Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

---

Dr. Jane Doe; Mary Moe; First Unitarian Society of Minneapolis and Our Justice,

Plaintiffs,

vs.

State of Minnesota, et al.,

Defendants

and

Ninety-First Minnesota State Senate,

[Proposed] Defendant-Intervenor.

Case Type: Civil/Other Misc.
Court File No: 62-CV-19-3868
Judge: Thomas Gilligan, Jr.

**NINETY-FIRST MINNESOTA STATE SENATE'S MEMORANDUM IN SUPPORT OF NOTICE OF INTERVENTION**

---

## I. INTRODUCTION

This lawsuit seeks to invalidate Minnesota statutes promoting quality health care and informed consent. The Ninety-First Minnesota State Senate (the "Senate") is the only institution in Minnesota's State Government that is able to defend the challenged statutes without conflict or qualification. The Court will depend on the adversarial presentation of argument and evidence to reach a just result. The Senate's intervention will ensure that the Court, and the people of Minnesota, can be confident that this process will properly function in this suit.

Observers of this litigation as diverse as Pro-Life Action Ministries and the *New York Times*, have raised material concerns regarding Attorney General Keith Ellison's defense in this case. These concerns are the inevitable result of the Attorney General's position in this suit. Mr. Ellison is required to defend statutes about which he has professed fundamental

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

disagreements, in a lawsuit brought by some of his closest political allies. The Senate is entitled to intervene and its decision to do so is an apt measure to mitigate these serious concerns.

The Senate's intervention is a substantive effort to defend the challenged statutes and ensure the legal process is not tainted by conflicting interests or even an appearance of conflicting interests. "Justice requires that the judicial process be fair and that it appear to be fair," and the Court is required to pursue these ends. *State v. Pratt*, 813 N.W.2d 868, 878 (Minn. 2012).

The Attorney General is currently litigating on behalf of Gender Justice, the advocacy organization that brought this case as part of its core mission to change Minnesota law through the courts. The Attorney General's collaboration with Gender Justice is not surprising in light of Mr. Ellison's deep relationships with the organization's leaders and with other organizations that have promoted and supported this lawsuit. These relationships and Mr. Ellison's long-standing policy positions create an appearance of divided loyalties and conflicts of interest that would forever cloud the public's perception of this proceeding, whatever its outcome.

The Senate's concerns regarding the potential for collusive behavior by allegedly adverse parties are not speculation. A recent attempt by the Attorney General's office to settle a suit brought by an apparent political ally bears the hallmark of "sue and settle" tactics scorned by both the Minnesota and U.S. Supreme Courts. These tactics are often invisible without the participation of an intervenor.

Regardless of its motivation for intervention, the Senate's ultimate purpose is to cooperate with the Attorney General's defense in this case. Its intervention should eliminate the need for the Court to address more difficult questions regarding conflicts or even disqualification. However, these genuine concerns demonstrate that only the Senate's intervention can ensure the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

illumination of difficult constitutional questions . . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The Senate asks the parties to consent to its intervention.

## II. ARGUMENT: THE SENATE IS ENTITLED TO INTERVENE OR, IN THE ALTERNATIVE, SHOULD BE ALLOWED TO PERMISSIVELY INTERVENE

### A. The Minnesota Senate

At this time, the Senate is the only institution in Minnesota's State Government that is able to defend the statutes at issue in this lawsuit (the "Challenged Statutes") without conflicts, limitations, or qualifications. (Declaration of Senator Scott Newman ("Newman Decl.") ¶2.) The Senate voted to intervene in this lawsuit as a result of its support for these statutes and because of concerns regarding the Attorney General's apparent conflicts of interest described below. (*Id.*)

As a result of these concerns, the Senate cannot be certain that the Attorney General will, or is even capable of, providing the necessary defense of the Challenged Statutes in this suit. (*Id*. ¶3.) The Senate has engaged a team of attorneys with deep experience defending statutes touching on the health, safety, informed consent, and other issues related to abortion. (*Id*.) The Senate understands that no attorney in the Attorney General's office has any experience *defending* statutes relating to or regulating abortion procedures. (*Id*.)

The Senate waited until the Court heard and decided Defendants' motion to dismiss to ensure that its intervention was, in fact, necessary. It now seeks to intervene to move this lawsuit forward and defend the Challenged Statutes. (*Id*. ¶4) After voting to intervene, the Senate contacted the Attorney General offering to work with him in this defense. (*Id*. ¶5 Ex. 1.)[1] The Senate was surprised at Mr. Ellison's unequivocal response rejecting the Senate's offer to collaborate with the

[1] Exhibits 1-3 are attached to the Declaration of Senator Scott Newman. Exhibits 4-64 are attached to the declaration of Samuel W. Diehl. Exhibits that are available on the Internet are hyperlinked in this document and also attached to the respective declaration.

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

Senate in this lawsuit's defense. (*Id*. ¶6, Ex. 2.) Nonetheless, the Senate intends to work with the Attorney General's office in this litigation as much as possible. (*Id*. ¶6)

**B. Standard for Mandatory Intervention**

The Senate seeks to intervene pursuant to Minn. R. Civ. P. 24.01 or alternatively pursuant to Minn. R. Civ. P. 24.02 or the Court's inherent authority. Rule 24.01 requires that a prospective intervenor be allowed to intervene:

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

Minn. R. Civ. P. 24.01. The rule has been analyzed through a four-part test, mandating intervention if an applicant demonstrates: "(1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties." *League of Women Voters Minnesota v. Ritchie* ("*Ritchie*"), 819 N.W.2d 636, 641 (Minn. 2012).

The Minnesota Supreme Court has declared a "policy of encouraging all legitimate interventions." *Costley v. Caromin House, Inc*., 313 N.W.2d 21, 28 (Minn. 1981). Because of this, "[R]ule 24 is to be liberally applied." *Nash v. Wollan*, 656 N.W.2d 585, 591 (Minn. Ct. App. 2003) (citing *Luthen v. Luthen*, 596 N.W.2d 278, 280-81 (Minn. Ct. App. 1999).)

