STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

Dr. Jane Doe, Mary Moe, and Our Justice, Plaintiffs, vs. Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing, Defendants, and Mothers Offering Maternal Support, Proposed Defendant-Intervenor.	Court File No.: 62-CV-19-3868 Case Type: Civil – Other

ORDER & MEMORANDUM

This matter came before the undersigned on January 5, 2023, upon the motion for intervention of Proposed Defendant-Intervenor Mothers Offering Maternal Support ("MOMS"). Plaintiffs Dr. Jane Doe, Mary Moe, and Our Justice ("Plaintiffs") were represented by Attorneys Melissa Shube, Jess Braverman, Stephanie Toti and Amanda Allen. Defendants Governor of Minnesota ("Governor"), Attorney General of Minnesota ("Attorney General"), Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing ("Defendants") were represented by Assistant

Attorney General Jennifer Olson and Solicitor General Liz Kramer. MOMS was represented by Attorneys Teresa Stanton Collett and April King.

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. MOMS' motion for intervention as of right is **DENIED**.

2. MOMS' motion for permissive intervention is **DENIED**.

3. The attached Memorandum shall be incorporated into this Order.

BY THE COURT:

Gilligan, Thomas(Judge)
Mar 14 2023 3:23 PM

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

Dated: March 14, 2023

MEMORANDUM

INTRODUCTION

The motion filed by MOMS is the fourth time this court has considered a request by a non-party to intervene in this case. As before, allowing the intervention of a non-party in a lawsuit has significant implications, because an intervenor essentially has the same rights as the parties. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986). An intervenor can raise issues for resolution that the original parties have not. Tobias, *Intervention After Webster*, 38 Kan. L. Rev. 731, 739-40 (1990). They also can make motions, participate in discovery and trial, and appeal adverse court decisions. *Id.* On one hand, the intervenor's participation may deprive parties of the control over their lawsuit, frustrate efficient and effective case management by the judge, significantly increase the costs expended by the original parties, and delay the lawsuit's prompt resolution. *Id.* at 739. On the other hand, a timely intervention by an interested non-party, which does not significantly prejudice the original parties, may help to resolve all related issues in one lawsuit. *See also Helgeland v. Wisconsin Municipalities*, 745 N.W.2d 1, 5 (Wis. 2008) ("Broadly speaking, a court determines whether an outside entity should intervene in or join an existing lawsuit by striking a balance between allowing the original parties to a lawsuit to conduct and conclude their own lawsuit and allowing others to join a lawsuit in the interest of the speedy and economical resolution of a controversy without rendering the lawsuit fruitlessly complex or unending. Whether to order intervention or joinder turns on judgment calls and fact assessments."). While intervention can promote judicial economy by facilitating the participation of interested non-parties in the lawsuits of others, the fact remains that a lawsuit "is a limited affair, and not everyone with an opinion is invited to attend." *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 423 (8th Cir. 1999) (citation omitted).

Here, MOMS filed its notice of intention to intervene in this lawsuit at 5:56 pm on September 12, 2022, after the original parties engaged in three years of public litigation, months after this court

issued an Order (the "Final Order") declaring certain abortion laws (the "Challenged Laws") relating to mandated physician care, hospitalization, criminalization, parental notification, and informed consent were unconstitutional, permanently enjoined their enforcement, entered final judgment, and just hours before the time would have expired to appeal from the final judgment. The relief requested by MOMS, if allowed to intervene, is essentially to start the case over.

The threshold question then, is whether MOMS' attempt to intervene in this lawsuit is untimely. This court concludes that MOMS is too late. Moreover, even if the attempted intervention was timely, MOMS has failed to demonstrate the other essential elements necessary to establish an entitlement to intervention as of right or permissive intervention. MOMS' motion for mandatory or permissive intervention is therefore denied.

PROCEDURAL BACKGROUND

While the course of this litigation has been recounted in several Orders of this court and is quite evident from the public record, the 1) duration of this litigation, 2) the motion battles between the parties, and 3) the demands on this court's time, bear repeating to provide context for this court's discretionary decision to find MOMS' motion to intervene untimely. To a lesser extent, this litigation history is helpful to understand this court's determination that Defendants' representation of MOMS' interests was adequate.

This lawsuit was filed in 2019. (ECF No. 1). From the beginning, the lawsuit attracted considerable media attention, since the Plaintiffs were challenging the constitutionality of more than a dozen laws which regulated abortion and reproductive care in Minnesota.[1] The Defendants responded to the lawsuit with a motion to dismiss the Complaint for lack of standing and for

[1] *See, e.g., Ellison to Defend State Laws Regulating Abortion*, Star Tribune, June 25, 2019 (https://www.newspapers.com/image/577365634); *Activists Question Ellison Defense of Abortion Laws*, Star Tribune, October 15, 2019 (https://www.newspapers.com/image/609285338); *Legal Fight Opens Over State Abortion Restrictions*, Minnesota Public Radio, October 31, 2019 (https://www.mprnews.org/story/2019/10/31/legal-fight-opens-over-state-abortion-restrictions).

