STATE OF MINNESOTA IN COURT OF APPEALS

A23-0620

Dr. Jane Doe, Mary Moe, and Our Justice,

Plaintiffs-Appellees,

vs.

State of Minnesota, Governor of Minnesota,
Attorney General of Minnesota,
Minnesota Commissioner of Health,
Minnesota Board of Medical Practice, and
Minnesota Board of Nursing,

Defendants-Appellees,

and

Mothers Offering Maternal Support ("MOMS")
Proposed Intervenor-Appellant.

APPELLANT'S PRINCIPLE BRIEF

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I. THIS COURT HAS JURISDICTION TO HEAR MOMS' APPEAL FROM THE DISTRICT COURT'S DENIAL OF INTERVENTION.

A. MOMS' right to appeal denial of intervention is not dependent on appealing the final judgment of the trial court.

Defendants-Respondents, hereinafter referred to as "Officials," challenge this Court's jurisdiction to hear MOMS' appeal from the denial of its motion to intervene. Officials' Br., at 15-18. Their argument is either premised on a flawed understanding of the nature of this appeal, or they mistakenly believe that the right to intervene is extinguished when final judgment issues. Either way, they are wrong. MOMS' motion to intervene was filed before the expiration of the time to appeal, and its appeal to this Court was equally timely. This Court has jurisdiction.

Officials may confuse this appeal from the order denying MOMS intervention (Index 431) with an appeal of the lower court's ruling that the Minnesota Parental Notification Law is unconstitutional, *see Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998 (Minn. Dist. Ct. July 11, 2022) at *9-10. MOMS is not, and has never sought, review of the lower court's ruling on the Parental Notification Law's constitutionality. This appeal is limited to the order denying intervention. A district court's denial of intervention as a matter of right is an appealable order. Minn. R. Civ. App. P. 103.02(j); *see also Norman v. Refsland*, 383 N.W.2d 373, 376 (Minn. 1986).

Officials provide no authority for the proposition that MOMS has somehow forfeited its right to appeal from the order denying intervention by declining to appeal from

the district court's decision and judgment on the underlying question of the Parental Notification Law's constitutionality. Perhaps because this simply is not the law.

Officials quote *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995) in support of their position (Officials Br. at 15), but they fail to note that the proposed intervenors in that case failed to seek intervention until after "the time to appeal had run." *Union Elec*., 64 F.3d at 1162. Similarly in *Jenkins by Agyei v. Missouri*, 967 F.2d 1245 (8th Cir. 1992), the Court found it had no jurisdiction because appellants "were not parties to this suit and *had not even asked to become parties*" before the expiration of the time to appeal. *Id*. at 1247 (emphasis added). That is not the case here. It is undisputed that MOMS filed its Notice of Intervention while an appeal of the Final Order and Judgment was still possible. Officials Br. at 4, 11, Providers Br. at 10-11.

Little Rock Sch. Dist. v. Pulaski Ct. Special Sch. Dist. No. 1, 738 F.2d 82 (8th Cir. 1984), also cited by Officials, Officials Br. at 16, further undercuts Officials' argument. The court notes that "only a party to a lawsuit may appeal from an adverse judgment." *Little Rock Sch. Dist.* at 779. MOMS is a stranger to this case until it is granted intervention and could not appeal the district court's Order of July 11, 2022, even if it desired to do so — something it does not desire because of the woefully deficient evidentiary record created by Officials.

Officials' reliance on *Mingen v. Mingen*, 679 N.W.2d 724 (Minn. 2004) and *Marzitelli v. City of Little Canada*, 582 N.W.2d 904 (Minn. 1998) is equally unavailing. Officials Br. at 16-17. MOMS does not dispute that a district court's power to amend its order expires when the time to take an appeal ends, nor does it dispute that the trial court

has no power to extend the deadline to appeal from its judgment. *See* Minn. R. Civ. App. P. 126 and *Star Int'l Trucks Inc. v. Navistar, Inc*. 837 N.W.2d 320 (Minn. Ct. App. 2013). But these rules are irrelevant to this appeal – MOMS' motion to intervene was filed before the expiration of the time to appeal, and its appeal to this Court was equally timely, and the Parties have conceded as much. *See* Officials Br. at 5, 13, Providers Br. 10-11. Officials' refusal to recognize this Court's jurisdiction is unjustifiable.

This Court has jurisdiction to decide this appeal and reverse the district court's order denying MOMS' motion to intervene.

B. MOMS has standing to pursue this appeal because members have lost the constitutional right to guide their minor daughters responding to unplanned pregnancies and the valuable statutory rights to be notified of their daughters' intention to obtain abortions.