**C. The Senate and the Court have an Interest in Eliminating Concerns Regarding the Appearance of Conflicts Inherent to the Attorney General's Defense**

The preamble to Minnesota's Rules of Professional Conduct notes that "[v]irtually all difficult ethical problems arise from the conflict between a lawyer's responsibilities to clients, the legal system and the lawyer's own interest in remaining an ethical person while earning a satisfactory living." Minn. R. Prof. Conduct, Preamble. The Attorney General is not exempt from

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

these concerns. Under the Professional Rules, a conflict of interest may arise if there is a significant risk that the Attorney General's representation of a client will be materially limited by his responsibilities to another client, to a third person, or by his personal interests. Such a conflict may even "result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs" if they impair the lawyer's ability to provide effective representation of a client." Restatement (Third) of the Law Governing Lawyers § 125 (2000); *see also Christeson v. Roper*, 574 U.S. 373, 378 (2015) (citing *id*. § 125)

Interpreting these rules, the Minnesota Supreme Court explained, "defense counsel owes a duty of undivided loyalty to [a client] and must faithfully represent the [client's] interests." *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002). Even the appearance of adversity "to the interests of his client is not only repugnant to the trust relations between lawyer and client but to the fundamental concept of justice itself." *Id.* (quoting *Newcomb v. Meiss*, 116 N.W.2d 593, 598 (Minn. 1962)). In *Rice v. Perl*, the Minnesota Supreme Court found that a law firm violated its fiduciary duties by failing to disclose its business relationship with an insurance adjuster before it negotiated a settlement on behalf of a client with that adjuster. 320 N.W.2d 407, 410-11 (Minn. 1982). The court found that regardless of whether the relationship was entirely separate:

> [t]he existence of the 'business relationship' created, at the very least, a substantial appearance of impropriety with respect to [the attorney], and a serious conflict of interest for [the insurance adjuster]. A reasonable client would certainly wish to know, and has a right to this information, before proceeding with settlement negotiations . . . .

*Id*. at 411; *see also Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 894 (Minn. 1979) (finding an attorney must even "refrain from representing a party in an action against [a] former client where there is an appearance of a conflict of interest or a possible violation of confidence, even if such may not be true in fact."). Minnesota trial courts are required to "closely scrutinize" a defense

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

counsel that may have conflicted loyalties "in the interest of preserving the integrity of the judicial process . . . ." *Newcomb*, 116 N.W.2d at 598. "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

**1. The Attorney General's close relationship with Gender Justice appears to conflict with his defense in this suit**

The Attorney General has deep and ongoing political relationships with Gender Justice and its staff. These public, longstanding relationships create the appearance of conflict with his defense in this suit. The Senate's participation would mitigate these concerns.

This lawsuit is not routine business litigation filed by a private law firm. Gender Justice exists to advance its policy goals "through the law," including by "dismantling" alleged barriers to its goals through "strategic & impact litigation." (Ex. 4, Ex. 5.) Unlike a private law firm, Gender Justice "select[s] cases based on their potential either to affect broad populations . . . or to set a powerful legal precedent on a particular issue." (Ex. 5.) Gender Justice is not just a dispassionate legal counsel, this litigation is central to accomplishing its mission.[2]

Mr. Ellison's relationship with Gender Justice may have begun with the organization's founding Board Chair, former Democratic-Farmer-Labor ("DFL") State Representative Betty Folliard. (Ex. 6.) Before joining Gender Justice's Board in 2012, Ms. Folliard was a member of

[2] Gender Justice is also effectively equivalent to a plaintiff in this lawsuit. "[W]hen interest groups initiate social justice litigation, . . . [s]ignificant resources are invested in identifying sympathetic plaintiffs . . . ." Lawyers' Committee For Civil Rights Under Law, *Toward a More Just Justice System: How Open are the Courts to Social Justice Litigation?* p, 20 *available at* https://lawyerscommittee.org/wp-content/uploads/2016/08/Toward-A-More-Just-Justice-System.pdf (accessed July 27, 2020).; *see also Cole v. Livingston*, No. 4:14-CV-1698, 2016 WL 3258345, at *9 (S.D. Tex. June 14, 2016) ("Plaintiffs' counsel selected the named Plaintiffs, and not the other way around, that is not uncommon in this kind of impact litigation . . . ."); Cynthia Godsoe, *Perfect Plaintiffs*, 125 Yale L.J. Forum 136, 136–37 (2015).

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

then-Congressman Ellison's staff from 2007-2011. (*Id*.) These shared relationships have continued and appear particularly strong today. Another former Congressional aide to Mr. Ellison, Erin Maye Quade, recently joined Gender Justice leading its advocacy efforts and acting as the "Campaign Manager" of "UnRestrict Minnesota," the public relations campaign supporting and promoting Gender Justice's work in this suit. (Ex. 7, Ex. 8.) Ms. Maye Quade served on Mr. Ellison's Congressional staff from 2014 until January 2017 when she became a member of the Minnesota House affiliated with the DFL. (Ex. 54 p. 630. Ex. 55 p. 657, Ex. 9.)

During her time as a State Representative, Ms. Maye Quade's political connections to Mr. Ellison appeared to remain strong. She co-authored a 2017 article with another former Congressional aide of Mr. Ellison's titled "How Keith Ellison is energizing young Democrats like us" and was quoted elsewhere crediting Mr. Ellison with prompting her to run for the Minnesota House of Representatives. (Ex. 10, Ex. 9.) In 2018, Mr. Ellison returned the compliment, citing Ms. Maye Quade's efforts in the legislature and stating, "Rep. Erin Maye Quade is a woman of sincere and firm conviction . . . ." (Ex. 11.) In November 2018, when Mr. Ellison was elected Attorney General, Ms. Maye Quade celebrated by announcing, "So proud to call ***my mentor and friend, Keith Ellison***, @EllisonCampaign Minnesota's next attorney general." (Ex. 12 (emphasis added.).)