failure to state a claim upon which relief may be granted. (ECF No. 51). While the parties were briefing their arguments on Defendants' motion to dismiss, Pro-Life Action Ministries, Incorporated ("PLAM"), and the Association for Government Accountability ("AGA") sought to intervene in this lawsuit. (ECF No. 55). This court determined that the PLAM/AGA motion for intervention was timely "[b]ecause the notice to intervene was brought at a very early stage of this litigation, before the court heard the motion to dismiss, and despite some intervening delay in perfecting the motion to intervene, the court finds that the Proposed Intervenors made a 'timely application.'" (ECF No. 95). Nonetheless, this court denied PLAM/AGA intervention as of right because they failed to demonstrate an interest in the subject of the action, that their interest would be impaired or impeded by the disposition of the lawsuit, or that Defendants' representation was inadequate. (*Id.*) This court also denied PLAM/AGA the opportunity to permissively intervene, because they failed to demonstrate that their interest in litigating a particular defense involved common questions of fact or law with this lawsuit, or that their intervention would not delay or prejudice the adjudication of the rights of the parties. (*Id.*) The Minnesota Court of Appeals affirmed this court's denial of PLAM/AGA's motion to intervene, and the Minnesota Supreme Court denied review. *Doe v. State*, 2020 WL 6011443 (Minn. Ct. App. Oct. 12, 2020), *rev. denied* (Minn. Dec. 29, 2020); (ECF Nos. 157, 162).

In June of 2020, this court denied Defendants' motion to dismiss in part, and granted it in part. (ECF No. 115). A month later, the Ninety-First Minnesota State Senate (the "Ninety-First Senate") provided notice of its intention to seek intervention as of right, or alternatively permissive intervention. (ECF No. 131). As with PLAM/AGA, this court determined that the Ninety-First Senate's motion for intervention was timely, while observing "[a]lthough it certainly would have been preferential and far more efficient to have addressed the Ninety-First Senate's intervention at or around the same time as that filed by PLAM and AGA, this case is still in its early stages." (*Id.*)

This court denied this second motion to intervene, however, because the Ninety-First Senate failed to establish the requisite additional elements necessary for intervention as of right or permissive intervention. (*Id.*)

This court issued a Scheduling Order on March 15, 2021, which was amended several times over the course of the lawsuit. (ECF No. 166). The parties then proceeded with discovery and the retention of expert witnesses.

With the court's approval, the parties agreed to trifurcate motions for summary judgment, so that it would hold three separate hearings over several months, with extensive separate briefing for each motion. Accordingly, the first motion for partial summary judgment related to issues of standing and whether certain defendants were proper parties to the lawsuit. (ECF No. 227). This court granted Defendants' first motion for partial summary judgment in part and denied it in part. (*Id.*)

In late 2021, the second round of motions for partial summary judgment were filed by both Plaintiffs and Defendants on several of the claims on the Challenged Laws. (ECF Nos. 228, 237). At the same time, Defendants also moved to exclude seven of Plaintiffs' expert witnesses from consideration by this court. (ECF No. 220). While those motions were pending, Defendants filed an interlocutory appeal to the Minnesota Court of Appeals from this court's Order denying in part Defendants' first partial motion for summary judgment related to standing. (ECF No. 289). Plaintiffs filed a notice of conditional appeal related to Defendants' appeal. (ECF No. 304).

In the meantime, this court heard the parties' third round of motions for partial summary judgment on the claims on the remaining Challenged Laws. (ECF No. 320). It also denied Defendants' motion to exclude Plaintiffs' experts. (ECF No. 324). In the Spring of 2022, litigation in the district court temporarily paused and resumed several times in light of the appeal pending before the Minnesota Court of Appeals and Defendants' Petition for Review at the Minnesota

Supreme Court. (ECF Nos. 311, 323, 331, 334, 335, 336). The lawsuit was eventually remanded back to this court, so it could resume consideration of the second and third rounds of motions for partial summary judgment. (ECF No. 340).

The trial was originally set for June 28, 2022. (ECF No. 329). Due to delays necessitated by the appeal and the stays, the court continued the trial to August 29, 2022. (ECF Nos. 329, 335). By the time the trial was continued, except for immediate pretrial deadlines, discovery was complete, expert disclosures were complete, and the case was trial-ready.

Two weeks later, this court issued the Final Order, which, among other things, declared that the "Physician Only Law," "Hospitalization Law," "Felony Penalties," "Two-Parent Notification Law," "Mandatory Disclosure Law," "Physician Disclosure Law," and "Mandatory Delay Law" were unconstitutional, granted Plaintiffs declaratory relief, and granted a permanent injunction "as to the enforcement of all laws that this court has declared unconstitutional." (ECF No. 357). This court entered judgment on the Final Order on July 13, 2022. (ECF No. 358). On July 28, 2022, the Attorney General announced that the Defendants would not appeal from the judgment on the Final Order.[2]

Several weeks after that, Traverse County Attorney Matthew Franzese ("Franzese") filed a notice of intervention and requested accelerated review. (ECF No. 362). The court held a hearing on an expedited basis on August 19, 2022, since the time for appealing the judgment entered on the Final Order would run on September 12, 2022. (ECF No. 380). Just over two weeks later, this court denied Franzese's motion to intervene. (ECF No. 382). Unlike the previous two motions to intervene, this court found Franzese's motion to intervene was untimely:

> This matter was commenced on or about May 29, 2019. The claimed relief of Plaintiffs – a declaration that several abortion laws were unconstitutional, and that the enforcement of

[2] *Attorney General Keith Ellison says he won't appeal ruling blocking Minnesota abortion restrictions*, Duluth News Tribune, July 28, 2022 (https://www.duluthnewstribune.com/news/minnesota/ellison-says-he-wont-appeal-ruling-blocking-minnesota-abortion-restrictions).