1. *MOMS' interest is direct and substantial.*

As noted by the U.S. Court of Appeals for the 8th Circuit, "only a party to a lawsuit may appeal from an adverse judgment." *Little Rock Sch. Dist.* at 779. Absent intervention MOMS is unable to protect the rights of its members under the Parental Notification Law, Minn. Stat. § 144.343 subd. 2-5. *See* Add. at 1 (an intervenor can "make motions, participate in discovery and trial, and appeal adverse court decisions."). A non-party is unable to do any of these things. *See S.E.C. v Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983). It is essential that this Court recognize MOMS' right to intervene.

MOMS is an unincorporated association of Minnesota mothers with minor daughters. Decl. of Jessica Chastek on Behalf of Mothers Offering Maternal Support. Officials Add. 32 ¶ 2. It has a direct interest in the constitutionality of the Parental

Notification Law because the law requires that abortion providers notify its members before performing abortions on their minor daughters. *See* Minn. Stat. § 144.343 subd. 2. Failure to provide such notice is a "misdemeanor and grounds for a civil action by a person wrongfully denied notification." Minn. Stat. § 144.343 subd. 5. The District Court has enjoined enforcement of the law based on its ruling that requiring such notice violates the Minnesota Constitution. *Doe*, 2022 WL 2662998 at *1. The injunction relieves abortion providers from their statutory duty to provide notice to parents and eliminates parents' right to bring a civil action for failure to provide such notice.

Officials claim that protection of Minnesota mothers' constitutional and statutory right to direct the care of their children, including their right to be notified if their minor daughters are seeking abortions, is nothing more than a "policy preference" and therefore MOMS lacks standing. Officials Br. at 18. Yet the case Officials rely on, C*onant v Robins, Kaplan, Miller & Ciresi*, *L.L.P.*, 603 N.W. 2d 143 (Minn. Ct. App. 1999), provides "sufficient stake [to have standing] may exist if the party has suffered an "injury-in-fact" or *if the legislature has conferred standing by statute*." *Id*. at 146 (emphasis added). In this case, the legislature conferred standing on Minnesota parents by requiring notice of the intended abortion and creating a civil right of action if a parent is wrongfully denied notification. Parental Notice Law. Minn. Stat. § 144.343 subd. 2, 5. These rights are not some "generalized right" "shared by the state or even "many Minnesotan parents," Dist. Ct. Op. at Add. 17-18, Officials Br. at 22. These rights are held not by *any* parent of *any*

Minnesota minor[1] – not even by the parents of a minor male who impregnated the girl – but *only* by the parents of the "pregnant women [sic]." They alone are entitled to notice and to sue if wrongfully denied notification." Minn. Stat. § 144.343 subd. 3, 5.

Officials suggest that the legislature, not the courts, is the "most appropriate[ ]" branch of government to address MOMS' "grievance" due to the loss of the statutory rights of MOMS members. Officials Br. at 21. This disregards the fact that the legislature *has* addressed MOMS' interest by creating a right to notice of an abortion provider's intention to perform an abortion on the parents' minor daughter and a right to sue if a parent is not notified. The creation of these rights represents the legislature's recognition that parents' interest in directing and guiding their children is deeply personal and not shared by the average citizen. It is separate and distinct from the public interest in protecting minors when seeking abortions, an interest that is protected by the misdemeanor penalty also contained in the statute. Minn. Stat. § 144.343 subd. 5.

As the United States Supreme Court declared almost a century ago, "[t]he child is not a mere creature of the state." *Pierce v. Soc'y of the Holy Name of Jesus and Mary*, 268 U.S. 510, 535 (1925). Half a century later, the Court applied this principle to parental involvement in children's medical treatment, opining that "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best

[1] For example parents of the pregnant girl's best friends, no matter how emotionally close to the pregnant minor, are not entitled to notice.

interests of their children." *Parham v J. R.*, 442 U.S. 584, 602 (1979). The Parental Notification Law is based on this understanding of the parent-child relationship. Under the Parental Notification Law parents retain an advisory, but not decisive, role in their young daughter's decision, absent a judicial determination that an abortion without notification would be in her best interests. Minn. Stat. § 144.343 subd. 6. *Cf. Parham*, 584 U.S. at 604 ("our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse"); and *Brown v Entertainment Merchants Ass'n*, 564 U.S. 786, 837-38 (2011) ("[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity").

The trial court found that abortion providers, financiers, and even the First Unitarian Society of Minneapolis have sufficient standing to permit the Plaintiffs to attack the Parental Notification Law, Index. #115, 227, while declaring parents' constitutional and statutory rights not sufficiently direct to allow MOMS to intervene. This is tragically absurd. More to the point, it is reversible error.

