) (internal quotation and citation omitted). *See also Jenkins by Agyei v. Missouri*, 967 F.2d 1245, 1248 (8th Cir.

1992) (dismissing intervenor's appeal where intervenor failed to make timely motion to intervene and consequently failed to file timely notice of appeal); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 738 F.2d 82, 85 (8th Cir. 1984) ("Intervenors, in other words, must take the lawsuit as they find it.").

When the time for appeal from an order or judgment expires without appeal having been taken, then the order becomes final. *Mingen v. Mingen*, 679 N.W.2d 724, 727 (Minn. 2004). *See also Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 906 (Minn. 1998) ("If the time for appeal from an order expires without appeal having been taken, then the order becomes final and the district court's jurisdiction to amend the order is terminated."). Once the time for filing a notice of appeal expires, the appellate court may not extend the time for filing. Minn. R. Civ. App. P. 126.02; *N. Star Int'l Trucks, Inc. v. Navistar, Inc.*, 837 N.W.2d 320, 325 (Minn. Ct. App. 2013) ("This court is specifically precluded from extending the deadline to appeal or considering an untimely appeal.").

Here, the Final Order became final when the time for appeal expired on September 12. *See* Minn. R. Civ. App. P. 104.01, subd. 1 ("an appeal may be taken from a judgment within 60 days after its entry"); Minn. R. Civ. App. P. 126.01; Minn. R. Civ. P. 6.01(a). As a result, the litigation is over and MOMS cannot breathe new life back into it. *See Union Elec. Co.*, 64 F.3d at 1162; *Jenkins*, 967 F.2d at 1248; *Little*

Rock Sch. Dist., 738 F.2d at 85.[10] MOMS's appeal is moot and should be dismissed. *See Peterson v. Humphrey*, 381 N.W.2d 472, 475 (Minn. Ct. App. 1986) ("It is well settled that if, pending an appeal, an event occurs which makes a decision unnecessary, the appeal will be dismissed as presenting a moot question.").

Appellant cites *In re Crablex* (MOMS Br., at 14-15), but the fact that intervention was allowed on appeal in that case does not support Appellant's position here, both because a party to the action *had* appealed the district court order and the intervenor sought to make the same arguments on appeal as the appellant. Crablex had entered into a purchase agreement to sell a building to Fine Associates. *In re Crablex, Inc.*, 762 N.W.2d 247, 250 (Minn. Ct. App. 2009). Crablex and Fine Associates did not close the sale and ended up in litigation. *Id.* While the litigation between Crablex and Fine Associates was pending, a separate litigation arose between Crablex and multiple third parties regarding easements the third parties sought to enforce on the property. *Id.* The district court concluded the easements were valid and would continue to encumber the property. *Id.* at 251. Crablex appealed the easement order, and oral arguments were scheduled. *Id.* Two weeks before the scheduled arguments, Crablex's counsel withdrew. *Id.* In response, Fine Associates, whose ownership interest in the building was still being litigated, sought to intervene in order to participate in the oral arguments. *See id.* This Court concluded that Fine Associates satisfied each of the four intervention

[10] None of the cases MOMS cites in support of its timeliness argument (MOMS Br., at 15-18) involved an intervention attempted after the time to appeal the final judgment expired.

requirements. *Id.* In finding that the intervention was timely, the Court observed that Fine Associates "essentially [sought] rulings only on the merits of Crablex's appeal[.]" *Id.* In contrast here, no party to the proceedings below has appealed and Appellant seeks to make entirely new arguments to the district court and appellate courts,

B. MOMS's Appeal Should Be Dismissed Because It Lacks Standing.[11]

Appellants must have standing to bring an appeal. Because MOMS lacks standing, its appeal should be dismissed without an analysis of its merits. *See State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 814 (Minn. 2014) (analyzing whether appellant had standing before considering merits of appeal); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512-13 (Minn. 2011) (analyzing whether appellant had standing to appeal). "An appellant has standing to appeal if the appellant is an aggrieved party." *Swanson*, 845 N.W.2d at 814. To be an aggrieved party, an appellant must have a direct interest in the subject of the litigation and its rights must have been injuriously affected by the adjudication. *In re Custody of D.T.R.*, 796 N.W.2d at 513 ("The injury to the right impacted by the adjudication must be immediate, and not a possible, remote consequence, or mere possibility arising from some unknown or future contingency.") The standing requirement "precludes citizens from bringing lawsuits against governmental agencies based only on their disagreement with policy."

[11] "Because an intervenor seeks to become a suitor, and asks the court to decide the merits of the dispute, he must not only satisfy the requirements of Rule 24, he must also have Article III standing." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (internal quotations and citations omitted).

Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P., 603 N.W.2d 143, 146 (Minn. Ct. App. 1999), *review denied* (Minn. Mar. 14, 2000).