> such abortion laws be permanently enjoined – has received considerable [ ] media attention and public exposure. That Defendants were not asserting the lack-of-a-private-cause-of-action defense, and that PLAM and AGA attempted unsuccessfully to intervene to assert it, and that the Minnesota Court of Appeals affirmed this court's decision on that intervention attempt, would have been well-known years ago. Instead of acting promptly to seek intervention, Franzese waited until the litigation was over to assert his stated interest. He waited until three years of extensive discovery and litigation had passed, four dispositive motions were briefed, argued, and decided by this court, and several appeals of various decisions of this court were addressed by appellate courts, prior to seeking intervention. Franzese has offered no reason for his delay in seeking intervention. Franzese is too late.

(*Id.*) This court found that Franzese also failed to establish that: 1) he had an interest relating to the subject of the action; 2) the disposition of this lawsuit would impair or impede his interest; or 3) the representation of his ostensible interest by Defendants was inadequate. (*Id.*) Therefore, this court denied Franzese's motion for intervention as of right. (*Id.*) Finally, this court denied Franzese permissive intervention because his last-minute intervention would significantly prejudice the rights of the existing parties. (*Id.*) Franzese filed a notice of appeal of the denial of the motion to intervene, "*and* as an intervenor, seeks review of the district court's [Final Order] for lack of subject matter jurisdiction." (ECF No. 384) (emphasis in original).

On September 12, 2022 – the last day to appeal from the Final Order and after Franzese had already filed his notice of appeal – MOMS filed its notice of intervention. (ECF No. 384). MOMS contends that it is an unincorporated association of Minnesota mothers who have a minor daughter. (*Id.*) According to MOMS, its members have a constitutional right of parental care and direction of their children, which includes the right to participate in the health care decisions of its members' daughters. (ECF No. 387). If MOMS is allowed to intervene in this lawsuit, it intends to "pursue relief from the final judgment" as to the "Physician Only Law," the "Two-Parent Notification Law," the "Mandatory Disclosure Law," and the "Mandatory Delay Law." (*Id.*) If relieved of the judgment, MOMS intends to "submit evidence putting into dispute many of Plaintiffs [sic] alleged facts that formed the predicate for this Court's opinion and judgment, making summary judgment in favor of Plaintiffs unsupportable in this case." (*Id.*) Last, if MOMS did not prevail at summary judgment, or

presumably at a possible trial, it would intend to "appeal any decision depriving parents of their rights." (*Id.*)[3] MOMS did not request accelerated review for its motion to intervene.

In the meantime, Franzese and the remaining parties have participated in the appeal before the Minnesota Court of Appeals. On October 19, 2022, the Minnesota Court of Appeals stayed the appeal of the judgment on the Final Order and Plaintiffs' related conditional appeal, pending appellate review on the denial of intervention and further appellate court order. Order, *Doe v. State*, A22-1265 (Minn. Ct. App. October 19, 2022). The appellate parties have completed briefing and oral argument on the denial of Franzese's motion to intervene, and the decision of the Minnesota Court of Appeals remains pending.

Both Plaintiffs and Defendants timely objected to the intervention of MOMS. (ECF Nos. 408, 409). The existing parties and MOMS filed their briefs and this court heard oral argument on the motion to intervene on January 5, 2023. (ECF No. 429). This court then took the motion under advisement. (*Id.*)

RULE 24.01 INTERVENTION STANDARD

MOMS has moved to intervene as of right under Minn. R. Civ. P. 24.01, which provides:

> Upon timely application anyone shall be permitted to intervene in an action 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.

Therefore, in order to intervene as of right under Rule 24.01, MOMS must show: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical

[3] MOMS also filed affidavits which are from witnesses that it would attempt to submit to the court if it was allowed to: 1) intervene; 2) vacate the judgment; 3) request permission to file a motion for reconsideration of the Final Order; 4) reopen the scheduling order to allow it to respond to one or more of the Plaintiffs' motions for partial summary judgment; and 5) participate as an intervening party at trial. (ECF Nos. 390-399, 405)

matter impair or impede the party's ability to protect that interest; and (4) that the intervening party is not adequately represented by existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). "The timeliness of the application to intervene, as in any case, will be based upon 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." *Id.* (citations omitted). Parties seeking intervention as of right must satisfy all these factors. *Luthen v. Luthen*, 596 N.W.2d 278, 280-81 (Minn. Ct. App. 1999).