Members of MOMS are the very people for whom the Parental Notification Law was enacted. *See Snyder' Drug Store Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974). Their interest is direct, substantial, and sufficient to establish standing to intervene.

2. *MOMS has sufficiently alleged injury in fact.*

Officials seek to avoid the inconvenient fact that MOMS has direct statutory rights at stake in this case. They claim that MOMS right to intervene is contingent upon its

members experiencing the very chain of events that the Parental Notification Law was enacted to prevent. The law creates two benefits to parents: first, the law requires that abortion providers notify parents before performing abortions on the parents' daughters, and second, if providers violate their legal obligation, the law provides parents a cause of action for providers' misconduct. Parents who know their daughters are pregnant and know these daughters are seeking an abortion receive little benefit from the law, except perhaps confirmation of place and time of the abortion.[2] It is the parents who do not know that their daughters are pregnant, and their daughters are contemplating abortion, who benefit most from the required notice. This fact makes MOMS' interest in intervention compelling, not speculative.

MOMS is similarly situated to the plaintiff in *Parents Involved in Community Schools v Seattle School Dist. No. 1*, 551 U.S. 701 (2007). Parents Involved in Community Schools was a group of parents with children in the Seattle district's elementary, middle, and high schools. *Id*. at 718. The complaint initiating the case claimed that members' children, who were elementary middle school students might be "denied admission to the high schools of their choice when they apply for those schools in the future." *Id.* The Seattle

[2] Such itself is not without value, since it gives parents the opportunity to assist their daughters in selecting providers who provide services in sanitary environments with properly licensed staff. The importance of this is illustrated by the case of Dr. Kermit Gosnell in Philadelphia. *Commonwealth v. Gosnell*, No. CP-51-CR-0001667-2011, defendant sentenced (Pa. Ct. Com. Pl., Phila. County May 15, 2013). His patients are not alone in suffering injuries during abortions due to unsafe clinic conditions or untrained personnel. *See* Amicus Brief of The Elliot Institute in Support of Petitioners in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), available at link (providing documentation of injuries arising from abortion).

School District challenged the group's standing "arguing Parents Involved members will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing." *Id*. The Supreme Court rejected this challenge, opining "[t]he fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed." *Id*. at 718-719.

Similarly, the fact that it is possible that daughters of MOMS members may not become pregnant or may choose to involve their parents in decisions regarding abortion does not eliminate the injury to members of MOMS. Its members have lost their statutory rights to notice before performance of abortions on their minor daughters, and the right to sue for failure to provide such notice.

Courts have uniformly recognized that a "heightened risk" of deprivation of a right constitutes sufficient harm to establish standing. *See e.g. Dept. of Commerce v New York*, 139 S Ct 2551, 2565 (2019); *Arc of Iowa v Reynolds*, 24 F.4th 1162, 1171 (8th Cir. 2022), vacated at moot, 33 F.4th 1042 (8th Cir. 2022 (same); and *Liddell v. Special Admin. Bd. of Transitional Sch. Dist. of City of St. Louis*, 894 F.3d 959, 965-66 (8th Cir. 2018) (standing present when rights are "threatened"). In the present case, Plaintiffs-Respondents, hereinafter "Providers" have admitted "they have adjusted their practices related to compliance with and enforcement of the Challenged Laws in reliance on the final judgment." Index. No. 417 at 8. In other words, to the extent that they provide abortions to Minnesota minors, a precondition to their standing to challenge the Parental Notification

Law, they are not providing notice to the minors' parents as required by Minn. Stat. § 144.343 subd. 2.

This Court has jurisdiction over this appeal because MOMS has standing to intervene as of right in this case and to appeal the district court's denial of intervention.

II. MOMS' MOTION TO INTERVENE MET ALL REQUIREMENTS FOR INTERVENTION BY RIGHT.

A. MOMS' motion to intervene was timely.

"[A]n intervention motion is not necessarily untimely even where the 'litigation is nearly wrapped up' or where the motion is postjudgment or even post-appeal." *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008). The test is whether the proposed intervenor became aware of its threatened interest in the litigation and how quickly it acted after learning of the threat. *Erickson v. Bennett,* 409 N.W.2d 884, 887 (Minn. Ct. App. 1987).

1. *Reading a newspaper story does not equal knowledge of the "constitutional implications of this lawsuit" or knowledge that MOMS rights were threatened.*

The parties argue that members of MOMS were on notice that their interest in the Parental Notification Law was threatened in this lawsuit because some members of MOMS read news reports describing the case when it was initiated. Officials Br. at 14-16; Providers Br. at 15. The district court endorsed this position, ruling that "the knowledge of MOMS' members about the constitutional implications of this lawsuit should have prompted it to act in 2022 or earlier." Add. at 14.