Another of Mr. Ellison's congressional aides, Rebecca Lucero, also joined Gender Justice's Board of Directors, where she served for three and a half years before becoming Commissioner for Human Rights. (Ex. 56, Ex. 13, Ex. 14.) Mr. Ellison, Gender Justice, and Ms. Lucero have continued to collaborate. Even after they, theoretically, became "adverse" in this lawsuit, they have teamed up to support other Gender Justice "strategic litigation" matters. One litigation matter is an Anoka County lawsuit titled—before Commissioner Lucero's intervention—*N.H. v. Anoka-*

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

*Hennepin School District*, Anoka County Case No. 02-CV-19-922; (Ex. 15.) The Attorney General's prompt and dramatic assistance in the case was highlighted by Gender Justice in an April 2019 fundraising appeal, stating:

> In February, we [Gender Justice] filed a lawsuit in partnership with the ACLU of Minnesota, asserting that the Anoka-Hennepin School District violated the Minnesota constitution and Human Rights Act . . . .
> ***
> And we're far from alone in our concern. Not even a month after our case was filed, the Minnesota attorney general stepped in on behalf of the Department of Human Rights (MDHR).[3] The state's complaint alleges, as we did, that the school district's policy constitutes discrimination against transgender students. It not only violates the law, but also the school's essential role as a safe learning environment.
>
> ***By intervening, the state of Minnesota affirms the value of the lawsuits we file, and the clients we represent. We're grateful for such a vote of confidence in our work, and proud to say this isn't the first time we've received it*** . . . .

(Ex. 16 (emphasis added).) Gender Justice's lawsuit against the Anoka-Hennepin School District continues. A certified appeal was argued before the Minnesota Court of Appeals on July 8, 2020. *N.H. and Rebecca Lucero, Commissioner of the Minnesota Department of Human Rights v. Anoka-Hennepin School District No. 11*, Minn. Ct. App. Case Number: A19-1944. During its oral argument, the lawyer from the Attorney General's office ceded the majority of her time to Gender Justice's counsel. (*See Id.*, Audio recording of Oral Argument available at: http://www.mncourts.gov/CourtOfAppeals/OralArgumentRecordings/ArgumentDetail.aspx?rec=963 (accessed July 27, 2020).)

The Anoka-Hennepin suit is not the only time the Attorney General has joined forces with Gender Justice. The same fundraising appeal referenced above stated:

> [I]n March [2019], the Office of the Attorney General filed a case on behalf of the state against CSL Plasma for refusing to allow a transgender woman to donate

[3] Commissioner Lucero intervened in the suit through the Attorney General's office. *See N.H. and Rebecca Lucero, Commissioner of the Minnesota Department of Human Rights v. Anoka-Hennepin School District No. 11*, Anoka County Case No. 02-CV-19-922.

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

> plasma. That woman, Alice James, is [Gender Justice's] client, and we have been representing her in her charge of discrimination filed with the MDHR. Gender Justice will be filing a motion to intervene on behalf of Ms. James, so that she, too, can be represented in the case.

(Ex. 16.)[4] The numerous and ongoing connections and cooperation between Gender Justice and the Attorney General create an appearance of conflict in this matter in which they are supposed to be adverse.

**2. A vigorous defense in this suit appears to conflict with the Attorney General's personal, political interests**

In addition to jeopardizing his relationship with Gender Justice, Mr. Ellison's vigorous defense of the statutes challenged in this lawsuit would jeopardize a number of his important political relationships. As referenced above, Ms. Maye Quade manages the publicity campaign promoting this lawsuit under the banner of "UnRestrict Minnesota." (Ex. 22, Ex. 23.) UnRestrict Minnesota is advertised as a joint effort between Gender Justice, AFSCME Council 5, the National Abortion Rights Action League, NARAL Pro-Choice Minnesota, OutFront Minnesota, TakeAction Minnesota, among other groups. (Ex. 24.) These organizations endorsed Mr. Ellison's Congressional campaigns, his campaign for Chair of the Democratic National Committee, as well as his campaign for Attorney General. (Ex. 25, Ex. 26, Ex. 27, Ex. 28, Ex. 29, Ex. 30, Ex. 31, Ex. 32, Ex. 33.) In October 2018, a NARAL representative spoke at an event with Mr. Ellison promoting Mr. Ellison's election as Attorney General. (Ex. 57.)

[4] Gender Justice has worked with, and praised the Attorney General for his work, in other matters. (*See, e.g.*, Ex. 17 (October 2019 press release praising the Attorney General's work in *Telescope Media v. Lucero*, 936 F.3d 740 (8th Cir. 2019)); Ex. 18 (praising same work); Ex. 19 (Attorney General's amicus brief supporting Petitioner in *Abel v. Abbott Northwestern Hospital*, Minn. Case No. A19-0461); Ex. 20 (Gender Justice amicus brief supporting Petitioner in *Abel v. Abbott Northwestern Hospital*, Minn. Case No. A19-0461) Ex. 21 (Gender Justice Article re *Abel v. Abbott Northwestern Hospital*, Minn. Case No. A19-0461).)

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

In addition, Mr. Ellison was supported in his campaign for Attorney General by the Democratic Attorneys General Association ("DAGA"), a national organization dedicated to helping Democrat candidates win state attorney general races. (Ex. 34.) News reports indicated that DAGA was one of the first organizations Mr. Ellison contacted when he contemplated running for attorney general. (Ex. 35.) DAGA appears to have provided significant assistance to Mr. Ellison's 2018 campaign. (Ex. 36.)

However, in November 2019, DAGA announced that it will only support state attorney general candidates who "demonstrate their commitment to" abortion rights. DAGA's announcement explained:

> Starting with the 2020 AG Elections, candidates seeking DAGA's endorsement and support will need to demonstrate their commitment to standing with the majority of Americans who support the right to access abortion. This means DAGA will only provide financial support, activate digital tools, and engage strategic partners for candidates who publicly commit to protecting the fundamental right that everyone should be able to make their own decision about their health care, including abortion. As part of the next steps on this announcement, Alexis McGill Johnson Acting President and CEO of Planned Parenthood Action Fund, will join DAGA at their Winter Policy Conference later this week.

(Ex. 37.)