MOMS maintains that it is entitled to intervention as of right under Rule 24.01. It claims that its motion to intervene is timely because it did not realize that its interests were not being protected by the parties in this case "until the Court ruled on Defendants' summary-judgment [sic] efforts and found them inadequate." (ECF No. 414). It argues that its notice to intervene was timely because it was filed within the time for appeal from the judgment and 43 days after the Minnesota Attorney General's Office announced that Defendants would not appeal. (*Id.*) MOMS claims, since its members are parents and have a constitutional right to protect and care for their minor daughters, that it has an interest more particularized than Defendants' general interest in protecting the health and safety of all Minnesotans. (*Id.*) MOMS also maintains that since the Minnesota Attorney General's Office failed to present evidence of the benefits of the Two-Parent Notification Law and rebut the putative harms to minor children in the absence of that law, it "will be denied the ability to move this Court for relief from the judgment and provide missing evidence and arguments that would have been provided if the interests of MOMS and [its members'] minor daughters had been adequately represented." (*Id.*)

Finally, MOMS argues that its interests were not adequately represented by existing parties for two reasons. MOMS contends that Defendants failed to present adequate evidentiary support for the Challenged Laws, and that it "stands ready" to present evidence from multiple experts for

this court's consideration. MOMS is also critical of Defendants' use of *Hodgson v. Minnesota*, 497 U.S. 417 (1990), maintaining that: "[b]y relying exclusively on *Hodgson*'s characterization of parental rights as state interests instead of constitutional rights Defendants effectively conceded the case to Plaintiffs." (*Id.*) Therefore, MOMS claims that it has met all the elements of intervention as of right.

Plaintiffs respond that MOMS' intervention motion is untimely. They contend that MOMS' members were aware of this litigation from its early stages but "took an impermissible wait-and-see approach" when it did not seek to intervene until after final judgment had been entered. (ECF No. 417). Second, they argue that MOMS has failed to identify a legally cognizable interest in the Challenged Laws, because any interest stemming from the constitutional right of MOMS' members to parent is "too attenuated and speculative to support intervention." (*Id.*) Third, Plaintiffs maintain that MOMS failed to establish that Defendants, which include the State's chief executive officer and the State's chief law enforcement officer, have failed to adequately represent its asserted interest in defending the constitutionality of the Challenged Laws. (*Id.*) As such, Plaintiffs argue that MOMS has not established the elements of intervention as of right.

Defendants oppose MOMS' intervention as well. As they did in opposition to Franzese's motion to intervene, Defendants make several preliminary arguments which they contend result in the dismissal of MOMS' motion even before considering its merits. First, Defendants argue that the Final Order ends the case, and MOMS cannot breathe new life into it by its delinquent intervention. (*Id.*) Second, Defendants argue that MOMS lacks standing to intervene, because it has not alleged a concrete and particularized invasion of a legally protected interest to its members or its organization.[4]

[4] As this court will later discuss, while the judgment on the Final Order does end the case, it is possible, though disfavored, to attempt to intervene post-judgment. Moreover, the arguments on standing and interest are so similar and intertwined that it is possible to adequately address them in connection within its consideration of Rule 24.01 intervention. Accordingly, there is no need for this court to separately address these arguments.

Regarding the merits of MOMS' motion for intervention, Defendants claim that the motion is untimely because the impact of a court decision in this case on the Challenged Laws which would affect the rights of parents and their daughters is not new. (ECF No. 415). They maintain that it should have been clear from publicly filed documents in November of 2021 that Defendants would not be advancing MOMS' favored legal strategy. (*Id.*) Because MOMS waited until after Defendants lost on the merits, Defendants claim that MOMS' post-judgment motion is a disfavored "wait-and-see" approach to advance its favored evidence or legal theory. (*Id.*) Second, Defendants argue that the asserted interest of MOMS and its members in directing the healthcare and upbringing of their minor daughters is nothing more than a generalized interest in the enforceability of the Challenged Laws, and that MOMS and its members have no direct, concrete, and cognizable interest related to the subject of this litigation that will be impaired. (*Id.*) Last, Defendants contend that any interest MOMS has in the constitutionality of the abortion statutes at issue in this case was "more than adequately represented" by Defendants, who mounted a vigorous defense throughout this litigation. (*Id.*) They contend that their representation is presumptively adequate, and absent a clear dereliction of duty, MOMS cannot rebut this presumption "by merely disagreeing with the litigation strategy or objectives of the party representing it." (*Id.*)

I. MOMS' ATTEMPTED INTERVENTION AS OF RIGHT IS UNTIMELY

Under Rule 24.01, the first factor for this court to consider is whether the motion to intervene is timely. "The timeliness of a motion to intervene must be determined on a case-by-case basis." *Omegon, Inc. v. City of Minnetonka*, 346 N.W.2d 684, 687 (Minn. Ct. App. 1984). "While Rule 24 should be construed liberally, intervention is untimely if the rights of the original parties will be substantially prejudiced." *Id.*

The reason for requiring a timely intervention is to ensure that the rights of existing parties are not prejudiced by an intervenor who comes in late, after the parties have fought through litigation

and have spent substantial time and resources in that process, to assert an interest which was identifiable at the outset of the case. This "wait-and-see" approach is disfavored for good reason. *State Auto. and Cas. Underwriters v. Lee*, 257 N.W.2d 573, 576 (Minn. 1977) (proposed intervenor "should not now, having waited to see if the decision would be favorable to its interests, be allowed to appeal a judgment binding upon and satisfactory to the parties to the action.").

As this court previously observed, in making a timeliness determination it must consider: 1) how far the suit has progressed; 2) the reason for any delay in seeking intervention; and 3) any prejudice to the existing parties because of a delay. *Schumacher*, 392 N.W.2d at 207.

