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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Civil Other / Miscellaneous

DR. JANE DOE; MARY MOE; FIRST UNITARIAN SOCIETY OF MINNEAPOLIS; and OUR JUSTICE,

Court File No. 62-CV-19-3868
Judicial Officer: Thomas Gilligan, Jr.

Plaintiffs,

vs.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATE OF MINNESOTA, et al.,

Defendants.

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INTRODUCTION

Abortion rights have been one of the most controversial topics in this country for at least half a century. The Defendants in this case respect a woman's fundamental right to privacy. They also respect the authority of the Minnesota Legislature to pass laws relating to health care and privacy of our citizens, and the duty of the State and local governments to enforce those laws.

This case raises a host of facial constitutional challenges to more than a dozen statutes and regulations that relate to how abortions are provided and recorded in Minnesota, and one statute regarding the marketing of treatment for sexually transmitted infections ("STIs"). However, not every Minnesotan has standing to challenge the constitutionality of every statute. The law requires a basic level of connection between a plaintiff and the challenged statute before our judicial system will expend the significant resources it requires to analyze a claim that a statute passed by our state Legislature violates our state Constitution. Similarly, the law requires that a named defendant have direct responsibility for enforcing a statute before the defendant can be responsible for that statute's validity. In this case, the great majority of Plaintiffs' claims fail those tests for standing. In addition, some of Plaintiffs' claims fail as a matter of law. As a result, Defendants move to dismiss Plaintiffs' First Amended Complaint ("Complaint").

FACTS

I. THE CLAIMS

The Complaint asserts that thirteen Minnesota statutes and regulations relating to abortion and STI medical-treatment advertising violate the state Constitution. The Complaint, which is 48 pages in length, is organized into eleven separate topics. For each topic, Plaintiffs describe the alleged status of Minnesota's law and why Plaintiffs believe the law to be problematic. (Am. Compl. ¶¶ 64-246.) Plaintiffs then filter the eleven topics into seven broad

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legal Counts. (*Id.* ¶¶ 247-68.) Most of these Counts, however, have numerous sub-parts, resulting in 36 separate legal claims (not including Plaintiffs' Count for declaratory judgment), as demonstrated by the chart below.

Topic	Statutory Provision(s)	Claims
"Physician-Only Law" *Providing that abortions must be performed by physicians.*	Minn. Stat. § 145.412, subd. 1(1)	(1) Right to Privacy (2) Equal Protection (3) Special Legislation
"Hospitalization Requirements" *Providing that abortions after the first trimester must be performed in a hospital or abortion facility.*	Minn. Stat. § 145.412, subds. 1(2) & 3(1)	(4) Right to Privacy (5) Equal Protection (6) Special Legislation (7) Vagueness
"Reporting Requirements" *Requiring certain anonymous medical data be reported to the Department of Health.*	Minn. Stat. § 145.413; Minn. Stat. § 145.4131, subd. 1(b)(1)-(12); Minn. Stat. § 145.4132; Minn. Stat. § 145.4134; Minn. Stat. § 145.4246, subd. 3; Minn. R. 4615.3600	(8) Privacy (9) Equal Protection (10) Special Legislation
"Felony Penalties for Regulatory Infractions" *Making it a felony to willfully perform an abortion in a manner inconsistent with Minnesota law.*	Minn. Stat. § 145.412, subds. 1(3), 4	(11) Privacy (12) Equal Protection (13) Special Legislation
"Mandatory Disclosure Requirements" *Requiring certain information be provided to a patient before an abortion is performed*	Minn. Stat. § 145.4242	(14) Privacy (15) Equal Protection (16) Special Legislation (17) Free Speech
"Physician Disclosure Requirement" *Requiring certain medical information be provided to a patient, by their physician, before an abortion is performed.*	Minn. Stat. § 145.4242(a)(1)	(18) Privacy (19) Equal Protection (20) Special Legislation
"Mandatory Delay Requirement" *Requiring that certain mandatory disclosures be provided 24 hours before an abortion is performed.*	Minn. Stat. § 145.4242(a)(1)-(2)	(21) Privacy (22) Equal Protection (23) Special Legislation

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"Felony Penalties For-Failure to Obtain Informed Consent" *Making it a felony to perform an abortion without the patient's informed consent.*	Minn. Stat. § 145.412, subds. 1(4), 4	(24) Privacy (25) Equal Protection (26) Special Legislation
"Fetal Tissue Disposition Requirement" *Requiring fetal tissue be disposed of "by cremation, interment by burial or in a manner directed by the commissioner of health."*	Minn. Stat. §§ 145.1621-145.1622; Minn. R. 4675.2205	(27) Privacy (28) Equal Protection (29) Special Legislation (30) Religious Freedom and Neutrality
"Two-Parent Notification Requirement" *Requiring parental notification, prior to performing an abortion on a minor, unless an exception applies.*	Minn. Stat. § 144.343, subds. 2-6	(31) Privacy (32) Equal Protection (33) Special Legislation
"Ban on Advertising STI Treatments" *Proscribing certain advertisements related to STI treatments.*	Minn. Stat. § 617.28	(34) Equal Protection (35) Special Legislation (36) Free Speech