The apparent conflict between DAGA's announcement and the Attorney General's defense in this lawsuit was even noted by the *New York Times* in a November 2019 article regarding DAGA's new litmus test and this case. The article stated:

> In Iowa, Tom Miller, the longest serving Attorney General in the country, has refused to defend a state abortion law that would ban the procedure as early as six weeks into pregnancy, saying the statute is a violation of his "core belief."[5] But in Minnesota, Attorney General Keith Ellison, a staunchly liberal Democrat, is

[5] Iowa Attorney General Miller recused himself from defending an Iowa abortion statute when challenged based on his assessment that "he could not zealously assert the state's position because of his core belief that the statute, if upheld, would undermine rights and protections for women." (Ex. 39.) DAGA praised this action. (Ex. 40.)

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

> defending a slate of state laws restricting abortion access, despite his personal views on the issue.

(Ex. 38.) As with Gender Justice, if Mr. Ellison's political future depends on maintaining support from DAGA, NARAL, AFSCME, and other organizations, a conflict of interest exists under Rule 1.7. *See* Minn. R. Prof. Conduct 1.7(a)(2).

**3. The Attorney General cannot be expected to take positions he has disavowed; Mr. Ellison's policy positions conflict with positions he must take in this case**

Mr. Ellison's positions as a Member of Congress and arguments he has made or endorsed in other lawsuits after becoming Minnesota's Attorney General also conflict with his defense in this lawsuit and arguments that defense requires. Each time it was introduced during his tenure in Congress, Mr. Ellison signed on as an original cosponsor of the Women's Health Protection Act ("WHPA"). (Ex. 41, Ex. 42, Ex. 43.) The WHPA sought to preempt and prohibit many of the Challenged Statutes. *See* Women's Health Protection Act of 2013, H.R. 3471, 113th Cong. §§ 4, 7 (2013), Women's Health Protection Act of 2015, H.R. 448, 114th Cong. §§ 4, 7 (2015), Women's Health Protection Act of 2017, H.R. 1322, 115th Cong. §§ 4, 7 (2017).) Its sponsors stated intention was to "take the offensive against state laws," such as the Challenged Statutes, and "put an end to the actions taken by states [that the sponsors allege] deny women access to safe and legal abortions." (Ex. 44.) The bill's language would preempt and prohibit Minnesota statutes including, at least, Minn. Stat. § 145.412, Minn. Stat. § 145.4242(a)(l)-(2) (requiring informed consent prior to abortion), among others.

Similarly, while he was a member of Congress Mr. Ellison noted, "Protestors at the Supreme Court fighting for a woman's right to choose" and promised "I will ***always*** stand and fight with them." (Ex. 45 (emphasis added).) One might justifiably wonder how and whether Mr. Ellison would fulfill his promise to "always stand and fight" with pro-choice advocates through

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

his defense in this suit. Likewise, one of the Challenged Statutes, Minn. Stat. § 145.4242, includes certain measures that promote informed choice. (*See, e.g.*, Amended Complaint ¶¶131-181.) One provision requires women to be informed of certain information, such as "medical risks associated" with their procedure, "by telephone or in person, by the physician who is to perform the abortion or by a referring physician, at least 24 hours before the abortion." Minn. Stat. § 145.4242(a)(1)(i). Critics, including Gender Justice, mislabel this provision as a "mandatory delay" or "waiting period" and mischaracterize its requirements. (Complaint ¶¶ 152-181.) While in Congress, Mr. Ellison's campaign pledged to support Gender Justice's position:

> I am pro-choice. . . . I am against legislation that would impose a waiting period on women who seek a safe and legal abortion, and I am against legislation that would restrict the information that a physician can share with a patient regarding reproductive choices. . . .

(Ex. 46.)

This rhetoric has continued during Mr. Ellison's campaign and into his tenure as Attorney General.[6] Mr. Ellison has routinely participated in lawsuits and signed amicus briefs filed by a group of pro-choice Democrat attorneys general. *See Oregon, et al. v. Azar,* 389 F. Supp. 3d 898, 902 (D. Or. 2019), *vacated and remanded sub nom. California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020); 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 (accessed July 27, 2020); 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-

[6] During the 2018 Attorney General's race, Mr. Ellison's tweets and public statements included:

- "I am proud to have a 100% rating from [Planned Parenthood] and [NARAL Pro-Choice America]. As Attorney General, I will stand up for a woman's right to choose, and will defend access to essential health care for ALL Minnesotans." (Ex. 47.)
- "As AG, I will fight to protect a woman's right to choose . . . . There is so much at stake.." (Ex. 48.)

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

6045) *available at* link (accessed July 27, 2020); 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 (accessed July 27, 2020); Brief for the States of California, *et al*. as Amici Curiae Supporting Appellees, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) *available at* link (accessed July 27, 2020); Brief for the States of California, *et al*. as Amici Curiae Supporting Appellees, *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) *available at* link (accessed July 27, 2020); *Oregon*, *et al. v. Azar*, 389 F. Supp. 3d 898, 902 (D. Or. 2019), *vacated and remanded sub nom. California by & through Becerra v. Azar*, 950 F.3d 1067 (9th Cir. 2020) *available at* link . Through such briefing, the Attorney General has taken positions that conflict with positions he must take in this case.

For example, in a 2019 amicus brief, the Attorney General argued that "[state] statutory and regulatory requirements that provide some marginal benefit to women's health must give way to a woman's interest in accessing abortion services." Brief for State of Nevada, *et al*. as Amici Curiae Supporting Appellees p. 19, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), *cert. denied sub nom. EMW Women's Surgical Ctr., P.S.C. v. Meier*, 140 S. Ct. 655 (2019) *available at* link (accessed July 27, 2020). While this position is inconsistent with Minnesota law, it is consistent with Plaintiffs' arguments in this lawsuit. *See, e.g*., *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 629 (Minn. 1976) ("The legislature is in the first instance the judge of what is necessary for the public welfare. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.") (quoting *Beck v. Groe*, 70 N.W.2d 886, 895 (Minn. 1955)). And while the Attorney General's website makes no reference at all to this suit, Mr. Ellison has issued at least four press releases touting his pro-choice work, including on:

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

- March 5, 2019: "Attorney General Ellison sues federal government to stop illegal gag rule on women's reproductive healthcare." (Ex. 49.)