The same rule is true for organizations and associations—in order to possess standing, those entities must have a direct stake in the litigation that is different from the general public. *Minn. Ass'n of Pub. Sch. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970) (holding association consisting of members and representatives of school boards did not have standing to challenge statute based upon their interest in promoting the educational interests of children). To show a direct stake, organizations can identify particular members who have suffered an injury-in-fact, or establish that the challenged statute has caused concrete injury to the organization. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012); *St. Paul Police Fed'n v. City of St. Paul*, Case No. A05-2186, 2006 WL 2348481, at *1 (Minn. Ct. App. Aug. 15, 2006), *review denied* (Minn. Oct. 17, 2006). MOMS has failed to establish any direct interest in the subject of the litigation or immediate injury to either its rights or its members' rights arising from the Final Order. *See Matter of Trade Secret Designations of 2019 Cogeneration & Small Power Prod. Reports*, Case No. A20-0827, 2021 WL 1247948, at *5 (Minn. Ct. App. Apr. 5, 2021) ("Organizations that seek to do no more than vindicate their own value preferences through the judicial process do not have standing.").

MOMS has no direct interest in the subject of this litigation—whether the Two-Parent Notification Law is constitutional and enforceable.[12] MOMS has failed to establish that any of its members has a daughter who is considering or has considered obtaining an abortion, let alone that a member has a daughter who decided to obtain an abortion, who chose not to disclose their plans to their parents, and who chose not to seek a judicial bypass. (*See* Chastek Decl., Add. 32-34.) MOMS also fails to establish any direct impact sustained by the organization itself. (*See id.*)

Recognizing the weakness of their argument for traditional standing, MOMS argues that the statute itself gives them standing. While statutes can confer standing, MOMS's argument that its members are beneficiaries of the Two-Parent Notification Law is too remote and hypothetical to establish standing. (*See* MOMS Br., at 19-21.)[13] Minnesota Statutes section 144.343, subdivision 5 provides that a person "wrongfully denied notification" under the statute may file a civil action. But MOMS fails to establish that any of its members is entitled to notification under the statute, and as a

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[12] To the extent MOMS argued at the district court that its interest was based on the now-repealed Minnesota Statutes sections 145.412 and 145.4242(a)-(c) (*see* Index No. 414, at 9), it seems to concede that those arguments are now moot. *See Peterson*, 381 N.W.2d at 475 (finding appeal moot where claims were based on constitutionality of repealed legislation). MOMS states its appeal is based on section 144.343 alone and that repeal "precludes further consideration" of the other statutes. (MOMS Br., at 8, 29.)

[13] MOMS's legislative beneficiary argument is included as part of its analysis of Rule 24.01's interest requirement, but it characterizes the argument as one of standing. (MOMS Br., at 19-21.) The district court did not address standing in its order denying MOMS's motion to intervene. (*See* Add. 11 n.4.)

result, no member is a beneficiary. In order to show entitlement to notification, a member would need to show that a minor daughter became pregnant, sought an abortion in Minnesota, chose not to disclose the plans to their parents, and chose not to seek a judicial bypass. MOMS would also need to show that the minor daughter's abortion provider failed to give the notice required by the statute. MOMS has not submitted any evidence showing that even a single member has a daughter who has considered an abortion, not to mention a daughter with a provider who also failed to provide the required parental notice. As a result, MOMS's claim that its members are designated beneficiaries is speculative, remote, and hypothetical.

MOMS's reliance on *Lorix v. Crompton Corp.*, 736 N.W.2d 619 (Minn. 2007) in support of its argument for statutory standing is misplaced. (*See* MOMS Br., at 20.) In *Lorix*, the plaintiff had standing where she alleged that she was harmed when she purchased a consumer good whose price was inflated by anticompetitive conduct. *Id.* at 631. But here, MOMS does not allege that any of its members has been or imminently will be injured because it fails to allege that any members' daughter has decided to obtain an abortion, has chosen not to disclose their plans to their parents, and has chosen not to seek a judicial bypass. As a result, MOMS has a generalized grievance most appropriately addressed by the legislature. *See Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) ("Prudential limitations on standing additionally require courts to refrain from adjudicating abstract questions of wide public significance that amount to generalized grievances and are most appropriately addressed by the

representative branches, and cases that do not fall within the zone of interests protected by the statute or constitutional provision in question.") (cleaned up).