The proper application of timeliness turns not on when a proposed intervenor learns that a lawsuit exists, but on when it learns that its interests are not adequately represented. *Erickson v Bennett*, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987) (allowing postjudgment intervention). Rather than focus on when MOMS members knew their interests had been inadequately represented, the key point of proper application of the timeliness requirement, the parties and the district court tendentiously claim that Minnesota parents reading news stories regarding this case equates, as a matter of law, with sufficient notice of the danger to their interests if Officials failed to adequately represent their interests. Add. at 14, Officials Br. at 25. Providers Br. at 15-16.

Inherent in the parties' argument and the District Court's ruling are at least seven factual assumptions that have no evidentiary support in the record. The ruling requires that 1) those members of MOMS who read news stories about this case read factually accurate stories; 2) those members knew what the Parental Notification law provided – that it created a right to be notified prior to performance of abortions on their daughters and a right to sue if denied notification: 3) they understood the constitutional implications of the lawsuit; 4) they knew that parents could seek to join in defending the lawsuit; 5) members knew how to access trial court records in the case; 6) they had sufficient legal knowledge to assess the adequacy of Officials' representation of their interest, and/or 7) they had the resources to locate and retain counsel to make that assessment. This chain of speculation cannot justify the denial of MOMS' right to intervention. The ruling of the trial court is clearly erroneous.

The cases relied upon by the parties add no support to the erroneous ruling. Members of MOMS were not personally involved in trial preparation nor present at trial every day. *Compare SST, Inc. v. City of Minneapolis,* 288 N.W.2d 225, 230 (Minn., 1979). MOMS is not in the business of monitoring and protecting against adverse legal outcomes like the proposed intervenor in *State Auto and Cas Underwriters v. Lee*, 57 N.W.2d 573 (Minn. 1977). MOMS is not owned, controlled, and operated by a party in the underlying litigation. *Compare Harbal v. Fed. Land Bank of St. Paul*, 449 N.W.2d 442 (Minn. Ct. App. 1989). Nor were any members of MOMS served with the complaint in this case like the successful proposed intervenor in *Erickson,* 409 N.W.2d at 887.

Nothing in the record of this case and no legal authority cited by the parties or the district court supports the ruling that "knowledge of MOMS' members about the constitutional implications of this lawsuit should have prompted it to act in 2022 or earlier." . Add. at 14.

2. *If MOMS is allowed to intervene, the parties will be in the same position as if Officials had defeated Providers Motion for Summary Judgment on Challenges to the Parental Notification Law.*

Officials and Providers argue that intervention by MOMS would prejudice their rights in this litigation and cause continued uncertainty for Minnesotans. Officials Br. at 40; Providers Br. at 16-18. By this, they mean that MOMS would seek to reopen the case and discovery to introduce evidence on the singular issue of the constitutionality of the Parental Notice Law. As Officials note, the remaining enjoined laws discussed in MOMS' original motion to intervene have been repealed, Officials Br. at 13-14, and MOMS no longer seeks to defend them.

A large majority of the litigation in this case has addressed the standing of Plaintiffs-Respondents, whether each of the Defendant-Respondents were proper parties to the lawsuit, and challenges to statutes other than the Parental Notification Law. *Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998 (Minn. Dist. Ct. July 11, 2022) at *3-5. The trial court did not even hear arguments on the Plaintiffs-Respondents' summary judgment motion regarding the Parental Notification Law until December 20, 2021,[3] only seven months before judgment. Index #272 pp. 57- 66. Notwithstanding Officials attempt to minimize its procedural importance, Officials Br. at 3-4, it was not until June 13, 2022, less than one month before final judgment issued, that Providers filed their final Amended Complaint. Index #347.

Officials refer to this case as having gone on four years, Officials Br. at 40, implying that a substantial portion of that time was devoted to defending the Parental Notice Law. In fact, the Parental Notification Law received only a small fraction of Officials' attention and briefing in this case. What time Officials did devote to the law appears largely to have been devoted to claims that Plaintiffs had no standing (Defs. Dismissal Memo. Index #51, Defs. Sum. Jdgt. Memo. Index #238 pp. 26-28) or attempting to persuade the state district court that the disposition of this case was controlled by a factual record developed more than thirty years ago in a federal district court. Defs. Sum. Jdgt. Memo. Index #238 pp. 28-

[3] MOMS' principle brief misidentified the date of the hearing on the motion for summary judgment related to the Parental Notice Law as January 31, 2022, MOMS Br. at 11. The January hearing involved challenges to the fetal disposition law, Women's Right to Know law (aka "Mandatory Disclosure Law") with felony penalties, and the Waiting Period. Index #312, p. 26, lines 1-4.