- April 5, 2019: "Attorney General Ellison joins multi-state effort to protect women's access to reproductive health." (Ex. 50.)

- April 15, 2019: "Attorney General Ellison continues support for women's reproductive rights." (Ex. 51.)

- October 7, 2019: "Attorney General Ellison defends women's access to full range of reproductive healthcare." (Ex. 52.)[7]

The Attorney General's defense in this lawsuit is of far greater consequence to Minnesotans than the Mississippi law he opposed while publicly proclaiming he was "defend[ing] women's access to full range of reproductive healthcare." (*Id.*) These contrasting communications give the appearance of a conflict of interest in this case.

**4. Recent conduct of the Attorney General's office raises concerns regarding the possibility of collusion or "sue and settle" tactics**

"Sue and settle" is a term used to describe the use of a "friendly lawsuit" by an interest group and an executive agency to change the law through the courts, without participation of the legislative branch. A lawsuit is filed against an executive agency by an outside interest group that shares the current administration's political or policy perspective. The agency may have even invited the suit. The agency and the outside group then quickly resolve the lawsuit through a legally binding consent decree or other court order requested through a settlement by the agency defendant and the interest group plaintiff. Both the Minnesota Supreme Court and the U.S. Supreme Court have rejected this practice. *See, e.g.*, *Davidson v. Patnaude*, 177 N.W. 495, 496 (Minn. 1920); *Ashwander*, 297 U.S. at 346 ("a party beaten in the legislature [may not use a "friendly suit" to] transfer to the courts an inquiry as to the constitutionality of the legislative act."). Without a true

[7] *See* Minn. R. Prof. Conduct 1.7(a)(1).

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

adversarial process, the court may be unaware of the facts on which such a decree is based. *See generally* W. Kovacs, et al., Sue and Settle: Regulating Behind Closed Doors, U.S. Chamber of Commerce, p. 5 (May 2013), *available at* link (accessed July 27, 2020).

Concerns regarding possible collusion between Plaintiffs' counsel and Defendants' counsel, including the possible use of the "sue and settle" litigation ruse, are very real. The Attorney General's office appears to have recently participated in just such a maneuver. On May 19, 2020, a Minneapolis attorney filed a federal lawsuit on behalf of the League of Women Voters against Secretary of State Steve Simon. *See League of Women Voters of Minn. Ed. Fund et al. v. Simon*, District of Minnesota, Case No. 20-cv-02105-ECT-TNL (hereinafter "*LOWV v. Simon*"). The Complaint alleged certain witness requirements for absentee ballots mandated by Minnesota Statute §§ 203B.07 and 203B.121 violated the First and Fourteenth Amendments of the U.S. Constitution. (*LOWV v. Simon* at ECF 1; Ex. 58.) According to the plaintiffs' law firm's website, the filing attorney had been the appointed General Counsel at the Minnesota Department of Commerce during Governor Mark Dayton's administration and is now a leader of the "DFL Lawyers' Committee." (Ex. 53.) Two attorneys from the Attorney General's office appeared on behalf of Secretary of State Simon on May 20 and June 16, respectively. (*LOWV v. Simon* at ECF 1; Ex. 59.)

On June 16, 2020, the parties notified the court that they had reached an agreement allegedly "negotiated at arm's length through counsel for the parties." (*LOWV v. Simon* at ECF 24 Ex. 60 ¶18.) The parties asked the Court to enter a consent decree enjoining the challenged Minnesota statutes' witness requirements for the upcoming primary election. (*Id*. pp. 5-6.) In other words, without any involvement of the Minnesota House or Senate, a DFL lawyer and a lawyer

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

from the Attorney General's office hoped to nullify a duly enacted statute designed to protect the integrity of elections.

On June 20, the Republican Party and President Donald Trump sought to intervene in the lawsuit and asked the federal court to reject the proposed consent decree. (*LOWV v. Simon* at ECF 38; Ex. 61.) At a June 23 hearing, the Court allowed the intervention and rejected the Proposed Order. (*LOWV v. Simon* at ECF 58; Exs. 62-63.) The Court found:

> [T]he consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement for the August primary. It would impose injunctive relief that is not necessary or justified by Plaintiffs' factual showing.
> ***
> Plaintiffs have not with their as-applied challenge shown a justification for the Secretary[ of State]'s blanket refusal to enforce the [statute's] requirement. In other words, that blanket refusal -- and the injunctive force that would go with it if the consent decree were approved -- go well beyond Plaintiffs' injuries, and Plaintiffs have not established a need for wholesale non-enforcement of the [statute].

(Ex. 63.)

In 2001, Attorney General Mike Hatch appeared on behalf of the State Defendants in a challenge to a Minnesota Statute in *Doe v. Ventura*, Hennepin County Case No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001). However, rather than actually defend the statute, Mr. Hatch did not oppose summary judgment and the Court found the challenged statute to be unconstitutional. *Id*. at *9. Critics of the Attorney General's non-adversarial defense did not intervene. Instead, they proposed a petition to recall the Attorney General, arguing that the recall was justified because the Attorney General is duty-bound to "provide a vigorous legal defense of statutes enacted by the Minnesota Legislature." *In re Proposed Petition to Recall Hatch* ("*In re Hatch*"), 628 N.W.2d 125, 126 (Minn. 2001). The Minnesota Supreme Court never reached the merits of this argument. Instead the court rejected the recall petition on technical grounds, finding

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

that "nonfeasance" under the recall statute requires "a repeated failure to act" and the recall asserted "only a single failure of the Attorney General to defend the constitutionality of a statute." *Id.* at 129.

The lesson from these two cases is clear. Intervention is a far more effective path to defend a statute from the risk of sue and settle or a non-adversarial defense, than attempting to put the genie back in the bottle after the damage is done. The Senate's intervention seeks to prevent any use of tactics short of a full and appropriate defense of the Challenged Statutes in this case.