II. THE PARTIES

While the Complaint is detailed in its description of the numerous laws Plaintiffs seek to invalidate, it is nearly silent as to the four named Plaintiffs themselves. (*Id.* ¶¶ 7-10.) Dr. Jane Doe is a "Board-certified obstetrician-gynecologist" practicing medicine at an unknown location, in an unknown county, but presumably in Minnesota given her licensure by the Minnesota Board of Medical Practice. (*Id.* ¶ 7.) Mary Moe is a "certified nurse midwife" who provides care to her patients at an unknown location, in an unknown county, in Minnesota. (*Id.* ¶ 8.) Moe "seeks to provide abortion care in Minnesota herself," which she is currently prohibited from doing. (*Id.*)

First Unitarian Society of Minneapolis ("FUS") is a "religious congregation in Minneapolis, Minnesota." (*Id.* ¶ 9.) FUS "is deeply committed to promoting social justice, and its vision of social justice includes access to high-quality sexual and reproductive healthcare for

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all people[.]" (*Id.*) FUS "supports its members who seek and provide sexual and reproductive healthcare, including abortion care." (*Id.*)

The final named Plaintiff is Our Justice, a Minnesota nonprofit corporation "with a mission to ensure that all people and communities have the power and resources to make sexual and reproductive health decisions with self-determination." (*Id.* ¶ 10.) Our Justice provides "financial assistance and resources to people seeking abortion care who cannot afford it." (*Id.*)

The Complaint contains no description of how the various statutes/regulations impact the Plaintiffs. And, while Plaintiffs do specify which Plaintiffs are bringing each of the seven Counts (*id.* ¶¶ 249, 252, 255, 258, 261, 264, 268), Plaintiffs fail to allege which Plaintiffs are bringing each of the 36 separate claims.

As to Defendants, the Complaint names six Minnesota officials and agencies: (1) the entire State of Minnesota; (2) the Governor; (3) the Attorney General; (4) the Commissioner of Health; (5) the Board of Medical Practice; and (6) the Board of Nursing. (*Id.* ¶¶ 11-16.) These Defendants are named because of their purported authority to enforce various criminal and regulatory penalties pertaining to abortion and STI advertising. (*Id.*) The Complaint, however, noticeably fails to allege that any of the named Defendants has ever actually taken any adverse action against the Plaintiffs or anyone else related to the statutes/regulation at issue. In addition, the Complaint fails to articulate which of the seven Counts (let alone the 36 identifiable claims) are brought against which Defendants. This forces Defendants, and the Court, to assume that all 36 claims are brought against all six Defendants, despite the unwieldy nature of such a pleading.[1]

[1] Defendants requested that Plaintiffs amend their complaint to clearly articulate: (1) who is bringing each claim, and (2) who each claim is brought against. While Plaintiffs provided some additional detail in their Amended Complaint, this amendment is insufficient to put Defendants on notice regarding who is alleging each of the 36 claims against whom. *See, e.g.*, *Richards v. Dayton*, Civil No. 13–3029, 2015 WL 1522199, at *12 (D. Minn. Jan. 30, 2015) ("Richards either directs his claims generally against every conceivable defendant, or, conversely, fails to (Footnote Continued on Next Page)

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LEGAL STANDARD

Plaintiffs' claims must be dismissed because the Plaintiffs do not have standing to assert their claims, which deprives the court of subject matter jurisdiction, and because Plaintiffs have failed to state viable claims. Minn. R. Civ. P. 12.02(a), (e); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) ("Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court."); *see also* Minn. R. Civ. P. 12.08(c).

In addition, Plaintiffs have failed to meet basic pleadings requirements. Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Minn. R. Civ. P. 8.01. This rule imposes an obligation on the plaintiff to "give notice to an opposing party of the specific claims asserted and relief sought." *City of Waite Park v. Minn. Office of Admin. Hearings*, 758 N.W.2d 347, 353 (Minn. Ct. App. 2008).[2] Such notice requires a plaintiff to identify which claims are brought against each defendant. *Murrin v. Mosher*, No. A08-1418, 2009 WL 2366119, at *4 (Minn. Ct. App. Aug. 4, 2009) (affirming dismissal, in part, when plaintiffs refused to "specify which counts are being alleged against which Defendants"), *review denied* (Minn. Oct. 28, 2009).

Even at this early stage, all of Minnesota's duly-enacted statutes are presumed constitutional. *See In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging a statute as unconstitutional has the burden of proving their claim "beyond a reasonable doubt."

(Footnote Continued from Previous Page)
identify any defendants at all. This type of 'kitchen-sink' or 'shotgun' pleading does not" meet the requirements of Rule 8.), *report and recommendation adopted*, 2015 WL 1522237 (D. Minn. Mar. 30, 2015).

[2] *See also Muscianese v. Dankers*, No. A17-1344, 2018 WL 1462170, at *3 n.6 (Minn. Ct. App. Mar. 26, 2018) ("Properly framing pleadings and stating grounds for relief have been indispensable requirements in Minnesota, even before it reached statehood.").

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Id. The Court should exercise its authority to declare a statute unconstitutional "with extreme caution and only when absolutely necessary." *Id.*

ARGUMENT

Plaintiffs' Complaint must be dismissed because Plaintiffs have not sufficiently alleged their standing and have named improper Defendants. Even putting these pleading deficiencies aside, numerous claims brought by Plaintiffs fail as a matter of law and must be dismissed with prejudice.

I. PLAINTIFFS HAVE FAILED TO PLEAD THEIR STANDING.

Plaintiffs seek to change Minnesota's abortion laws. But, while the Complaint is detailed regarding Plaintiffs' objective, it is nearly devoid of any facts indicating why the four specific Plaintiffs have standing to obtain the relief they seek. Mere dissatisfaction with the state of the law is not enough to come into court. Rather, Plaintiffs must be directly and negatively impacted by each and every law they seek to invalidate here. As a result, this case must be dismissed, in large part, for Plaintiffs' lack of standing.