A. The progression of the litigation does not favor intervention

Most attempts to intervene come somewhere within the course of active litigation. They come early, which is generally favored. In fact, this court twice determined that intervention motions filed towards the beginning of this case were timely. They also come late, which is disfavored. *See Erickson v. Bennett*, 409 N.W.2d 884, 886-7 (Minn. Ct. App. 1987) (post-trial intervention is not viewed favorably). It is rare, except perhaps in instances of default, for an attempt to intervene to occur after litigation has concluded and a decision on the merits has been made. *Id.* at 887. Similarly, it is rare for an attempt to intervene to occur after final judgment has been entered and an appeal of the final judgment has been filed. Post-judgment interventions are strongly disfavored. *See, e.g., United Food and Comm'l Workers Union, Local No. 663 v. United States Dept. of Agric.*, 36 F.4th 777, 780 (8th Cir. 2022).[5] It is rarer still, for a party to seek intervention so that it can effectively have a "do-over" to make strategic and tactical judgment calls which differ from those made by the existing parties, present arguments that were not made to its satisfaction by the existing parties, or to supplement the record with voluminous new evidence. Yet, this exceedingly

[5] This court finds it helpful to look to federal caselaw for guidance on intervention, since Fed. R. Civ. P. 24(a) contains nearly the same language as Minn. R. Civ. P. 24.01. *See, e.g., State v. Deal*, 740 N.W.2d 755, 762 (Minn. 2007) and *Erickson v. Bennett*, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987).

rare and strongly disfavored circumstance is precisely what MOMS' attempted intervention presents to this court. In the words of one federal district court judge, this is a "ninth-inning-with-two-outs" intervention attempt. *In re Uponor, Inc., F1807 Plumbing Fittings Products Liability Litigation*, 716 F.3d 1057, 1066 (8th Cir. 2013). The status of this case at the time MOMS filed its motion to intervene, and MOMS' proposed course of action if intervention is allowed, strongly weighs against intervention.

B. The reasons for delay do not favor intervention

MOMS attempts to justify its delay in intervening in this case by contending that its members "lacked awareness that their interests were not being protected by Defendants' strategy and evidence until the Court's ruling on July 11, followed by the Attorney General's failure to seek reconsideration, and the later announcement that Defendants would not appeal." (ECF No. 421). They further claim that MOMS' members can't be expected to have the expertise, skills, or time to ensure that the government officials who are entrusted with their representation are doing an adequate job. MOMS says there is no legal authority for citizens such as MOMS' members to monitor the course of this lawsuit and cites *Erickson* in support of this contention. 409 N.W.2d at 887.

MOMS admits, however, that its members "vary in their past awareness that abortion activists had challenged Minnesota laws assuring parental involvement, informed consent, and adequate reflection time prior to the performance of an abortion, as well [as] limiting performance of abortions to physicians." (ECF No. 389). At oral argument, counsel for MOMS represented that some of its members "read the front-page news in the various state newspapers that occurred either the day of or following the day that the Plaintiffs filed their complaint." (ECF No. 430). MOMS' members who were aware the laws had been challenged "relied upon the state's representation of [their] parental rights as well as the health and safety of [their] daughters, given

Defendants' duties to enforce and defend the state constitution and laws of Minnesota." (ECF No. 389).

Defendants contend that since at least some of MOMS' members knew of the constitutional challenges made by Plaintiffs when the lawsuit was filed, and since MOMS takes issue with the legal arguments and evidence which they submitted in opposition to Plaintiffs' motion for summary judgment, it should have been aware by at least November 21, 2021, (when Defendants filed their publicly available briefs and affidavits) that Defendants were not advancing its favored strategy. (ECF No. 415). As a result, they contend that it was unreasonable for MOMS to wait until this court found some of the Challenged Laws unconstitutional, to delve into the alleged inadequacy of Defendants' representation of its interests. (*Id.*) They also claim that *Erickson* does not support MOMS' justification of waiting until after final judgment had been entered to seek intervention. (*Id.*)

Plaintiffs make similar arguments; though they contend that MOMS should have realized that its alleged interests were not being represented by Defendants by at least January of 2022 "when all of the summary judgment briefing was publicly filed and arguments on the merits had concluded." (ECF No. 417). They also distinguish *Erickson*, because of its "special circumstances" and because the proposed intervenor in that case, unlike MOMS, "did not sit back, waiting to act only if the default hearing resulted in an adverse decision." 409 N.W.2d at 887. (ECF No. 417).

MOMS' argument that citizens of ordinary experience and education should not be expected to monitor the work of government officials to ensure that their interests are being represented in litigation, has some superficial appeal. Not everyone has the time and expertise to evaluate the government's legal advocacy. Lawyers who do have such time and expertise, are often costly. Yet, this argument has troubling public policy implications. The Minnesota Supreme Court has held that it does not favor "wait-and-see" approaches to intervention. *Lee*, 257 N.W.2d at 576;

See also Erickson, 409 N.W.2d at 887 (intervention allowed where intervenor "did not sit back, waiting to act only if the default hearing resulted in an adverse decision"). It seems quite clear that parties with knowledge of the potential implications of constitutional litigation to its alleged interests must act promptly to protect those interests, no matter who they are.