Because MOMS cannot show more than a mere possibility of an injury or mere interest in a hypothetical problem, it lacks standing. While MOMS's members may have a generalized worry shared by many Minnesotan parents, that is insufficient. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978) (noting that standing should be declined to those whose asserted harm is a "generalized grievance shared by a large number of citizens"); *North Dakota v. Heydinger*, 288 F.R.D. 423, 428 (D. Minn. 2012), report and recommendation adopted, No. 11-CV-3232 SRN/SER, 2013 WL 593898 (D. Minn. Feb. 15, 2013) (denying intervention based on lack of standing, which requires "more than an opinion about the proper outcome"); *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. Ct. App. 2009) ("A mere possibility of an injury or mere interest in a problem does not render the petitioner aggrieved or adversely affected so that standing exists"); *Hanson*, 701 N.W.2d at 262 ("To establish constitutional standing, a potential litigant must demonstrate injury in fact—a harm that is both concrete and actual or imminent, not conjectural or hypothetical.") (internal quotations and citation omitted).

Its appeal should thus be dismissed. *See, e.g.*, *Glaze v. State*, 909 N.W.2d 322, 327 (Minn. 2018) (dismissing appeal where appellant was not an aggrieved party and lacked standing); *City of St. Paul v. LaClair*, 479 N.W.2d 369, 371 (Minn. 1992) (dismissing appeal where appellant lacked standing to appeal); *In re Welfare of Children*

of D.L.O., Case Nos. A14-1929, A14-1931, 2015 WL 1609029, at *3 (Minn. Ct. App. Apr. 13, 2015) (dismissing appeal where appellant lacked standing because the order at issue did not adversely affect any of his substantial rights).

II. AFFIRMANCE IS APPROPRIATE BECAUSE MOMS SATISFIES NONE OF THE FOUR MANDATORY REQUIREMENTS TO INTERVENE AS A MATTER OF RIGHT.

Even if MOMS could establish standing and its appeal were not moot, it cannot meet the test for intervention as a matter of right because it fails to satisfy any of the four requirements set out in Rule 24.01. Minn. R. Civ. P. 24.01; *see Schroeder v. Minn. Sec'y of State Steve Simon*, 950 N.W.2d 70, 76 (Minn. Ct. App. 2020) (listing requirements), *review denied* (Nov. 25, 2020). Those requirements are: "(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) the applicant's interest is not adequately represented by existing parties." *Id.* (*quoting League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012)). Note that all four requirements must be met; if this Court finds any one of them lacking, it must affirm.

A. MOMS's Intervention Attempt Is Untimely.

MOMS brought its motion to intervene 39 months after the lawsuit was filed, on the very last day to appeal the Final Order, even though at least some of its members were aware of the litigation within days of its filing. As a result, its intervention is not timely.

"The timeliness of a motion to intervene must be determined on a case-by-case basis." *Omegon, Inc. v. City of Minnetonka*, 346 N.W.2d 684, 687 (Minn. Ct. App.

1984). To determine whether the motion is timely, Minnesota courts consider "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." *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 450 (Minn. Ct. App. 2000). Each factor supports the district court's determination of untimeliness.

1. MOMS was aware of the litigation and chose to let Defendants represent its interests.

Timeliness is determined based on when the proposed intervenor became aware of its purported threatened interest in the litigation, and on how quickly it acted after learning of the threat. *Erickson v. Bennett*, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987). Contrary to MOMS's argument (MOMS Br., at 18-19), post-judgment intervention is untimely when sought by an intervenor who is aware of the litigation but chooses to let a government entity represent its interests, even if that intervenor was not personally involved in a party's trial preparations. *See, e.g.*, *Omegon*, 346 N.W.2d at 687.

In *Omegon*, for instance, the proposed intervenor was aware the plaintiff sought a writ of mandamus to compel the City of Minnetonka to issue a conditional use permit. *See id*. at 686. Rather than attempting to intervene during the litigation, the proposed intervenor "affirmatively chose to let the City of Minnetonka represent its interests." *Id.* Approximately one month after the district court granted the writ, the proposed intervenor sought to intervene for the purposes of perfecting an appeal. *Id.* This Court relied on a Minnesota Supreme Court decision finding intervention inappropriate where an intervenor "waited to see if the decision would be favorable to its interests" before

intervening and affirmed the district court's conclusion that the intervention was untimely. *See id.* at 687 (*citing State Auto. & Cas. Underwriters v. Lee*, 257 N.W.2d 573, 576 (Minn. 1977)).

MOMS admits that it has been aware of this litigation since its commencement in June 2019. (*See* Add. 14.) Yet it did not attempt intervention until judgment had been entered on all claims. *See Erickson*, 409 N.W.2d at 886-87 ("Posttrial intervention is not viewed favorably, and is not allowed where circumstances show the would-be intervenor was aware of the suit and permitted the trial to proceed, waiting to see if the decision would be favorable to its interests.") (internal citation omitted). MOMS repeatedly points to the timing of the Second Amended Complaint in an effort to make its intervention look less tardy. But the Second Amended Complaint was filed to effectuate the parties' resolution of an interlocutory appeal (addressing whether the church plaintiff had standing, and whether any plaintiff had standing to challenge an advertising statute). It did not amend Plaintiffs' claims regarding the Two-Parent Notification Law, the only statute at issue in this appeal. (*See* Index No. 348.) MOMS concedes as much. (MOMS Br., at 9.) The timing of the Second Amended Complaint is thus irrelevant. (*See* MOMS Br., at 28.)