A. Minnesota Law on Standing.

Standing requires "that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). When a statute is challenged as unconstitutional, a plaintiff "must, in order to invoke the jurisdiction of the court, be able to show that the statute is, or is about to be, applied to his disadvantage." *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585, 588 (Minn. 1977). "[T]here is no standing to raise a constitutional challenge absent a direct and personal harm resulting from the alleged denial of constitutional rights." *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 393 (Minn. 1980). In this case, Plaintiffs must therefore plead "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Hanson v. Woolston*,

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701 N.W.2d 257, 262 (Minn. Ct. App. 2005) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)).[3] This interest must be alleged for each of the 36 claims pursued here.

If a plaintiff's interest is the same as Minnesota citizens generally, the plaintiff lacks standing to assert the claim. *See Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015). "[M]ere interest in a problem" is not enough to show that the plaintiff is "aggrieved or adversely affected so that standing exists." *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. Ct. App. 2009), *review denied* (Minn. Aug. 11, 2009); *see also Marzitelli*, 258 N.W.2d at 590. The standing requirement "precludes citizens from bringing lawsuits against governmental agencies based only on their disagreement with policy." *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); *see also Hanson*, 701 N.W.2d at 262.

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*, 287 Minn. 415, 419, 178 N.W.2d 846, 850 (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*

[3] The fact that a statute may be enforced criminally could provide standing, but there must be an actual, credible threat of future enforcement for standing to exist. *See, e.g.*, *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006) ("The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute.").

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Police Fed'n v. City of St. Paul, No. A05-2186, 2006 WL 2348481, at *1 (Minn. Ct. App. Aug. 15, 2006), *review denied* (Minn. Oct. 17, 2006).

B. Plaintiffs Fail to Sufficiently Plead Their Standing.

Plaintiffs, two entities and two individual medical professionals, fail to meet the above basic requirements to have this Court resolve their 36 claims.[4] Without standing, this Court lacks jurisdiction and this case should be dismissed.

1. *First Unitarian Society Lacks Standing.*

First Unitarian Society ("FUS") lacks standing to allege any claims here. FUS alleges that it is "deeply committed to promoting social justice," which includes "access to high-quality sexual and reproductive healthcare for all people regardless of income, race, and other socio-economic factors." (Am. Compl. ¶ 9.) FUS purports to bring this lawsuit on behalf of itself and its members "who seek and provide sexual and reproductive healthcare, including abortion care." (*Id.*) FUS does not specifically allege, however, that any of its members actually provide abortion care or have sought abortion care.

The allegations in the Complaint are insufficient to allege FUS's standing as a matter of law. FUS alleges no injury or direct impact sustained by it, or its members, as a result of the challenged statutes. FUS has not alleged how the various statutes at issue have actually impacted

[4] The sheer size and scope of Plaintiffs' Complaint makes a claim-specific analysis on standing impossible. By way of example, Plaintiffs allege what they purport to be a single Count for violation of equal protection. (Am. Compl. ¶ 251.) This Count, however, contains eleven separate claims lodged by each named Plaintiff. It goes without saying that the legal question of whether the physician-only law violates equal protection is separate and distinct from the question of whether the hospitalization requirement violates equal protection. Turning then to the issue of standing, the question of whether Dr. Doe has standing to challenge the physician-only requirement as violating equal protection (which she does not), is distinct from whether Mary Moe has standing to challenge the physician-only requirement as violating equal protection (which she does). Given that Plaintiffs allege that all four of them have standing for almost all of the 36 claims, the standing analysis would require, in theory, over 100 separate analyses. Such an analysis is unnecessary, however, because Plaintiffs fail to provide even rudimentary factual allegations pertaining to their standing.

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any of its specific members, or will do so in the future. Rather, FUS has alleged an interest in social justice, which is no different than the interest of all Minnesota citizens generally.

The Minnesota Supreme Court opinion in *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585 (Minn. 1977), is particularly instructive. In *Marzitelli*, the St. Paul Chamber of Commerce asserted that its members had "direct pecuniary interests in the business future of downtown St. Paul" sufficient to provide them standing to challenge a statute pertaining to the construction of Interstate Highway 35E. *Id.* at 590. The Minnesota Supreme Court rejected this argument, holding that the Chamber's "broad interest, if held to be sufficient for justiciability, would give the Chamber or similar groups a right to challenge virtually every legislative enactment affecting business in St. Paul." In this case, FUS's claimed interest is even broader than the economic interests of the St. Paul Chamber of Commerce. Indeed, if FUS is held to have standing here, it would have standing to challenge virtually any statute they contend is contrary to their vision of social justice.

FUS and all its claims must be dismissed for lack of standing.

2. *Our Justice Fails to Plead Sufficient Standing.*

Our Justice has also failed to allege any basis for its standing. Only one paragraph in the Complaint is dedicated to describing Our Justice. No facts are provided describing how the thirteen statutes and regulations at issue actually impact Our Justice or its clients. (Am. Compl. ¶ 10.) Rather, Our Justice seeks to bring this lawsuit based upon its mission to "ensure that all people and communities have the power and resources to make sexual and reproductive health decisions with self-determination." (*Id.*) This mission, like FUS's beliefs as to social justice, is insufficient to allege an interest in the lawsuit different from that of the general public. Our Justice and all its claims must be dismissed for lack of standing.