Here, the claims in this lawsuit and the course of this controversial litigation were widely reported in the press and attracted attention from watchdog groups like PLAM/AGA to an elected body of legislators like the Minnesota Senate. The documents which revealed Defendants' legal strategy in opposing Plaintiffs' motion for summary judgment were publicly filed and available. The hearings which further revealed Defendants' legal strategy and the quality of their advocacy were open and attended by members of the public. This court agrees with Plaintiffs and Defendants that the knowledge of MOMS' members about the constitutional implications of this lawsuit should have prompted it to act in 2022 or earlier, rather than allowing MOMS to wait until this court rendered an adverse decision to conduct an after-action review, marshal its forces, and attempt to resurrect the defense of this lawsuit.

In addition, MOMS offers its reliance on the representation of government advocates to protect the interest of its members as part of the reason it did not attempt to intervene sooner.[6] This court will address the adequacy of the representation of MOMS' interest later in this decision, but MOMS' reliance here is not a persuasive justification for its delay. In fact, knowing that your interest is at risk, assuming that interest will be protected, failing to assess whether that interest is actually being protected until after an adverse and final decision is reached, is a quintessential "wait-and-see" approach to intervention.[7]

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[6] A party may appropriately choose "to rely on the Attorney General's best efforts," but those who do "are not, however, entitled to then enter the proceedings after the case has been fully resolved, in an attempt to achieve a more satisfactory resolution." *See Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir. 1993).

[7] Since this court has determined that MOMS did "wait-and-see," and the Final Order was a merits determination and not a "special circumstance" like a default, *Erickson* does not help MOMS here.

This factor weighs against allowing intervention.

C. Prejudice to the existing parties because of delay does not favor intervention

The existing parties claim that they will be substantially prejudiced by MOMS' late intervention. Plaintiffs claim that their rights have been fully adjudicated and they have adjusted their practices related to this court's decision on the Challenged Laws, and intervention now would unnecessarily increase the burdens and costs of this litigation. (ECF No. 417). Defendants, in large part, echo the arguments made by Plaintiffs on this point. (ECF No. 415). They claim that further delay would cause uncertainty to Minnesotans "regarding the legal landscape of abortion" and will "negatively impact all Minnesotans seeking and providing reproductive healthcare." Defendants reason that MOMS "seeks to wordsmith an argument Defendants already made and submit different evidence in support of the same goal Defendants have been advocating for since 2019" and that revisiting that argument and the submitted evidence would result in a waste of public money, beyond the significant resources already spent on the litigation. (*Id.*)

MOMS responds that the costs of past litigation and resulting complications inherent in continued litigation are not significant factors to be considered in evaluating the prejudice to existing parties. (ECF No. 414). It also argues that even if such factors are considered, "[a]ny weight given to such concerns is certainly outweighed by the fact that MOMS[']s members will lose fundamental constitutional rights if not allowed to intervene." (*Id.*)

"Prejudice is not necessary to deny intervention where the other timeliness factors weigh clearly against intervention." *ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1095 (8th Cir. 2011). Even so, there is a risk of prejudice to the existing parties here and the court will address this factor.

Though MOMS invites this court to balance the prejudice to the existing parties if intervention is allowed with the prejudice to its members if it is not allowed to intervene, this factor

evaluates only "any prejudice to the existing parties because of a delay." *Schumacher*, 392 N.W.2d at 207. In other words, this is not a balancing test. As such, this court will focus on the risk of prejudice to the existing parties.

MOMS' stated intention upon intervention is to provide this court with new legal argument and new evidence. As counsel for MOMS acknowledged at oral argument, this would likely mean that the parties would engage in discovery, retention of new experts, and motion practice. The whole litigation process, if MOMS is allowed to intervene and embark on its intended course of action, would start over. There is no serious argument from MOMS that this would not cause the existing parties (and Minnesota taxpayers) to expend substantial time and resources to relitigate the issues in this case; rather, it contends that cost and time do not matter. This court disagrees. The record demonstrates that the parties have spent considerable time and devoted considerable resources to prosecuting and defending this litigation. Relitigating a case from the beginning is inherently prejudicial to the existing parties.[8]

Both Plaintiffs and Defendants have also emphasized the impact that relitigating the case will have on their constituencies. According to the Attorney General: "The organizations providing abortion care need to know what the law is. The people who work or are considering working for organizations that provide abortion care need to know what the law is. Pregnant Minnesotans need to know what the law is." (ECF No. 415). Plaintiffs maintain that: "the parties' rights have been fully adjudicated and they have adjusted their practices related to compliance with and enforcement of the Challenged Laws in reliance on the final judgment." (ECF No. 417). Unwinding the judgment on the Final Order would create uncertainty, which in turn would prejudice the existing parties.

This factor weighs against allowing intervention.

[8] "Of course, permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration." *Arizona v. California*, 460 U.S.605, 615 (1983).

In summary, MOMS' attempt to intervene in this litigation is too late. For this reason alone, its attempted intervention as of right is denied.[9]

II. MOMS HAS NOT DEMONSTRATED AN INTEREST SUFFICIENT TO INTERVENE AS OF RIGHT

The second factor asks this court to evaluate whether MOMS has an interest relating to the property or transaction which is the subject of the action.