MOMS cannot change the key facts that determine the outcome of this appeal. The specific concern MOMS alleged in its motion—the impact of an order on the rights of parents and their daughters—has been a possibility since June of 2019. Yet MOMS did not file its motion until after three years of litigation, nearly ten months after

Defendants submitted evidence in support of their summary judgment briefing, and more than two months after the district court issued its Final Order. As a result of its significant delay, MOMS's motion is untimely. *See SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) ("The intervenor should not now . . . having waited to see if the decision would be favorable to its interests, be allowed to appeal a judgment which was binding on and satisfactory to the parties to the action.").

2. MOMS fails to offer an excuse that justifies its delay.

The second factor for assessing timeliness is the intervenor's reason for its delay. MOMS argues that although at least some of its members were aware of the litigation from its inception, as "ordinary citizens" they cannot be expected to affirmatively ensure any interest they believed they had in the litigation was being protected by the government's representation. (*See* MOMS Br., at 16.) MOMS cites no case in support of its proposed rules that ordinary citizens should not be held to any time requirements, or that as long as a case involves fundamental constitutional rights, there are no timeliness constraints. (*Id.* at 16-17.) As the district court observed, adopting those rules would have "troubling public policy implications." (Add. 15.) The court correctly concluded that "[i]t seems quite clear that parties with knowledge of the potential implications of constitutional litigation to its alleged interests must act promptly to protect those interests, no matter what they are." (*Id.* at 16.)

The United States Supreme Court's decision in *NAACP v. New York* is instructive. 413 U.S. 345 (1973). There, New York sued the United States seeking a

declaratory judgment that three counties' use of literacy tests as a voting requirement did not violate the Voting Rights Act. *Id.* at 349. Just two weeks after New York filed its summary judgment motion, the United States consented to entry of judgment. *Id.* at 360. Four days later, the NAACP moved to intervene. *Id.* There, like here, the litigation had been covered in the press and the proposed intervenor did not deny that it was aware the case was pending. *Id.* at 366-67. The Supreme Court found that by the time the plaintiff filed its summary judgment motion, it was obvious there was a strong likelihood the United States would consent to the entry of judgment. *Id.* at 367. The Supreme Court concluded that at that point, it was incumbent on the intervenor to take steps to protect its interests. *Id.* But like MOMS, it failed to do so, and instead chose to rely on the government's representation. *Id.* at 367-68. As a result, the Supreme Court concluded the motion was untimely and affirmed the lower court's decision denying intervention. *Id.* at 368.

Similarly here, by the time Defendants filed their summary judgment brief it was obvious Defendants were arguing the statute survives strict scrutiny, but had made the strategic decision not to rely on the extreme evidence MOMS seeks to submit.[14] Although it was then incumbent on MOMS to take steps to protect its alleged interest,

[14] In particular, MOMS wanted to introduce evidence that conflicted with discovery conducted in the case, opinions of Defendants' experts, or has been rejected by respected medical literature, including that many individuals seeking abortions are ambivalent about the abortion decision or especially subject to manipulation, that abortion places patients at risk for mental health declines, that fetuses can feel pain at early stages of pregnancy, that abortion leads to exploitation of women, and that abortions place women at increased risk of breast cancer. (Index No. 387, at 12-15.)

MOMS took a wait-and-see approach, waiting until after the district court issued its final order on the merits to seek to submit evidence it believes is more persuasive than the evidence Defendants submitted. (*See* Add. 16 ("knowing 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.").) As a result, MOMS's motion is not timely. *See NAACP*, 413 U.S. at 368.

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), on which MOMS relies, does not change this conclusion. (*See* MOMS Br., at 17.) In that case, the proposed intervenor was a putative member in a class action challenging an airline's employment policies. *Id.* at 388. After the district court denied class certification, the plaintiffs initially attempted to file an interlocutory appeal, which the appellate court declined to accept. *Id.* Ultimately, the plaintiffs did not appeal the class certification denial and instead settled the case. *Id.* at 389. After the entry of judgment, the intervenor filed a motion to intervene in order to appeal the denial of class certification. *Id.* at 390. The Supreme Court found that the intervention was timely, observing that the intervenor had no reason to assume the plaintiffs would not appeal the class certification denial because they had already attempted to appeal it once. *Id.* at 393-94. Once it became clear that plaintiffs would not appeal the final judgment, the intervenor promptly moved to protect her interest and appeal the class certification denial. *Id.* at 394. Here, in contrast, MOMS knew that Defendants were not submitting MOMS's preferred evidence when

they publicly filed their summary judgment briefing in November 2021, but MOMS did not seek to submit its preferred evidence for nearly ten more months, until after judgment was entered. The district court thus applied the law to the particular facts of this case when it concluded MOMS's motion was untimely.