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3. *Mary Moe Fails to Plead Sufficient Standing for the Majority of Her Claims.*

Mary Moe also lacks standing for almost all of her claims. Mary Moe is a certified nurse midwife who "treats patients seeking abortion care" and "seeks to provide abortion care in Minnesota[.]" (*Id.* ¶ 8.) Mary Moe would like to be able to provide abortion treatment to her patients but is currently prohibited from doing so. (*Id.*) *See* Minn. Stat. § 145.412, subd. 1(1). Those facts are sufficient to establish that Mary Moe has standing to challenge the physician-only requirement,[5] but they do not establish her standing to challenge any other statute at issue here. For example, because Mary Moe cannot provide abortions, none of the other statutes regulating the abortion procedure apply to her advanced nursing practice. As a result, these statutory requirements also could not possibly impact Moe's patients. All claims asserted by Mary Moe, with the exception of her claims pertaining to the physician-only requirement, must be dismissed for lack of standing.[6]

4. *Dr. Doe Fails to Plead Sufficient Standing.*

Dr. Doe is a licensed obstetrician-gynecologist providing a full range of obstetrics and gynecology care, including abortion. (Am. Compl. ¶ 7.) The Complaint, however, provides no factual allegations regarding Dr. Doe's actual experiences related to the challenged statutes. Dr. Doe asks the Court to assume that because Dr. Doe provides abortion care, that all abortion-related and STI advertising statutes negatively impact Dr. Doe and her patients. Such an assumption of standing, however, is insufficient; Dr. Doe must affirmatively plead facts establishing her standing to invoke the jurisdiction of the Court.

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[5] Minn. Stat. § 145.412, subd. 1(1).

[6] Regardless, Mary Moe's challenges to the physician-only statute fails as a matter of law for the reasons described in Section III, *infra*.

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By way of example, Dr. Doe challenges the "hospitalization requirement" of Minn. Stat. § 145.412, subds. 1(2) and 3(1) as a violation of various provisions of the Minnesota Constitution, but there is no indication in the Complaint that Dr. Doe practices in a non-hospital environment such that this provision would impact her practice. Similarly, Dr. Doe challenges the physician-only requirement of Minn. Stat. § 145.412, subd. 1(1), but this statutory provision does not impact Dr. Doe, or her patients, because Dr. Doe is a licensed physician. Although it is certainly possible that Dr. Doe and her patients are impacted by some of the challenged statutes and regulations at issue here, Dr. Doe must allege why she specifically has standing to pursue each of her claims. She has failed to do so.

Dr. Doe also purports to bring this lawsuit on behalf of her unnamed patients. But, "one does not have standing to assert the constitutional rights of a third party." *In re Welfare of Children of J.R.B.*, 805 N.W.2d 895, 906 (Minn. Ct. App. 2011), *review denied* (Minn. Jan. 6, 2012). *But see Minn. Med. Ass'n v. State*, 274 N.W.2d 84, 87 n.2 (Minn. 1978). Dr. Doe has pleaded no facts about her patients or how the challenged statutes negatively impact them. There are no sufficient allegations of standing for Dr. Doe to move forward with her claims here.

II. PLAINTIFFS HAVE FAILED TO NAME THE PROPER DEFENDANTS.

Just as not every Minnesotan has standing to challenge every statute, not every Minnesotan is a proper defendant to every lawsuit. Defendants must have a unique connection to a challenged statute, and the enforcement thereof, in order to be forced to defend it. *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998) ("[W]here the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue."); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (holding that the injury alleged must be "traced to the

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challenged action of the defendant" and not a third party); *Schaeffer v. Newberry*, 35 N.W.2d 287, 288 (Minn. 1948) (finding that the named defendant had no more interest in the claim than the general citizens of the town, and therefore had no authority to defend it); *cf. Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. Ct. App. 2017) (to demonstrate injury, plaintiff must show it suffered an injury "that is fairly traceable to the *defendants'* challenged action" (emphasis added)), *review denied* (Minn. Apr. 26, 2017).

A proper defendant is one who caused the plaintiffs' injury, not the maker of the legislation under which the challenged action was taken. As explained by Judge Easterbrook in *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995):

> A person aggrieved by the application of a legal rule does not sue the rule maker—Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him.

(second emphasis added); *accord Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998) ("[T]he proper defendant is the person whose actions cause injury, not the author of the legal rule that leads to those actions.").

A. The State of Minnesota Is Not a Proper Party.

The "State of Minnesota" is not a proper party. The only allegation in the Complaint with respect to the "State of Minnesota" is that "criminal prosecutions are brought in the State's name." (Am. Compl. ¶ 11.) While that is true, the responsibility for prosecuting crimes in Minnesota has been "specifically delegate[d] . . . to the offices of county attorneys and city attorneys." *State v. Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (collecting statutes). Therefore, the proper defendants for claims seeking to enjoin criminal prosecutions are the specific county and city attorneys that Plaintiffs seek to enjoin.