MOMS contends that it "has a legally recognized interest of constitutional stature in the continuing validity" of the Challenged Laws. (ECF No. 414). This interest, according to MOMS, is the parental right of its members to participate in decisions regarding the health care of their daughters. (*Id.*) At the same time, however, MOMS acknowledges that it is "the *state's* interest in both assuring that a minor's decision to obtain an abortion is 'knowing, intelligent, and deliberate'…and protecting the parent's right to direct the care of their minor children," and that both rights are at stake in this case. *Hodgson v. Minnesota*, 497 U.S. 417, 445-56 (1990) (ECF No. 414)(cleaned up) (emphasis added). In seeking intervention, MOMS seeks to protect those rights. (ECF No. 414).

Defendants and Plaintiffs argue that MOMS' interest in directing the health care and upbringing of its members' minor daughters is not an interest in the subject matter of this litigation that warrants intervention because it is too generalized. (ECF Nos. 415, 417). On this point, Plaintiffs argue that the claimed right of MOMS' members to parent and direct the health care of their children is "too attenuated" to support intervention, because otherwise "any parent could intervene in any case that might potentially impact the welfare of their children." (ECF No. 417) Plaintiffs also maintain that the alleged interest of MOMS and its members is too speculative to

[9] This discretionary decision is enough to end this court's consideration of MOMS' motion for both mandatory and permissive intervention. In the interest of addressing the motion comprehensively, this court will nonetheless address the remaining Rule 24.01 and Rule 24.02 factors.

support intervention. (*Id.*) Last, Plaintiffs argue that MOMS' desire to advance a certain policy outcome related to the Challenged Laws is insufficient to support an interest sufficient to support intervention as of right. (*Id.*)

"Not every alleged interest in a lawsuit supports intervention as a matter of right." *Schroeder v. Minn. Sec'y of State*, 950 N.W.2d 70, 76 (Minn. Ct. App. 2020). "For instance, in general, personal or familial interests are insufficient to warrant intervention as a matter of right." *Id.* "And if a judgment will not affect a proposed intervenor's legal rights, the proposed intervenor is generally not entitled to intervene as a matter of right." *Id.* This concept was applied in *Valentine v. Lutz*, 512 N.W.2d 868, 870 (Minn. 1994), where a child's foster parents sought to intervene in a child protection proceeding. The foster parents' claimed interest was "derived from the attachment, knowledge, and concern for the child…developed over time." *Id.* The Minnesota Supreme Court considered whether this interest was a sufficient basis for intervention:

> This very personal interest is inconsistent with the language of Rule 24.01. Rule 24.01 concerns "interests relating to…property or transactions." This language more appropriately applies to interests involved in traditional civil actions, such as in contracts and torts, rather than the very personal and family interests involved in CHIPS proceedings.

Id. (cleaned up). The court held that the type of interaction between foster parents and a child is not an interest to justify intervention as a matter of right. *Id.* Though the intervention rule is liberally applied, not all claimed interests are cognizable as an interest sufficient to intervene. *Id.*

Like the proposed intervenors in *Valentine*, MOMS' asserted interest in directing the health care decisions of its members' minor daughters relate to "very personal and family interests" which are "derived from the attachment, knowledge, and concern for the child." *Id.* According to *Valentine*, the type of interaction between mothers and their minor daughters "is not an interest that allows intervention under Rule 24.01." *Id.* The Minnesota Supreme Court's interpretation of Rule 24.01 in *Valentine* does not allow MOMS' intervention here.

This court also finds the United States Supreme Court's decision in *Diamond* helpful in its determination of whether MOMS has an interest in the subject of this litigation. 476 U.S. at 68. At issue in *Diamond* was whether the interests asserted by an Illinois physician and father of a daughter of "childbearing years" in seeking to intervene in a lawsuit which challenged the Illinois Abortion Law, were sufficient to confer standing. *Id.* at 68. While much of the Court's discussion and analysis related to standing, its focus was on the physician/father's interest in the case. The physician/father asserted that he had standing, in part, as the father of a daughter of "childbearing years." *Id.* at 67. The Court determined that the physician/father "failed to show that he is a proper person to advance his claim on [his daughter's] behalf," because among other things, he did not show that his daughter "is otherwise incapable of asserting her own rights." *Id.* As such, the Court concluded that the physician/father's "failure to adduce factual support renders him incapable of maintaining this appeal in his capacity as a parent." *Id.* Similarly, while MOMS asserted that its members' daughters are minors, MOMS has not shown that they are incapable of asserting their own rights. To the extent which MOMS bases its interest on the protection of its members' minor daughters, under *Diamond*, this interest is not sufficient to support intervention as of right.