31; Transcript, Index #272, p. 60 lines 19 through p. 61 line 22, discussing *Hodgson v. State of Minn.*, 648 F. Supp. 756 (Minn. 1986), rev' d, 853 F.2d 1452 (8th Cir. 1988), aff'd *sub nom*. *Hodgson v Minnesota*, 497 U.S. 417 (1990). No time or briefing was devoted to providing *evidence* of the state's interest in facilitating parental involvement or the limitations of minors' decisional capacity.

It is unclear what "complication" or "expenses" Officials will experience if MOMS is allowed to intervene. Officials Br. at 29, 40. Unlike Officials, MOMS has already proffered sworn testimony by national experts on the value and efficacy of parental involvement laws, Index #387-388, 390-399, rebutting many of the claims made by Providers. *See Doe*, 2022 WL 2662998 at *45 (fact findings supporting the judgment).

Providers argue that "MOMS need not intervene to protect its asserted interest" suggesting that "fostering health communication [with their daughters] about sex and pregnancy" would eliminate any need for notification by providers. Providers Br. at 23-24. This "solution" disregards the reality that many minors are uncomfortable discussing sex with anyone, even the most loving of parents, and some are subject to sexual coercion and sex trafficking unbeknownst to their parents. *See* Minn. Dept. Public Safety, *Sold for Sex: A Parents' Warning for Minnesota Families* (Jan. 18, 2022) available at link.; Decl. of Priscilla K. Coleman, Ph.D., Index #390 at ¶¶ 35, 45-78; Decl. of Melissa Moschella, ¶ 35; Decl. of David C. Reardon, Ph.D., Index #405 at ¶¶ 17-18. *See also* Minn. Dept. Transp., *Human Trafficking Awareness* ("In 2015, Minnesota had the third-highest number of human trafficking cases.") available at link.

Providers complain that intervention would "impose substantial burdens and costs on the original parties." *Providers Br.* at 17. It is true that, if MOMS is allowed to intervene, Providers' prosecution of their claims will require more effort and time than has been required during the proceedings to date. It is difficult to image any case involving intervention that this would not be true of. Unlike Officials, who offered no evidence rebutting the claims of Providers' experts regarding minors' decisional capacity and purported harms from requiring notification in cases where the minor did not voluntarily involve her parents, MOMS has already proferred evidence that disproves many of Providers' claims. Index ##390, 391,396, 397, 399, and 405. If allowed to intervene, it will establish that the Parental Notification Law advances a number of compelling state interests. The question for determining the timeliness of the motion to intervene is whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) (declining to consider any delay in entry of the Consent Decree as any bar to intervention).

Officials have failed to raise any interest that offsets the grave injury MOMS has suffered in the loss of its members' constitutional and statutory right to notice of their minor daughters' intention to obtain abortions, and the opportunity to advise and guide the girls in their decisions. The district court erred in determining that MOMS' notice of intervention was untimely, and the decision must be reversed.

B. MOMS has a cognizable interest in the subject of this litigation.

1. MOMS' interest is direct and concrete.

MOMS established that its interest in this case is direct and concrete in Section I (B) and will not repeat the arguments here. Officials equate the constitutional and statutory rights of MOMS' members at stake in this case with the interests of public advocacy groups, unions, and lobbyists Officials, Br. at 30 *citing Keith v. Dailey,* 764 F.2d 1265 (7th Cir. 1985) (public advocacy group); *Northland Family Clinic, Inc. v. Cox*, 487 F.2d 323 (6th Cir. 2007) (same); *Athens Lumber Co., Inc. v. Fed. Elections Comm'n*, 690 F.2d 1364 (11th Cir. 1982) (unions and public advocacy group); *Whitewood v. Wolf*, 2014 WL 12479642 (M.D. Penn. Feb. 6, 2014) (community group); and *Resort Timeshare Resales v. Stuart*, 764 F. Supp. 1495 (S.D. Fla. 1991) (industry advocacy group). MOMS recognizes that each of the organizations in these cases have particular constitutional rights that may be violated by the government in a wide variety of situations, but none of the cases cited by the Officials involve such a violation. In the case before this Court, it is the constitutional and statutory rights of MOMS' members that are directly at risk.