Indeed, Minnesota courts have repeatedly concluded that the "State of Minnesota" is not a proper party in cases such as this one. *See, e.g.*, *Tokarz v. State*, A16-0134, 2016 WL 4497423,

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at *2 (Minn. Ct. App. Aug. 29, 2016) ("[I]t appears that the registrar, not the state, is the proper party" to case involving birth certificate) (citing *Meriwether Minn. Land & Timber, LLC v. State*, 818 N.W.2d 557, 562-63, 573 (Minn. Ct. App. 2012)); *Hoch v. State*, No. 62-cv-15-3953 (Minn. Dist. Ct. Jan. 14, 2016) ("Because the 'State of Minnesota' is not a proper party in this action, it is dismissed."); *Laudenbach v. State*, No. 62-cv-14-6539 (Minn. Dist. Ct. Feb. 6, 2015) (dismissing the "State of Minnesota" because the case "properly lies with the Board of Psychology"); *Brodkorb v. Minn.*, No. 12-1958, 2013 WL 588231 at *15–17 (D. Minn. Feb. 13, 2013) (granting motion to strike the "State of Minnesota" as a party where the plaintiff's employer was the Minnesota Senate, and no claims were pled against the "State" other than those against the Senate).

Even if the Court were to keep the State in as a party, at a minimum Plaintiffs' claims that do not allege a criminal component should be dismissed against the State (because Plaintiffs only named the State of Minnesota due to its role in criminal prosecutions). For example, Plaintiffs make no reference to criminal consequences when discussing mandatory disclosure requirements (Am. Compl. ¶ 139), physician disclosure requirements (*id.* ¶ 154), or mandatory delay requirements (*id.* ¶ 165).

B. The Attorney General Is Not a Proper Party.

The Attorney General should also be dismissed. Plaintiffs do not allege that the Attorney General has taken any adverse action against them or is likely to do so in the future. The only allegations in the Complaint regarding the Attorney General are that he has some conditional authority to enforce the criminal laws challenged in the case and he is the attorney for state officials. (*Id.* ¶ 13.) Neither are sufficient to establish a justiciable controversy between Plaintiffs and the Attorney General.

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As the Minnesota Supreme Court has emphasized, the prosecution of crimes in Minnesota is done "almost exclusively through county attorneys or city attorneys." *Lemmer*, 736 N.W.2d at 662. "The attorney general plays only a limited role in criminal prosecutions and then *only at the request* of the county attorney or [with respect to an indictable offense] the governor." *Id.* (citing Minn. Stat. § 8.01) (emphasis added). This limited conditional authority alone is insufficient to make the Attorney General a party to this case. *See, e.g.*, *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn. 1996) (reiterating that "merely possible or hypothetical injury is not enough to" establish a justiciable controversy regarding the constitutionality of a statute); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-2938, 2011 WL 797462, at *4 (D. Minn. 2011) (Attorney General's "conditional authority to prosecute an indictable offense at the Governor's request is insufficient to maintain the attorney general as a defendant in this action").

C. The Governor Is Not a Proper Party.

Likewise, Plaintiffs' inclusion of the Governor is improper. The Governor's constitutional authority to "take care that the laws be faithfully executed" (Article V, Section 3), is not a valid basis to add him as a defendant. *See, e.g.*, *Calzone v. Hawley*, 866 F.3d 866, 870 (8th Cir. 2017) (Missouri Governor's duty to "take care that the laws are distributed and faithfully executed" is an insufficient connection to the enforcement of a statute); *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) ("If a governor's general executive power provided a sufficient connection to state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant."); *Scott v. Francati*, 214 So. 3d 742, 747 (Fla. Dist. Ct. App. 2017); *Allegheny Sportsmen's League v. Ridge*, 790 A.2d 350, 355 (Pa. Commw. Ct. 2002), *aff'd*, 860 A.2d 10 (Pa. 2004).

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In addition, the Governor's connection to criminal law enforcement is simply too attenuated to establish a justiciable controversy. The Supreme Court has made clear that:

> [r]egardless of the nature of the proceeding, whether it be by way of relief through a declaratory judgment or otherwise, a litigant who questions the constitutionality of a statute, must, in order to invoke the jurisdiction of the court, be able to show that the statute is, or is about to be, applied to his disadvantage.

State ex rel. Smith v. Haveland, 223 Minn. 89, 94, 25 N.W.2d 474, 478 (1946). "[M]erely possible or hypothetical injury is not enough." *Kennedy*, 544 N.W.2d at 6. Here, Plaintiffs do not allege that the Governor has applied any of the challenged statutes against them or anyone else. Nor do they allege that he is likely to do so in the future.

In fact, it is extremely unlikely that the Governor would attempt to enforce any criminal statute. The Governor's criminal authority under section 8.01 is merely a "safety-valve alternative[] for use in extreme cases of prosecutorial inaction." *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 365 (Minn. 1977). Plaintiffs do not allege any instances of extreme prosecutorial inaction relating to the challenged statutes. Their failure to allege any prosecutorial inaction by the appropriate criminal authorities or any adverse action taken by the Governor requires his dismissal.

D. The Commissioner of Health Is Not a Proper Party to Many Claims.

Most of Plaintiffs' claims against the Commissioner of Health should be dismissed because the Department of Health lacks enforcement authority. More specifically, Plaintiffs do not allege any actual or potential adverse action by the Department of Health in the majority of their claims. *See* Am. Compl. ¶¶ 64–77 (physician-only), 78–96 (hospitalization), 117–126 (felony penalties for regulatory infractions), 131–151 (mandatory disclosures), 152–162 (physician disclosures), 163–181 (mandatory delay), 182–189 (felony penalties for failure to obtain informed consent), 190–212 (fetal tissue disposition), 213–238 (two-parent notification), and 239–246 (STI advertisement ban).

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E. The Board of Medical Practice Is Not a Proper Party to Many Claims.