**D. <u>The Senate Easily Demonstrates the Elements of Mandatory Intervention</u>**

**1. The Senate's intervention is timely**

The timeliness of a motion to intervene is determined by "the particular circumstances involved and such factors as how far the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of a delay." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986) (citing *SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979); *Engelrup v. Potter*, 224 N.W.2d 484, 489 (Minn. 1974)). Recognizing that no intervention would be necessary if Defendants' motion to dismiss was granted, the Senate waited to intervene until the Court had denied that motion. The Senate has promptly intervened before the Court has even entered a scheduling order to advance a timely resolution of the issues in this case. As such, its application is timely. *See, e.g.*, *Engelrup*, 224 N.W.2d at 489 (finding district court committed reversible error by denying intervention as untimely even though the parties had served and responded to written discovery and had taken multiple depositions). The Senate desires prompt decision on the challenges presented in this case, and willingly submits to the Court's inherent case management authority to ensure the Senate's

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

intervention does not complicate or delay the case. *See, e.g.*, *Norman v. Refsland*, 383 N.W.2d 673, 678 n. 3 (Minn. 1986).

**2. The Senate has multiple interests in this litigation, each of which could justify its intervention**

"Rule 24.01 is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *BE & K Const. Co. v. Peterson*, 464 N.W.2d 756, 758 (Minn. Ct. App. 1991) (citing *Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. Ct. App. 1987)). Both the Minnesota Supreme Court and the U.S. Supreme Court (twice) have endorsed intervention by Minnesota State Senates, with and without the Minnesota House. *See, e.g.*, *Ritchie*, 819 N.W.2d at 642; *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) (finding Sixty-Seventh Minnesota State "senate is directly affected by the District Court's orders[ and is therefore] an appropriate legal entity for purpose of intervention."); *Emison v. Growe*, 782 F. Supp. 427, 430 (D. Minn. 1992), *rev'd on other grounds* 507 U.S. 25 (1993) (noting "a motion to intervene in this action was granted to the Seventy-seventh Minnesota State House of Representatives and State Senate").

An interest in a subject of the litigation exists if the proposed intervener has "a beneficial interest in the subject matter in suit . . . even though the intervener may have another remedy." *Veranth v. Moravitz*, 284 N.W. 849, 851 (Minn. 1939). In opposing the previous motion to intervene in this case, both Plaintiffs and Defendants asserted that the 2012 Minnesota Supreme Court decision in *League of Women Voters Minnesota v. Ritchie* controlled the determination of the prospective intervenors' interest. (*See* Plaintiffs' January 10, 2020, Memorandum in Opposition to Motion to Intervene p. 7; Defendant's January 10, 2020, Memorandum of Law in Opposition to Motion for Limited Intervention p. 6.) In *Ritchie*, the court allowed the Eighty-Seventh Minnesota House of Representatives and the Eighty-Seventh Minnesota Senate to intervene, while rejecting

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

a non-profit advocacy organization's similar effort. *Id*. at 641-42. In approving the House and the Senate's intervention, the Supreme Court adopted their argument that "members of the House and Senate drafted the proposed amendment and ballot question and voted to place the question on the ballot." (Ex. 64 p. 3 (Motion to Intervene by the 87th Minnesota House of Representatives and the 87th Minnesota Senate).) The Supreme Court held these intervenors could defend the legislation because they were "bodies that passed the legislation at issue." *Ritchie,* 819 N.W.2d at 642.[8]

As a body that passed the statutes at issue in the case at bar, the Senate has this same interest.[9] Federal courts have repeatedly recognized similar interests. *See, e.g*., *Windsor v. United States*, 797 F. Supp. 2d 320, 324 (S.D.N.Y. 2011) (finding members of the U.S. House of Representatives had "a cognizable interest in defending the enforceability of statutes the House has passed when the President declines to enforce them.") (citing *Barnes v. Kline*, 759 F.2d 21, 23 n. 3 (D.C.Cir. 1985), *vacated on other grounds sub nom. Burke v. Barnes*, 479 U.S. 361 (1987) and collecting cases).

The Senate has additional interests related to the constitutional separation of powers that are independently sufficient to justify its intervention. The Executive Branch—including the Attorney General—may not avoid the powers of the Legislative Branch that require a majority vote of the Senate to pass, repeal, or amend a statute. Minn. Const. Art. III § 1, Art. IV § 22. For more than 100 years, the Minnesota Supreme Court has prohibited the judiciary's participation in an attempt to "abrogat[e] . . . a statute by the agreement of the parties to an action" because "a public law is not the property of any man and cannot be confessed away." *Davidson*, 177 N.W. at

[8] After finding this interest was not represented, the *Ritchie* Court declined to review any remaining issues pursuant to mandatory intervention because it found permissive intervention to be appropriate under Minn. R. Civ. P. 24.02, the Court was not required to analyze any other elements under Rule 24.01.

[9] The Senate has invited the Minnesota House to hire counsel and work with the Senate to intervene. However, the House has yet to respond to this invitation. (Declaration of Sen. Newman ¶7, Ex. 3.)

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

496. The U.S. Supreme Court has similarly forbidden the use of "a friendly suit" by "a party beaten in the legislature [to] transfer to the courts an inquiry as to the constitutionality of the legislative act." *Ashwander v. Tennessee Valley Auth*., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Past attempts to criticize the Attorney General were ineffective in no small part because the non-defense had already occurred and the Court's order was final. *See, e.g*., *In re Hatch*, 628 N.W.2d at 128-29. Instead of ineffectively criticizing the process after the fact, the Senate has elected to defend its interests by participating in the process to ensure to ensure all of the evidence is before the Court.