Finally, with respect to the third and final factor, as discussed in detail below, intervention at this late stage will prejudice the parties by creating further delay and complication. *See Omegon*, 346 N.W.2d at 687 ("While Rule 24 should be construed liberally, intervention is untimely if the rights of the original parties will be substantially prejudiced.").

B. MOMS Does Not Have a Cognizable Interest in the Subject of This Litigation.

MOMS's stated familial, generalized, and remote interest is shared by many Minnesota parents and insufficient to justify intervention, and therefore, the district court should be affirmed. As this Court recently held, "[n]ot every alleged interest in a lawsuit supports intervention as a matter of right." *Schroeder*, 950 N.W.2d at 76. The proposed intervenor must have legal rights that will be directly affected by the litigation. *Id.* ("[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."). Stated differently, the claimed "interest" must be "a direct and concrete interest that is accorded some degree of legal protection." *Miller v. Miller*, 953 N.W.2d 489, 494 (Minn. 2021).

Here, the interest of MOMS and its members in directing the healthcare and upbringing of their minor daughters is not an interest in the subject matter of this

litigation that warrants intervention. *See Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (finding Illinois Pro-Life Coalition lacked interest to support intervention in physician lawsuit challenging constitutionality of abortion statutes). MOMS has not identified any member who has a minor daughter who became pregnant, sought an abortion in Minnesota, chose not to disclose the plans to their parents, and chose not to seek a judicial bypass. (*See* Chastek Decl., Add. 32-34.) As a result, MOMS shares the same generalized interest in this litigation as the public at large, and it has not explained how its members' ability to direct the healthcare and upbringing of their minor daughters will be imminently and concretely impacted by this litigation.

Courts regularly deny intervention motions where intervenors assert only a generalized interest in the enforceability of state statutes. *See, e.g.*, *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007) ("[public interest group's] interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right"); *Keith*, 764 F.2d at 1270 (denying intervention because Illinois Pro-Life Coalition lacked interest, stating "Rule 24(a) precludes a conception of lawsuits, even 'public law' suits, as necessary forums for such public policy debates."); *Athens Lumber Co., Inc. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982) (interest shared with all unions and citizens concerned about the ramifications of direct corporate expenditures "so generalized it will not support a claim for intervention of right"); *Whitewood v. Wolf*, Case No. 1:13-cv-1861, 2014 WL

12479642, at *3 (M.D. Penn. Feb. 6, 2014) (denying intervention where asserted interests in religious expression too remote to support intervention); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1499 (S.D. Fla. 1991) ("such an expanded definition of 'interest' might open the courtroom door to every citizen who has called his congressman concerning legislation, thereby compromising the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches") (cleaned up).

Additionally, as the district court concluded, MOMS's stated interest is a personal and familial interest that is insufficient to warrant intervention as of right. (Add. 20.) Such a "personal interest is inconsistent with the language of Rule 24.01[,]" which "more appropriately applies to interests involved in traditional civil actions, such as in contracts and torts, rather than the very personal and family interests" involved in the interest of MOMS's members in directing the healthcare of their minor daughters. *Valentine v. Lutz*, 512 N.W.2d 868, 870 (Minn. 1994). As in *Valentine*, a case involving a foster parent's attempt to intervene in a child protection proceeding, the interest of MOMS's members is "derived from the attachment, knowledge, and concern" for their daughters. *See id.* Such an interest is not one that allows intervention as of right. *See id.*

Finally, MOMS's argument that its members are beneficiaries of the Two-Parent Notification Law fails to establish a cognizable interest for purposes of Rule 24.01 for the same reasons it fails to establish standing. *See Keith*, 764 F.2d at 1271 (finding

stated interest of potential adoptive parents of fetuses "too speculative an interest to support [their] alleged right to intervene").

C. The Disposition of This Case Does Not Practically Impair or Impede MOMS's Ability to Protect Any Cognizable Interest in the Abortion Statutes.

The purpose of Rule 24 is "to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Gruman v. Hendrickson*, 416 N.W.2d 497, 499 (Minn. Ct. App. 1987). As discussed above, MOMS does not have an interest in the abortion statutes at issue in this case. Because it does not have an interest, it follows that the disposition of this case will not impact its ability to protect it. *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022), is inapposite. (*See* MOMS Br., at 23.) Unlike the statute there, which explicitly recognized the intervenor's right to bring suit, MOMS has not identified a single member eligible to bring suit under the Two-Parent Notification Law. *See Berger*, 142 S. Ct. at 2202. MOMS's failure to satisfy this requirement also supports affirmance.