The following claims against the Board of Medical Practice should be dismissed for failure to allege any actual or potential adverse action by the Board against Plaintiffs: Am. Compl. ¶¶ 64–77 (primarily felony penalties for failure to comply with physician-only), 117–126 (felony penalties for regulatory infractions), 182–189 (felony penalties for failure to obtain informed consent), and 239–246 (STI advertisement ban).

F. The Board of Nursing Is Not a Proper Party to Many Claims.

The following claims against the Board of Nursing should be dismissed for failure to allege any actual or potential adverse action by the Board against Plaintiffs: Am. Compl. ¶¶ 78–96 (hospitalization), 97–116 (reporting), 117–126 (felony penalties for regulatory infractions), 152–162 (physician disclosures), 182–189 (felony penalties for failure to obtain informed consent), and 239–246 (STI advertisement ban).

III. SIX OF PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW.

Putting the above deficiencies aside, six of Plaintiffs' claims also fail as a matter of law because there are no facts they could introduce, consistent with their pleading, that would support granting the requested relief. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014).

A. Count I, Alleging the Violation of the Right to Privacy under the Minnesota Constitution, Fails as a Matter of Law.

Plaintiffs assert that all of the challenged Minnesota statutes and regulations at issue violate the right to privacy guaranteed by the Minnesota Constitution, with the exception of the statute pertaining to STI treatment advertising. (Am. Compl. ¶¶ 247-49.) Plaintiffs do not, however, allege how each of the laws impact the abortion decision itself, and it is not conceivable that they can overcome that burden. As a result, the majority of Plaintiffs' privacy claims fail as a matter of law.

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The Minnesota Constitution protects, as a fundamental right, "the right of a pregnant woman to decide whether to terminate her pregnancy." *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995). In order to violate that constitutional right, "a law must impermissibly infringe upon" it. *Id.* (quoting *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987)); *see also Hickman v. Grp. Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986). Several of the laws challenged by Plaintiffs, however, have no logical impact on a woman's decision to choose whether to abort. Rather, most of the laws pertain to restrictions and regulations on medical practitioners, who do not have a fundamental right to provide abortions.[7]

For example, Plaintiffs challenge numerous state statutes and regulations pertaining to what they call "reporting requirements."[8] (Am. Comp. ¶¶ 97-116.) The Minnesota Department of Health collects public health data "to inform policies, change behavior and help communities uncover issues to develop solutions and protections for the hazards, exposures and socioeconomic factors that influence our health."[9] In order to obtain and analyze such critical data, Minnesota laws and regulations require medical providers to report on various topics, including abortion. *E.g.*, Minn. Stat. § 145.413, .4131, .4132, .4134, .4246, subd. 3; Minn. R. 4615.3600.

Plaintiffs assert that the above reporting requirements intrude on the privacy rights of Plaintiffs' patients. (Am. Compl. ¶ 111.) The names and identifying information of women

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[7] There is no fundamental right to pursue a specialized profession. *See Matter of Unity Health Care*, A16-0682, 2017 WL 745740, at *5 (Minn. Ct. App. Feb. 27, 2017), *review denied* (Minn. May 16, 2017).

[8] Defendants note that the reporting requirement of Minn. Stat. § 145.413 was upheld as constitutional by the Eighth Circuit in *Hodgson v. Lawson*, 542 F.2d 1350, 1357 (8th Cir. 1976).

[9] Minnesota Department of Health, *MN Public Health Data Access Portal*, https://data.web.health.state.mn.us/web/mndata/ (last viewed Sept. 26, 2019).

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obtaining abortions, however, is never publicly disclosed because such disclosure is prohibited by both state and federal law.[10] And, the Minnesota Supreme Court and the United States Supreme Court have upheld such medical data reporting/compilation because it has '"no legally significant impact or consequence on the abortion decision or on the physician-patient relationship."' *Minn. Med. Ass'n*, 274 N.W.2d at 91 (Minn. 1978) (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 81 (1976)). Given the required anonymity of the "reporting requirements," there is simply no basis upon which to allege that such reporting requirements impact a woman's fundamental right to choose abortion.

The same is true for the "fetal tissue disposition requirement" challenged by Plaintiffs. (Am. Compl. ¶¶ 190-212.) The law requires dignified, sanitary, and uniform disposition of any tissue from an abortion. Minn. Stat. § 145.1621, subd. 1. The method of disposal does not need to be discussed with the patient. *Id.*, subd. 6 ("[N]o discussion of the method of disposition is required with the woman obtaining an induced abortion.") Information that is not discussed with a patient is not likely to impact her choice regarding whether to carry a fetus to term. Indeed, the Eighth Circuit has already concluded that Minnesota's fetal tissue disposition statute does not violate a woman's right to privacy under the federal constitution. *See Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 (8th Cir. 1990). The statute "does not burden the abortion choice" because it has "no significant impact on a woman's exercise of her right to an abortion[.]" *Id.* at 486.

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[10] *See* Minn. Stat. § 145.4134 ("The commissioner shall ensure that none of the information included in the public reports can reasonably lead to identification of an individual having performed or having had an abortion."); Minn. R. 4615.3600, subp. 2(C) ("The commissioner shall ensure and maintain confidentiality of all individual pregnancy termination records."); Minn. Stat. § 13.3805, subd. 1(b) (providing that "health data" on individuals is private); 42 U.S.C.A. § 1320d-6 (penalizing "[w]rongful disclosure of individually identifiable health information").