2. The district court erred in equating the rights of parents with those of foster parents.

The parties and the District Court wrongly minimize MOMS' interest by reliance on an erroneous reading of *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994). Officials Br. at 31, Providers Br. at 12, 19-20, Add. at 18. *Valentine* involved an attempted intervention by *former* foster parents in a Child Protective Services case. The couple attempted to intervene in the case when the child no longer lived in their home, they "were not providing care to J.A.D. and were under no duty to provide care for this boy." 512 N.W.2d at 871. The Court distinguished the interest of former foster parents from current foster parents,

recognizing current foster parents' right to intervene, but not former foster parents. *Id*. citing *In the Matter of the Welfare of C.J.*, 481 N.W.2d 861 (Minn. Ct. App. 1992). Members of MOMS are Minnesota mothers who *currently* have at least one minor daughter. Chastek Decl., Def. Add. 32 ¶ 2. Contrary to the ruling of the district court, *Valentine* supports the right of MOMS to intervene. On this point alone, the District Court erred in its finding that MOMS has no cognizable interest and should be reversed.

Even more important than the *Valentine* Court's distinction between current and former foster parents lies the fundamental distinction between foster parents and legally recognized parents. The United States Supreme Court articulated this difference in *Smith v. Org. of Foster Families for Equality and Reform*. 431 U.S. 816 (1977). The natural family or the family created by marriage has "its origins entirely apart from the power of the State" unlike "a foster family which has its source in state law and contractual arrangements." *Id* at 845. There is only "the most limited constitutional 'liberty' in the foster family," *id*. at 846, while the right of parents to direct the care of the child in the natural family is "perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." *Troxel v Granville*, 530 U.S. 57, 65 (2000). *Accord SooHoo v Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) ("parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right.")

MOMS has a cognizable interest in this case. The District Court erred in failing to recognize this fact.

C. The loss of the statutory right to notice and the right to sue for the denial of notice gravely impairs MOMS' members right to direct the care of their daughters.

Officials effectively concede that if MOMS prevails in establishing that it has standing and a cognizable interest in this litigation, its interests will be impaired by this litigation. Officials' Br. at 32. Providers' silence on the issue suggests the same concession. In determining whether disposition of an action will impede or impair MOMS' ability to protect its interests the question should be viewed from a practical standpoint rather than one based on strict legal criteria. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). It is sufficient to show that proposed intervenor might be practically disadvantaged by the disposition of the action. *Union Elec. Co.*, 64 F.3d at 1161-62. In the interest of brevity MOMS will not repeat the arguments presented in its principal brief. MOMS Br. at 33-34.

D. Officials failed to adequately represent MOMS' interest.

The parties' argument that Officials are entitled to a presumption of adequate representation is premised on a false equivalency of the interests of government and parents in the wellbeing of children. Officials Br. at 33-36; Providers Br. at 24-25. American jurisprudence has never equated the rights of parents in the care of their children with that of all other citizens or the police power of state governments to protect the health and well-being of its young citizens. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (comparing American tradition of childrearing with that of Sparta and the imaginary Republic of Plato). If it were not so, parental rights would be subsumed by government authority, and our Platonic Guardians could set about ordering family life in accord with government

officials' values and beliefs. *Cf. In re Welfare of Children of Coats*, 633 N.W.2d 505, 514 (Minn. 2001) ("parents have a fundamental right to the care, custody, and control of their children that should not be interfered with except for 'grave and weighty reasons.'").

1. *The federal presumption of the adequacy of representation by Officials does not apply in this case*.

As Officials admit, neither the Minnesota Supreme Court or this Court have adopted the doctrine that "when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest, . . . the government is presumed to represent the interests of all its citizens." Officials Br. at 33 citing *Living Word Bible Camp v. County of Itasca*, No. A12-0281, 2012 WL 4052868 at *6 (Minn. Ct. App, Sept. 17, 2012). Notwithstanding this, Officials argued for the application of this presumption before the District Court, Index #415 at 17. The District Court was persuaded, that the federal rule was desirable but ultimately declined to apply the presumption. Add. at 22. The court's reason for its choice is unstated but given its erroneous refusal to recognize MOMS' cognizable interests in the case, it seems unlikely that it properly distinguished MOMS' interests from the sovereign interest that Officials were obligated to protect in the case.

Even had the trial court recognized the federal presumption, it would have been error to apply it given the unique and personal interest that members of MOMS have in directing the upbringing of their daughters. *See Pierce*, 268 U.S. at 535. MOMS' interests differ from the interests that Officials identified as motivating their decision not to appeal the ruling of unconstitutionality. "Minnesota taxpayers and all Minnesotans who need the finality of knowing that they can make intimate decisions about their own bodies free of

undue interference by the government." Statement of Attorney General as contained in Press Release, Attorney General Ellison, co-defendants will not appeal *Doe v. Minnesota*, (July 28, 2022), available at link. Officials are even more explicit in their brief regarding their alignment with and commitment to protecting the interests of Providers. "Allowing intervention thus will not only prejudice Defendants, but will negatively impact all Minnesotans seeking and providing reproductive healthcare." Officials Br. at 40.