D. MOMS's Interests Are More than Adequately Represented.

Finally, even if MOMS had a cognizable interest in the abortion statutes at issue here, and had acted timely in seeking intervention, it could not meet the requirements of Rule 24.01 because Defendants presented a comprehensive and vigorous defense of the disputed statutes.

There are two potential standards for assessing the adequacy of representation in this case—a presumption of adequacy that must be rebutted when the government is defending; or a general test applicable to all litigants. Defendants' representation easily passes both tests.

1. MOMS has not rebutted the presumption of adequacy.

Because MOMS's generalized interest does not diverge from the public interest, Defendants' defense is presumed to be adequate as a matter of law. *N.D. ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). MOMS has not rebutted that presumption of adequacy.

"When one of the parties is an arm or agency of the government, acting in a matter of sovereign interest, the governmental entity is presumed to represent the interests of its citizens as parens patriae, or parent of the country." *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). To overcome the presumption, an intervenor must establish "gross negligence or bad faith." *Planned Parenthood of Wisc., Inc. v. Kaul,* 942 F.3d 793, 799 (7th Cir. 2019). Although most cases applying the presumption come from federal courts, this Court cited the presumption of adequacy favorably in *Living Word Bible Camp v. County of Itasca*, No. A12-0281, 2012 WL 4052868, at *6 (Minn. Ct. App. Sept. 17, 2012).

In *Chiglo*, for instance, a group of parents sought to intervene in a case involving an ordinance regulating tobacco advertising. *Id.* at 186-87. In support of their motion, they relied on their belief that the ordinance was desirable to protect children from the

inducements of tobacco advertising. *Id.* at 187. The district court denied their motion and the Eighth Circuit affirmed, finding that the parents' interest in protecting children from smoking "[fell] squarely within the City's interest in protecting public health[.]" *Id.* at 188.

MOMS attempts to avoid this presumption by alleging that its concern is not a matter of sovereign interest. (*See* MOMS Br., at 24.) But MOMS's stated interest is encompassed by Defendants' interest, so the presumption applies. *Mausolf v. Babbit*, 85 F.3d 1295 (8th Cir. 1996), on which MOMS relies, is distinguishable. There, a conservation group moved to intervene in a litigation between snowmobilers and the federal government in which the snowmobilers sought to expand their right to snowmobile in Voyageurs National Park. *Id.* at 1298. The Eighth Circuit concluded that "when managing and regulating public lands" the federal government "must inevitably favor certain uses over others" and that those uses would sometimes conflict. *Id.* at 1303. In situations where such a conflict arises, "even the Government cannot always adequately represent conflicting interests at the same time." *Id.* The *Mausolf* litigation was exactly such a circumstance—the Court found that in litigation pitting environmental conservation against recreational activity, the government could not adequately represent the conservation's group interests when it also had an interest in promoting recreational activity. *Id.* at 1304. There is no such conflict in this case. Defendants shared MOMS's goal of defending the statutes, and Defendants argued that the statute survived strict scrutiny.

Like the parents in *Chiglo*, MOMS's interests are more than adequately represented by Defendants. *See id*. ("proposed intervenors have articulated an interest that coincides with the City's role as protector of its citizens"). *See also Heydinger*, 288 F.R.D. at 431 (finding government-defendants adequately represented proposed intervenors where they shared the same objective of upholding statute that protected intervenors' stated interest against constitutional attack); *Parrish v. Dayton*, Case No. 12-149 (SRN/JSM), 2012 WL 12895202, at *5 (D. Minn. Mar. 13, 2002) (finding government-defendants adequately represented intervenors interest where both sought a finding that executive order was constitutional). The Two-Parent Notification Law was enacted to protect the very interest MOMS claims. (See MOMS Br., at 25.) As a result, Defendants' interest in defending the statute encompasses MOMS's interest, and Defendants adequately defended it for more than three years of contentious litigation. *See Heydinger*, 288 F.R.D. at 431 ("Nevertheless, the Defendants' interests in defending the [statute]—which ultimately protects the environmental and health concerns Movants cite—encompass Movants' asserted interests.").

MOMS cannot rebut the presumption of representation "by merely disagreeing with the litigation strategy or objectives of the party representing [it]." *Chiglo*, 104 F.3d at 188. *See also Keith*, 764 F.2d at 1270 ("A subjective comparison, however, of the conviction of defendants and intervenors is not the test for determining adequacy of representation. Adequacy can be presumed when the party on whose behalf the

applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor.").