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The same logic described above applies to most of the statutes challenged by Plaintiffs as violating the fundamental right to choose. The fact that some disclosures, for example, must be provided by a doctor (rather than by another medical professional), has no logical impact on the *patient's* decision to choose. (Am. Compl. ¶¶ 152-62.) Similarly, the fact that medical providers may face various penalties for violation of Minnesota's abortion laws again, does not impact the *patient's* right to choose. (Am. Compl. ¶¶ 117-26, 182-89.) For these reasons, Plaintiffs' privacy claims must be dismissed for failure to state a claim.

B. Count II, Alleging Violation of Equal Protection, Fails as a Matter of Law.

Plaintiffs assert that various statutes and regulations violate equal protection for treating the abortion procedure differently than other unnamed and undescribed medical procedures. (Am. Compl. ¶ 251.) Plaintiffs, however, have not pleaded the required elements of this claim. *See Sec. Bank & Tr. Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 501-02 (Minn. 2018) (affirming district court judgment on the pleadings for failure to plead required elements of claim); *Finn v. Alliance Bank*, 860 N.W.2d 638, 654-55 (Minn. 2015) (affirming dismissal of claim for failure to plead all required elements)

"The threshold showing for an equal-protection claim is differential treatment of (at least) two groups of similarly situated people." *Forslund v. State*, 924 N.W.2d 25, 35 (Minn. Ct. App. 2019). Persons who are differently situated need not be treated the same. *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018). In determining whether two groups are in fact "similarly situated," the focus is on "whether they are alike in all relevant respects." *State v. Cox*, 798 N.W.2d 517, 522 (Minn. 2011). Courts will sustain classifications if any reasonable distinction can be found. *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999), *review denied* (Minn. May 18, 1999).

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Plaintiffs do not allege what other specific medical procedures are treated differently from abortion for purposes of their equal protection challenges. Without that key element, Plaintiffs have failed to sufficiently plead this Count and it should be dismissed.

C. Count III, Alleging Violation of the Constitutional Proscription on Special Legislation, Fails as a Matter of Law.

Plaintiffs also allege that every statute and regulation challenged in this lawsuit constitutes "special legislation" prohibited by the Minnesota Constitution. Plaintiffs misunderstand the meaning of the phrase "special legislation."

Article XII, Section 1 of the Minnesota Constitution states, in part:

> In all cases when a general law can be made applicable, a special law shall not be enacted . . . . Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever.

Laws are not special simply because different rules are applied to different subjects. *See Visina v. Freeman*, 252 Minn. 177, 196, 89 N.W.2d 635, 651 (1958) ("A law is general when it is uniform in its operation even though it divides the subjects of its operation into classes and applies different rules to different classes."). Indeed, "[l]egislation in its very nature involves classification." *Kellerman v. City of St. Paul*, 211 Minn. 351, 355, 1 N.W.2d 378, 380 (1941).

The term "special legislation", as opposed to "general legislation", is reserved for legislation that is "so patently arbitrary as to demonstrate constitutional evasion." *In re Tveten*, 402 N.W.2d 551, 558 (Minn. 1987).[11] A three-part test is utilized to determine if a classification is justified and constitutional. A classification is constitutional if:

[11] *See also Kaljuste v. Hennepin Cty. Sanatorium Comm'n*, 240 Minn. 407, 418, 61 N.W.2d 757, 764 (1953) ("It is only when the classification is so manifestly arbitrary as to evince a legislative purpose of evading the provisions of the constitution that the courts may and must declare the classification unconstitutional.").

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> (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation; (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Id. at 558-59.

The classifications at issue here satisfy the test because they are general laws, which apply to all medical providers providing abortion care and all advertisers seeking to advertise STI treatments. Regulations and laws addressing specific medical conditions or procedures are not special laws. *See, e.g.*, *Kaljuste*, 240 Minn. at 418, 61 N.W.2d at 764 (holding law applying to all public employees afflicted with tuberculosis to be a general law, stating "[i]t cannot be seriously contended that the legislation in question does not affect the right of all persons similarly situated within the sphere of its operation"); *see also Kellerman*, 211 Minn. at 355, 1 at 380 (upholding law pertaining to "coronary sclerosis" among firemen as not constituting a prohibited special law).

In *Tveten*, the Minnesota Supreme Court found two laws, which regulated the same financial products differently, were special legislation providing more favorable treatment to products issues by fraternal benefit societies in comparison to traditional for-profit insurance companies. 402 N.W.2d at 559-60. In contrast, Minnesota laws do not distinguish between classes of persons seeking and providing abortion care, rather, this class of individuals are regulated uniformly. Abortion care is distinct from other medical care, and as a result, the regulation thereof does not constitute special legislation and these claims should be dismissed.

D. Count IV, Alleging Violation of Free Speech, Fails as a Matter of Law as to the Mandatory Disclosure Requirements.

In Count IV, Dr. Doe and Ms. Moe allege that two statutes violate their freedom of speech guaranteed by the Minnesota Constitution – the mandatory disclosure statute and the ban

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on advertising STI treatments. (Am. Compl. ¶¶ 256-258.) Their challenge to the mandatory disclosure statute (Minn. Stat. § 145.4242) fails as a matter of law.

The mandatory disclosure statute, entitled "informed consent," provides that an abortion is only voluntary if the physician who performs the abortion or refers the patient tells the patient about risks of the abortion procedure as well as the risks of carrying the fetus to term, and tells the patient about financial and health care assistance available. Minn. Stat. § 145.4242

A nearly identical Pennsylvania statute was challenged by providers as a violation of the First Amendment in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992). The Pennsylvania statute had the same title, same introductory language, and required the same information be given to the patient. (Both the Minnesota and Pennsylvania statute are included as Exhibit A.)