The interests MOMS seeks to protect in this case are far different from those of taxpayers or abortion providers. Its members seek to protect their constitutional and statutory rights as mothers, a group that Officials have yet to acknowledge has lost vital rights.

2. *MOMS has satisfied the minimal burden to establish inadequacy of representation under this Court's precedents.*

Officials claim that they "submitted hundreds of pages of briefing and evidence," Officials Br. at 36-37, implying that a significant number of these pages were in defense of the Parental Notification Law. This implication is inaccurate. Among those "hundreds of pages" there was only one document that even arguably qualifies as "evidence" supporting the Parental Notification Law – an unsworn expert report[4] by Professor Jason Lindo, limited to the sole issue of whether the law substantially reduced abortion rates and

[4] Unsworn statements and unsworn or uncertified copies of papers are not competent evidence to defeat a summary-judgment motion, see Minn. R. Civ. P. 56.05(d) (setting forth requirements for affidavits in summary-judgment motions). *Kay v Fairview Riverside Hosp.*, 531 N.W.2d 517, 520 (Minn. App. 1995, rev. denied July 20, 1995) (facts submitted by appellant in the police reports and psychologist's report not considered for purposes of the summary judgment determination because they were not submitted in proper affidavit form).

unwanted pregnancies, (Index No. 247, Ex. O ¶¶ 9, 15, and the professor even equivocated on this last point. *Id*. His report is the sum total of expert opinion Officials offered related to the Parental Notification Law to rebut the sworn declarations of Providers' numerous experts.

By their own admission, and consistent with the district court ruling, Officials proffered *no* evidence, not even *unsworn* expert reports, establishing the benefits of parental involvement in minors' decisions regarding abortion. Nor did they offer any evidence disputing the claims of Providers' experts regarding the capacity of minors to make complex decisions regarding an unplanned pregnancy. *Doe*, 2022 WL 2662998 at *45. This failure has resulted in the loss of MOMS' rights to notice and to file a civil action if that notice is not provided.

Officials insist the adequacy of their representation in this case is established by their mere recitation of the legal rule that parents have an interest in protecting the wellbeing of their children. Officials' Br. at 37. Yet, that rule was never at issue in this case. Even Providers have not argued that parents have no legally recognized interest in the wellbeing of their minor daughters.

The issues in this case are whether minors have the experience, maturity, and capacity for judgment to make autonomous decisions regarding abortion, and if so, whether the Minnesota Constitution, as interpreted in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), requires the state to allow minors to make such decisions without notice to their parents. Officials provided no evidence on the factual issue of capacity, 2022 WL 2662998 at *45, notwithstanding their current claims that legal arguments are the equivalent of evidence.

Officials Br. at 37 n. 15. Instead they chose to rely almost exclusively on a federal case to address the state constitutional issue of accommodating both the rights of minors and their parents. This is particularly egregious given that the ruling in the *Hodgson* case was abrogated by the U.S. Supreme Court decision in *Dobbs v. Jackson Women's Health Org*., 142 S.Ct. 2228 (2022) three weeks prior to entry of judgment in this case, yet officials made no effort to reopen discovery or rebrief and reargue the issues. Instead the Attorney General publicly proclaimed his commitment to "expanding access to abortion." Press Release, *Attorney General Ellison joins AGs nationwide in reaffirming commitment to protecting abortion access* (June27, 2022) available at link.

Both Officials and Providers argue that MOMS seeks to defend an interest that Defendants argued in its briefing. Officials Br. at 37; Providers Br. at 24 (citing cases from the U.S. Courts of Appeals in the 4th and 7th Circuits). But as the Court of Appeals for the 8th Circuit has ruled, "'[t]he "tactical similarity' of the 'legal contentions' of a current party with that of a proposed intervenor, however, does not assure adequate representation." *Sierra Club v Robertson*, 960 F.2d 83, 86 (8th Cir. 1992). *See also Planned Parenthood of Minn. Inc. v. Citizens for Community Action*, 558 F.2d 861, 870 (1977) (intervention appropriate where the interests of proposed intervenor and current party, "while not adverse, are disparate," even though both sought same legal goal); and *Kansas Pub. Employees Retirement Sys. v Reimer & Koger Assoc., Inc.*, 60 F.3d 1304, 1308-09 (8th Cir. 1995) (where interests of the intervenor and the parties are disparate, even though directed at a common legal goal, intervention is appropriate).