Moreover, as MOMS conceded at the district court, Defendants did in fact raise parents' interest in directing and protecting the wellbeing of their children at summary judgment—exactly the argument MOMS seeks to advance if it is allowed to intervene. (*See* Index No. 414, at 9.) Thus, by its own admission, MOMS seeks to continue this litigation in order to re-characterize the argument Defendants already made. MOMS's belated effort to change Defendants' legal strategy only after it proved unsuccessful does not demonstrate inadequacy. *See Chiglo*, 104 F.3d at 188; *Keith*, 764 F.2d at 1270.

2. MOMS cannot establish inadequacy under *Jerome Faribo Farms*.

The general test for adequacy comes from *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990). In response to four separate intervention motions in this case, the district court has held defense counsel to be adequate under the standard. (*See* Index Nos. 95, at 12-13; 159, at 20-23; 382, at 11-13; 431, at 22-25.) Specifically, when considering MOMS's motion, the district court applied the standard articulated in *Jerome Faribo Farms*, after observing that federal case law establishing a presumption of adequacy was persuasive. (Add. 24.) MOMS's assertion to the contrary is incorrect. (*See* MOMS Br., at 24.)

Defendants' zealous legal defense included a motion to dismiss, extensive discovery, a motion to exclude Plaintiffs' experts, and three summary judgment motions. At summary judgment, Defendants submitted hundreds of pages of briefing

and evidence. (Index Nos. 238, 265.) Defendants' summary judgment briefing highlighted parents' interest in protecting the well-being of their children[15]—exactly the interest MOMS sought to advance in its motion. (*See* Index No. 238, at 26.) Defendants' representation has been and continues to be adequate, and therefore, MOMS should not be allowed to intervene. *State ex rel. Donnell v. Jourdain*, 374 N.W.2d 204, 206 (Minn. Ct. App. 1985) ("If a proposed intervenor's interest is adequately represented by existing parties, he is not entitled to intervene as of right.").

In sum, MOMS cannot meet any of the four requirements for intervention as of right. If it reaches the merits, this Court should affirm the district court.

III. THE DISTRICT COURT'S DENIAL OF PERMISSIVE INTERVENTION IS NOT APPEALABLE.

A. MOMS's Appeal from the Denial of Permissive Intervention Should Be Dismissed.

It is well-established that orders denying permissive intervention are generally not appealable. *Norman v. Refsland*, 383 N.W.2d 673, 675 (Minn. 1986) ("an order denying permissive intervention under Minn. R. Civ. P. 24.02 is not appealable"); *Doe*

[15] For instance, Defendants argued that "parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children." (*See* Index No. 238, at 26.) They also recognized that encouraging discussion between parents and children regarding abortion "was intended to allow parents to provide emotional support and guidance and forestall irrational and emotional decision-making[,]" and that "[p]arents can also provide information concerning the minor's medical history of which the minor may be unaware, authorize the release of medical data, and supervise/provide post-abortion care." (*Id.*) Defendants also pointed out that parents have a role in supporting a minor's psychological well-being and mitigating any adverse psychological consequences. (*Id.*)

v. State, Case No. A22-1265, 2023 WL 2763167, at *1 n.1 (Minn. Ct. App. Apr. 3, 2023); *Doe v. State*, Case No. A20-0273, 2020 WL 6011443, at *1 n.2 (Minn. Ct. App. Oct. 12, 2020), *review denied* (Dec. 29, 2020) ("orders denying permissive intervention under Rule 24.02 are not appealable") (cleaned up). While an exception may apply when permissive intervention is denied based on a finding that a party has no protectable interest in a litigation, here the district court denied MOMS's request for permissive intervention because it was untimely and it would significantly prejudice the rights of the parties. *See State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007). (Add. 27-31.) MOMS misstates the record in representing that the district court denied the permissive intervention motion based on lack of protectible interest. (MOMS Br., at 14.)[16] Accordingly, the district court's denial of permissive intervention is not appealable under binding precedent and the appeal from the order denying permissive intervention should be dismissed.

B. Alternatively, the District Court Did Not Abuse Its Discretion in Denying Permissive Intervention.

Even if this Court reviewed the district court's permissive intervention decision, it would not find any abuse of discretion. A denial of a request for permissive intervention will be reversed only when a clear abuse of discretion is shown. *Deal*, 740 N.W.2d at 760. Permissive intervention under Rule 24.02 is allowed, upon a timely

[16] The district court's order is clear: "Because MOMS' motion is untimely and would unduly delay and prejudice the rights of the existing parties, any common questions of law or fact between its intended defense and this action still do not favor allowing permissive intervention." (Add. 30.)

application, when the third-party's "claim or defense and the main action have a common question of law or fact" and intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Minn. R. Civ. P. 24.02.