The U.S. Supreme Court found the Pennsylvania disclosure statute did not violate the providing physician's First Amendment rights. *Id.* at 884. Although a provider's free speech rights are implicated, the court found the requirement was part of the "reasonable licensing and regulation" that is inherent in the practice of medicine. *Id.* The Supreme Court held: "We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.*

Although Dr. Doe and Ms. Moe assert their free speech claims under the Minnesota Constitution, and not the U.S. Constitution, the result is the same. The Minnesota Supreme Court has found that the Minnesota Constitution does not offer broader speech rights than its federal counterpart. *E.g.*, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012) (recognizing "the Minnesota constitutional right to free speech is coextensive with the First Amendment."); *State v. Wicklund*, 589 N.W.2d 793, 799 (Minn. 1999) (declining to interpret

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Article I, Section 3 as having "more expansive protection for free speech than . . . the First Amendment").

Because Minnesota has consistently found that the free speech guaranteed in the Minnesota Constitution is the same as that guaranteed by the First Amendment to the U.S. Constitution, and the U.S. Supreme Court has found that a nearly identical disclosure statute does not violate a physician's free speech rights, Count IV should be dismissed with respect to the mandatory disclosure statute.

E. Count V, Alleging a Vagueness Challenge, Fails as a Matter of Law.

Plaintiffs allege that the hospitalization requirement of Minn. Stat. § 145.412, subds. 1(2) and 3(1) is unconstitutionally vague. (Am. Compl. ¶ 260.) This claim fails as a matter of law for two independent reasons: (1) there is no such thing as a facial vagueness challenge outside the realm of speech claims; and, even if there were, (2) the statute is not vague on its face.

Minnesota courts have held that vagueness challenges, outside of the speech context, "must be examined in light of the facts at hand." *State v. Becker*, 351 N.W.2d 923, 925 (Minn. 1984) (citing *United States v. Powell*, 423 U.S. 87, 92 (1975)); *see also State v. Mogler*, 719 N.W.2d 201, 206 (Minn. Ct. App. 2006) ("When First Amendment freedoms are not involved, vagueness challenges must be examined in light of the defendant's actual conduct). As a result, Plaintiffs seeking to pursue a vagueness challenge must allege how the statute "applied to [their] conduct[.]" *State v. Broten*, 836 N.W.2d 573, 578 (Minn. Ct. App. 2013), *review denied* (Minn. Nov. 12, 2013). Plaintiffs' facial constitutional challenge can be dismissed for this reason alone: the law does not recognize facial challenges on the basis of vagueness.

Even if a facial challenge were allowed, the hospitalization statute is not vague as a matter of law. The statute clearly provides that second and third trimester abortions must be performed in a hospital or "abortion facility" as defined by the Minnesota Department of Health.

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The fact that the Department of Health does not currently define the phrase "abortion facility" does not render the statute void for vagueness. The void-for-vagueness doctrine requires that the prohibited conduct be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *State v. Wendorf*, 814 N.W.2d 359, 364 (Minn. Ct. App. 2012) (quoting *State v. Bussmann*, 741 N.W.2d 79, 83 (Minn. 2007)). A person of ordinary intelligence will decipher that if not performed in a hospital, a second or third trimester abortion could be deemed in violation of Minn. Stat. § 145.412, subds. 1(2) and 3(1), unless and until the Department of Health issues a regulation stating otherwise.

F. Count VII, Requesting a Declaratory Judgment, Fails as a Matter of Law.

The Uniform Declaratory Judgments Act provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Minn. Stat. § 555.11. "[T]he joinder requirement in Minn. Stat. § 555.11 is consonant with but broader than the joinder requirement in [Minn. R. Civ. P.] 19." *Unbank Co., LLP v. Merwin Drug Co.*, 677 N.W.2d 105, 108 (Minn. Ct. App. 2004).

The failure to join an interested party is a "fatal defect." *Id.* at 107. Indeed, when necessary parties are not joined, the case is not justiciable. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 276 (Minn. Ct. App. 2001); *see also Frisk v. Bd. of Educ. of City of Duluth*, 246 Minn. 366, 382, 75 N.W.2d 504, 514 (1956); *City of Hopkins v. Stroner*, No. A14-0509, 2014 WL 6090676, at *3 (Minn. Ct. App. Nov. 17, 2014); *Hoch v. State*, No 62-cv-15-3953 (Minn. Dist. Ct. June 19, 2015).

Plaintiffs seek to enjoin the enforcement of numerous criminal statutes. As noted above, the responsibility for prosecuting crimes belongs to city and county attorneys. *Lemmer*,

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736 N.W.2d at 661. Those elected and appointed officials clearly have an interest in the enforcement of Minnesota's criminal law. Plaintiffs' attempt to enjoin their actions without naming them as a party is a fatal defect that requires dismissal.

CONCLUSION

The Plaintiffs want to re-write Minnesota law with respect to abortion. The courts are not the right vehicle for that effort—the Legislature is. Plaintiffs have not shown that they have standing to challenge the laws they disfavor, nor that the Defendants have any special responsibility for those laws, and many of their claims are not viable under Minnesota law. Defendants ask the Court to dismiss the case.

Dated: September 25, 2019

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