3. *Officials' positional conflict of interest are sufficient to establish the inadequacy of their representation of MOMS' interests.*

The failure of Officials to provide any evidence even attempting to refute the factual claims asserted by Providers and their experts, as well as the characterization of MOMS' expert declarations as "extreme", Officials Br. at 27, reflects Officials' deep commitment to promoting unlimited abortion and the Attorney General's positional conflict in its defense of this case. During the Attorney General's tenure in office, General Ellison has participated in a multitude of lawsuits outside of Minnesota seeking to expand abortion. Just during the pendency of this lawsuit, he has chosen to participate in cases before the Court of Appeals for the 5th, 9th, 10th, and 11th Circuits, at least three cases before the United States Supreme Court. *See* Petition for a Writ of Certiorari for the State of Oregon *et al. Oregon*, *et al. v. Azar*, 389 F. Supp. 3d 898 (D. Or. 2019), *vacated and remanded sub nom. California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) *available at* link; Brief for State of New York, *et al*. as Amici Curiae Supporting Appellees, *Marshall v. Robinson*, (11th Cir. 2020) (No. 20-11401) *available at* link; Motion of the States of New York, *et al*. to Submit a Brief as Amici Curiae Supporting Appellees, *S. Wind Women's Ctr. LLC v. Stitt*, (10th Cir. 2020) (No. 20- 6045) *available at* link; Brief for State of New York, *et al*. as Amici Curiae Supporting Respondents, *In re Abbott*, 954 F.3d 772, 780 (5th Cir. 2020) *available at* link; Brief for the States of California, *et al*. as Amici Curiae Supporting Respondents, *Dobbs, v. Jackson Women's Health Org*, 142 U.S. 2228 (2022) *available at* link; Motion for Permission to file as Amici Curiae and Brief for Massachusetts *et. al*. as Amici Curiae Supporting Petitioner, *United States of America*

v. State of Texas et al., 142 U.S. 416 (2021) *available at* link; and Brief for the State of New York *et al.* as Amici Curiae Supporting Application for a Stay, *Danco Laboratories, LLC, v. ALLIANCE FOR HIPPOCRATIC Medicine, et. al.* 143 U.S. 1075 (2023) *available at* link.

There seems to be no limit to the time and expense Officials will embrace in gratuitous nation-wide efforts to defend the abortion industry both inside and outside Minnesota. Most recently, the Attorney General filed a brief in this Court claiming a right to participate in *Anderson v. Atkin Pharmacy Services et al*., No. A23-0484 (Minn. Ct. App.). Amicus Curiae Brief Minnesota Attorney General, *Anderson v. Atkin Pharmacy Services et al*., No. A23-0484 (Minn. Ct. App.) (July 6, 2023). Throughout the litigation of this case Officials have continuously pursued the removal of any limitations on abortion, a position that conflict with his defense in this case, and the interests of MOMS in upholding the Parental Notification Law. This positional conflict alone is sufficient to establish the inadequacy of Officials' representation.

MOMS has met the minimal burden of showing that its interests differ from those of Officials, and that Officials' representation of MOMS (and all Minnesota parents) was inadequate. The district court order to the contrary was erroneous and should be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING MOMS PERMISSIVE INTERVENTION.

MOMS has established that the District Court's abused it discretion in its principle brief and will not burden the Court in repeating its arguments here. MOMS Br. at 27-29.

CONCLUSION

At stake in this case is one of the oldest and most precious rights recognized by American courts – the right of parents to direct and guide their children, particularly when their children are confronting difficult and unexpected circumstances. Parents provide the experience, maturity, and judgment that minors often lack at such times. MOMS seeks to intervene and restore an important aspect of this right recognized in the Minnesota Parental Notification Law – the right of a parent to know their minor daughter is seeking an abortion.

The District Court erroneously denied MOMS intervention by imputing to its members both knowledge of the threat to their rights and the capacity to assess Officials' representation of those rights. It simultaneously (and erroneously) declared mothers' rights and interest in their children's wellbeing no different than the interests of public officials. It declared Officials representation adequate, notwithstanding that (as the District Court found) the record is devoid of any evidence supporting parents' interests in guiding their daughters who are considering abortion, and the benefits parental notification provides to the girls.

MOMS meets all four requirements for intervention by right. This Court should reverse the district court's denial and allow MOMS to intervene and defend its interests.

Respectfully submitted this 7th day of August, 2023,

/s/ Teresa Stanton Collett

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CERTIFICATE OF COMPLIANCE

I, Teresa Stanton Collett, certify that I used Word Version 2302 of Office 365 to prepare the brief. The brief complies with the typeface requirements of Minn. R. Civ. App. P. 132.01(b) and contains 6974 words.

Date: August 7, 2023 /s/ Teresa Stanton Collett

Teresa Stanton Collett