While the standard for permissive intervention under Rule 24.02 is less demanding than Rule 24.01, MOMS fails to meet even that lower threshold. "In deciding whether to grant permissive intervention, courts consider[] three factors: (1) whether the motion to intervene is timely; (2) whether the applicant's claim shares a question of law or fact in common with the main action; and (3) whether intervention will unduly delay or prejudice adjudication of the original parties' rights." *Heydinger*, 288 F.R.D. at 429. The principal consideration is whether the intervention will unduly delay the proceedings or prejudice the rights of the existing parties. *Nat'l Parks Conservation Ass'n v. U.S. Envtl. Prot. Agency*, Case No. CV 12-3043 (RJK/JSM), 2013 WL 12074954, at *12 (D. Minn. May 28, 2013). Courts may also consider the adequacy of protection afforded to the prospective intervenors by the existing parties, but it is "only a minor variable in the Rule 24(b) decision calculus." *Heydinger*, 288 F.R.D. at 429.

On the first factor, as argued above, the motion is untimely. *Cameron v. EMW Women's Surgical Center*, 142 S. Ct. 1002 (2022), cited by MOMS, is distinguishable. (*See* MOMS Br., at 28.) There, the United States Supreme Court concluded that the Kentucky attorney general should be allowed to permissively intervene because, as the state's chief legal officer, he had the authority to defend the constitutionality of a state

statute. *Cameron*, 142 S. Ct. at 1011. MOMS has no such authority here. Additionally, and in contrast to MOMS's characterization (*see* MOMS Br., at 28.), the district court did not find untimeliness "simply because the case had been going on for three years"—rather, the district court carefully applied the law to the facts of this case in finding MOMS's motion untimely.

On the last factor, MOMS's intervention will further delay these proceedings, prejudice the rights of the existing parties who have been litigating this case for four years, and cause continued uncertainty for Minnesotans regarding the legal landscape of abortion. Defendants already made the very argument MOMS seeks to advance, and will be significantly prejudiced if it is re-litigated. Beyond the proposed intervention's direct impact on Defendants, Minnesotans and their healthcare providers need to know what the law is. Allowing intervention thus will not only prejudice Defendants, but will negatively impact all Minnesotans seeking and providing reproductive healthcare.

Finally, in previously denying permissive intervention of another third-party in this case, the district court noted a concern about the "waste of public resources." (Index No. 95, at 15.) The same concern is present here. The State of Minnesota has already spent more than $600,000, and 4,000 hours litigating this case. Based in part on this significant drain of state resources, the Defendants made the decision not to continue wasting the State's money on an appeal that is unlikely to yield a different outcome. MOMS now seeks to wordsmith an argument Defendants already made and submit different evidence in support of the same goal Defendants have been advocating for

since 2019, which would obligate Minnesota's courts to needlessly continue expending resources on this litigation.[17] Allowing MOMS to intervene would thus result in a significant waste of public taxpayer dollars.

For these reasons, MOMS's request for permissive intervention was properly denied. *See, e.g.*, *Stenehjem*, 787 F.3d at 923 (affirming denial of permissive intervention when the third party lacked standing, lacked a legally protected interest, and intervention would cause delay); *Nat'l Parks Conservation*, 2013 WL 12074954, at *12 ("determinative question of delay and prejudice dictates the denial of permissive intervention"); *Heydinger*, 288 F.R.D. at 429 (denying permissive intervention "[e]ven though Movants' motion is timely and contains questions of law and fact in common with the case" because it would cause delay, unnecessary complication, and because the interests of the intervenor were adequately represented); *Ritchie*, 819 N.W.2d at 642 (affirming denial of permissive intervention when proposed intervenor lacked standing); *Heller v. Schwan's Sales Enters.*, 548 N.W.2d 287, 292 (Minn. Ct. App. 1996) (affirming denial of permissive intervention when third-party "did not establish any interest in the underlying action"); *Omegon*, 346 N.W.2d at 687 (denying permissive intervention where intervenor waited until after parties' rights had already been adjudicated to see whether the decision was favorable to its interests).

[17] For instance, because MOMS intends to start discovery from the beginning, Defendants will be obligated to participate to ensure that the public interest is represented.

CONCLUSION

MOMS's late effort to advance a slightly re-characterized version of the very same argument Defendants already pursued should not be allowed. MOMS must take the lawsuit as it currently stands, and cannot breathe new life into rights the parties have already foregone. Additionally, MOMS lacks standing to appeal, and it fails to satisfy any of the four requirements it must establish to prevail on its request for intervention as of right. The district court's order should be affirmed. Because this appeal confirms well-settled Minnesota law, the Court's opinion should be nonprecedential.

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