A separate and independently sufficient interest for intervention is the Senate's strong interest in sustaining and furthering judicial deference to legislative judgment and fact-finding. Recognizing the separation of powers, Minnesota's courts are required to defer to the regulatory decisions and fact-finding of the Minnesota's House and Senate. The Minnesota Supreme Court has repeatedly held "it is not this court's function, at least in the absence of overwhelming evidence to the contrary, to second-guess the scientific accuracy of a legislative determination of fact." *Minnesota State Bd. of Health by Lawson v. City of Brainerd*, 241 N.W.2d 624, 629 (Minn. 1976); *see also Kismet Inv'rs, Inc. v. Cty. of Benton*, 617 N.W.2d 85, 94 (Minn. Ct. App. 2000) (same); *Davidson*, 177 N.W. at 496 ("[T]he determination by the Legislature of an open or debatable question of fact is not subject to review if the question is one which it has power to determine."); *Moes v. City of St. Paul*, 402 N.W.2d 520, 525 (Minn. 1987) (quoting *Minnesota State Bd. of Health*, 241 N.W.2d at 629 and holding a party had "not provide[d] the type of overwhelming evidence necessary to sustain a constitutional challenge."); *Beck v. Groe*, 70 N.W.2d 886, 895 (Minn. 1955) ("Courts cannot pass on the soundness or expediency of theories embodied in statutes. . . . The legislative determination . . . is final, except when so arbitrary as to be violative

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

of the constitutional rights of the citizen."); *cf. Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."). Plaintiffs challenge the factual foundation of the Challenged Statutes, alleging they are "out-of-step," "reflect antiquated views," and are "unnecessary restrictions . . . ." (Complaint ¶¶2, 5.) The Senate has a strong interest in defending its findings and the statutes' evidentiary foundation challenged in this litigation.[10]

**3. The Senate is unable to protect its interests unless it intervenes because the parties do not appear to share its interests**

The Senate also fulfills the final two interrelated elements of mandatory intervention under Rule 24.01. The Senate's concerns regarding potential conflicts of interest, the separation of powers, and sue and settle arise precisely because the Attorney General has admitted he does not share the pro-life goals and interests of the Senate Majority that voted to intervene. In light of Mr. Ellison's relationships, statements, and actions described above, it is beyond dispute that Mr. Ellison might not, in fact, represent the Senate's interests in this litigation, which is sufficient to meet this standard. *See, e.g.*, *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990).

[10] The Senate, like this Court, also has "legitimate interests in upholding the ethical standards of the [legal] profession, ensuring both that [this action is] actually fair and that it also appear[s] to be fair" to the people of Minnesota. *State v. Patterson*, 812 N.W.2d 106, 113 (Minn. 2012); *see also Wersal v. Sexton*, 674 F.3d 1010, 1036 n. 17 (8th Cir. 2012) ("[T]he Minnesota Supreme Court promulgates the canons of judicial conduct . . . at the direction of the Minnesota legislature who, in turn, may alter the ultimate work product produced.") (citing Minn. Stat. §§ 480.05, 480.058); *Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979) (finding that when considering what "the legislature meant" in enacting the Code of Judicial Conduct, the court must consider that "[t]he integrity and effectiveness of the judiciary [that] depend in no small measure on the public trust and confidence . . . ."). For purposes of intervention, even a newspaper's interest "in the public's right to access under the Supreme Court Interim Rules on Access to Public Records" was a sufficient interest to justify intervention under Rule 24.01. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986).

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

Even if the Senate's interest were "similar to" the Attorney General's intended defense in this case—it certainly does not appear to be so—the Court must allow the Senate to intervene "***unless it is clear*** that the party will provide adequate representation" of the Senate's interest in its absence. *Costley v. Caromin House, Inc*., 313 N.W.2d 21, 28 (Minn. 1981) (quoting 7A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 1909, at 524 (1972)) (emphasis added). The Senate's burden on this element is "minimal" and easily met here. *Id*.

Allowing the Senate to intervene should allow the Court to avoid more detailed analysis of the Attorney General's apparent conflicts or even whether disqualification of the Attorney General and his office is required. The Court need not determine such thornier questions to allow the Senate to intervene and intervention may prevent the Court to avoid a determination of these issues altogether. Courts have repeatedly found that potential differences in a party's goals justify a third-party's intervention. *See, e.g*., *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc*., 506 F. Supp. 234, 235 (S.D.N.Y. 1980) (finding intervention was the appropriate cure for the concern that a lawsuit "was filed as a friendly suit and that [the original plaintiff and defendant] desire the same result" because the intervenors' ensure that the "litigation will have 'that concrete adverseness which sharpens the presentation of the issues.'") (quoting *Baker*, 369 U.S. at 204); *Windsor*, 797 F. Supp. 2d at 324 (finding U.S. House members had demonstrated the "'minimal' burden for demonstrating inadequacy of representation" because the U.S. Department of Justice "has made clear that it will not defend the constitutionality of" the statute at issue.); *cf. Ritchie,* 819 N.W.2d at 642 (affirming the House and Senate's permissive intervention because the Secretary of State declined to defend legislation they passed); *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharmacy*, 221 N.W.2d 162, 167 (Minn. 1974) (affirming permissive intervention due to concern that the original plaintiff and defendant represented the same interest.)

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

The Minnesota Supreme Court's decision in *Costley v. Caromin House, Inc*. is particularly relevant to this issue. There, the court supported its finding that mandatory intervention under Rule 24.01 was appropriate because the original defendant "does not adequately represent the interest of the [proposed intervenor] and ***does not pretend to do so.***" *Costley,* 313 N.W.2d at 28 (emphasis added). [11] It is obvious that the court would have found intervention appropriate even if the original defendant had unsuccessfully pretended to represent intervenor's interests. The standard is, after all, "may not" represent the intervenor's interest, rather than "will not." Again, the Senate does not have knowledge the Attorney General is pretending and does not accuse him of the same. However, the appearance of numerous conflicts of interests, including potentially conflicting relationships, political interests, and statements and positions on matters going to the heart of this litigation, even without the added layer of concern regarding office's recent settlement tactics, meet the standard for intervention.

It is clear that the Senate's interests at issue in this litigation are not certain to be represented unless it is allowed to intervene. As pled, this case is fact intensive. Proper resolution will require both expert testimony and legal experience in representing the interest of states in regulating abortion. (*See* Amended Complaint.) The Senate must ensure that the right evidence is presented and the right issues are before the Court at the time this case is determined. It has no desire to play

[11] Federal courts applying Federal Rule of Civil Procedure 24 have applied a higher standard when a government defendant is alleged to not represent a party's interest "because in such cases the government is presumed to represent the interests of all its citizens." *Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015) (quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996)). Only one Minnesota appellate court has cited this standard, and did so only in finding the district court erred and intervention should have been ***allowed***. *See Living Word Bible Camp v. Cty. of Itasca*, No. A12-0281, 2012 WL 4052868, at *6 (Minn. Ct. App. Sept. 17, 2012). Even if the standard were applied, "intervention ***will be allowed, if there is even a hint of collusion*** between the purported representative and those to whom the representative is formally opposed in the litigation, or if for any other reason it appears that the representative is not making or may not make a diligent effort to protect the absentee's interest." 7A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 1909 (3d ed. 2020) (emphasis added).

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

ineffectual Monday-morning quarterback. The Senate has engaged counsel who experience defending abortions regulations. It is aware of no comparable experience in the Minnesota Office of the Attorney General. The Senate's effective defense will move this case forward with as much cooperation as the Attorney General will allow. The Senate must be allowed to intervene because it meets the standard for mandatory intervention.

**E. <u>The Senate Easily Meets the Standard for Permissive Intervention</u>**

Rule 24.02 provides for permissive intervention, stating:

> Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a common question of law or fact. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Minn. R. Civ. P. 24.02. Rule 24.02's "standard for permissive intervention is as broad as can be imagined." Permissive Intervention, 1 Minn. Prac., Civil Rules Annotated R 24.02 (6th ed.). The Court has a similar "inherent power [to] permit a party to intervene even if the party has not shown himself or herself entitled to come within the provisions of" Rule 24. *Murray v. Antell*, 361 N.W.2d 466, 469 (Minn. Ct. App. 1985) (citing *State v. Bentley*, 12 N.W.2d 347, 354 (Minn. 1944). Rule 24 "does not curtail a court's inherent power to bring before it persons not parties, whenever for complete administration of justice it is necessary to bring them in." *Id*. (citing *Webster v. Beckman*, 202 N.W. 482 (Minn. 1925)).

Permissive "intervention under Rule 24.02 is clearly discretionary with the trial court and the trial court will not be reversed unless there is a showing of clear abuse of that discretion." *Snyder's Drug Stores, Inc*., 221 N.W.2d at 166 (citing *Bumgarner v. Ute Indian Tribe of Uintah*, 417 F.2d 1305, 1309 (10 Cir. 1970)). However, when there is a legitimate concern that "absent intervention . . . the parties on both sides of [a] lawsuit" may represent similar interests, refusing permissive intervention is reversible error. *Id*. By definition, to be "timely" pursuant to Rule 24.01

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

and to ensure intervention does not "unduly delay or prejudice the adjudication of the rights of the original parties" pursuant to Rule 24.02, the Senate must intervene before it can be certain whether there will be collusion on summary judgment or through a later settlement. However, the apparent conflicts and concerns that prompt the Senate's intervention are consistent with the Minnesota Supreme Court's concern regarding the potential control of litigation by similar interests. *Snyder's Drug Stores, Inc*., 221 N.W.2d at 167; *see also Costley*, 313 N.W.2d at 28 (applicant "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee").

The Senate should be allowed to intervene permissively in light of its concerns regarding potential conflicts between Plaintiffs and the Attorney General. This is clearly consistent with *League of Women Voters v. Ritchie*, in which the Minnesota Supreme Court allowed the Senate to permissively intervene with minimal analysis. 819 N.W.2d at 641. Surely the people of Minnesota are entitled to have the Court decide important constitutional questions at issue with "the most effective advocate of the rights at issue is present to champion them. *Duke Pwr. Co. v. Carolina Env't Study*, 438 U.S. 59, 80 (1978). "The integrity and effectiveness of the judiciary depend in no small measure on the public trust and confidence . . . ." *Bundlie v. Christensen*, 276 N.W.2d 69, 72 (Minn. 1979). Intervention by the Senate is necessary and helpful to this action. The Senate will help to move this case along as it finally begins the discovery phase of this suit.

## III. CONCLUSION

The Senate fulfills Minnesota's standard for mandatory and permissive intervention. The stakes of this case are too great and the interest to the people of Minnesota are too important for the Senate to sit back and hope the Attorney General is capable of a vigorous defense despite his apparent conflicts. As one court aptly summarized:

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

> The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case.

*Hull v. Celanese Corp.*, 375 F. Supp. 922, 924 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 568 (2d Cir. 1975). Even if the Senate's intervention is not required because the Attorney General would provide the necessary defense of the Challenged Statutes without the Senate, the Senate's presence will avoid any air of illegitimacy brought about by the relationships and concerns outlined above. In any event, the Senate asks the parties to consent to its intervention in this case.

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

Dated: July 29, 2020

**SAUL EWING ARNSTEIN & LEHR LLP**

By: *s/Samuel W. Diehl*

Samuel W. Diehl (#388371)
33 South Sixth Street, Suite 4750
Minneapolis, Minnesota, 55402
P: (612) 225-2800
F: (612) 677-3844
Email: sam.diehl@saul.com

and

Teresa Stanton Collett (Tex.#24033514)[12]
Professor of Law
University of St. Thomas Prolife Center
1000 LaSalle Avenue, MSL 400
Minneapolis, MN 55403-2015
651.271.2958
tscollett@stthomas.edu

and

Catherine W. Short (Cal.#117442)[12]
Alexandra Snyder (Cal.# 252058)[12]
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675
(707) 224-6676 (fax)
kshort@lldf.org
asnyder@lldf.org

**ATTORNEYS FOR [PROPOSED] DEFENDANT-INTERVENOR NINETY-FIRST MINNESOTA STATE SENATE**

37263020.1

[12] Motions for admission Pro Hac Vice are filed herewith.

Filed in District Court
State of Minnesota
7/29/2020 6:03 PM

## ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211, Subd. 3, to the party against whom the allegations in this pleading are asserted.

Dated: July 29, 2020

*s/Samuel W. Diehl*
Samuel W. Diehl