MOMS contends nonetheless that the interest of its members is different than that articulated by the physician/father in *Diamond*, because under the Two-Parent Notification Law its members are "designated beneficiaries" of that challenged law. (ECF No. 430). In other words, MOMS contends that the legislature has given parents, including its members, a right under the Two-Parent Notification Law to file a civil lawsuit if they are not provided notification of a minor child's pending abortion. *See* Minn. Stat. §144.343, subd. 5 ("Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person

wrongfully denied notification."). It maintains that it is this direct interest which supports its intervention as of right.[10]

Plaintiffs respond that the interest of MOMS' members in the potential opportunity to file a civil lawsuit under the Two-Parent Notification Law is too remote and speculative to support intervention as of right. In order for MOMS' members to have standing to file a civil lawsuit under the Two-Parent Notification Law as it currently is written, their minor daughters would have to: 1) become pregnant; 2) seek an abortion in Minnesota; 3) choose not to disclose their plans to have an abortion to their parents; and 4) choose not to seek a judicial bypass rather than disclose their abortion to their parents. MOMS' members ability to maintain a civil lawsuit under the Two-Parent Notification Law as it is currently written would be further dependent upon the failure of their minor child's abortion-provider to give the required notice to their parents, at the risk of facing civil, criminal, and professional liability. These potentialities are speculative and remote and cannot provide a sufficient interest for MOMS to intervene as of right. *See Keith v. Daley*, 764 F.2d 1265, 1271-72 (7th Cir. 1985) (denying intervention to proposed intervenors seeking to defend abortion regulations where their interests as potential adoptive parents of fetuses were "too speculative an interest to support [their] alleged right to intervene").

MOMS has not met its burden of demonstrating that it has an "interest relating to the property or transaction which is the subject of the action." Minn. R. Civ. P. 24.01.

III. MOMS HAS FAILED TO DEMONSTRATE THAT DISPOSITION OF THIS LAWSUIT WOULD IMPAIR OR IMPEDE ITS INTEREST

The third factor asks this court to consider the circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest. The purpose of Rule 24 is "to protect nonparties from having their interests adversely

[10] MOMS does not offer similar arguments to support its intervention to defend the constitutionality of the "Physician Only Law," the "Mandatory Disclosure Law," or the "Mandatory Delay Law."

affected by litigation conducted without their participation." *Gruman v. Hendrickson*, 416 N.W.2d 497, 499 (Minn. Ct. App. 1987).

The interest analysis for this third factor is inextricably intertwined with the second factor. Because MOMS lacks an interest in the subject of the action, it also lacks an interest which is subject to protection. *See Doe*, 2020 WL 6011443, *3 (the "subject of this action is abortion-related laws…"). Even if this court were to consider this third factor unresolved by its resolution of the second factor, MOMS has not demonstrated that the disposition of this lawsuit without its participation would impede its alleged interest.

MOMS offers that "[a]bsent intervention MOMS will be denied the ability to move this Court for relief from the judgment and provide missing evidence and arguments that would have been provided if the interests of MOMS and their minor daughters had been adequately represented." (ECF No. 414). Similar to PLAM/AGA's unsuccessful attempt to intervene, MOMS seeks to make legal arguments that it contends Defendants did not make and submit evidence that it contends were not provided to this court. An interest in tactical, strategic, or substantive litigation decisions is not, as the Minnesota Court of Appeals concluded in this case, an interest in the subject of this action. *Doe*, 2020 WL 6011443, *3. MOMS' stated interest in attempting to relitigate the case, is not an interest which demands protection through intervention.

Furthermore, from the outset of this lawsuit, the Defendants – through the Attorney General – defended the constitutionality of the Challenged Laws. The Minnesota Supreme Court has recognized the authority of the Attorney General to act on behalf of Minnesotans within its broad *parens patriae* authority. *State v. Minn. School of Business, Inc.*, 935 N.W.2d 124, 133 (Minn. 2019). The *parens patriae* doctrine "allows a state to maintain a legal action where state citizens have been harmed, where the state maintains a quasi-sovereign interest, which occurs when the health and well-being of its residents is affected, or where the state works to assure that its residents enjoy

the full benefit of the laws." *Id.*, n. 4 (quoting *State by Humphrey v. Standard Oil Co. (Ind.)*, 568 F. Supp. 556, 563 (D. Minn. 1983))(cleaned up). Since MOMS has acknowledged that assuring "that a minor's decision to obtain an abortion is 'knowing, intelligent, and deliberate'…and protecting the parent's right to direct the care of their minor children" are the interests of the state, and because Defendants have spent years fighting constitutional challenges to protect those interests, it is difficult to understand how MOMS can reasonably contend that its interests, identical to those of the state, would be impaired without its participation. (ECF No. 414).

MOMS has not demonstrated disposition of the action may as a practical matter impair or impede its ability to protect that interest.

IV. MOMS HAS FAILED TO DEMONSTRATE THAT DEFENDANTS' REPRESENTATION IS INADEQUATE

The fourth and final factor for consideration by this court relates to the adequacy of the representation of MOMS' interest by existing parties. Here, MOMS must establish "specific facts or reasons" why it is not adequately represented by the existing parties. *See Husfeldt v. Willmsen*, 434 N.W.2d 480, 483 (Minn. Ct. App. 1989).

This court will apply the standard used by the Minnesota Court of Appeals in *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990) to determine whether MOMS' interests were adequately represented by Defendants; however, this court is persuaded by federal authority which raises the bar for demonstrating inadequacy of representation when one of the parties is an arm or agency of the government and the case concerns a matter of sovereign interest. *See, e.g., North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015) ("Although the burden of showing inadequate representation usually is minimal, when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest, the bar is raised because in such cases the government is presumed to represent the interests of all its citizens.") (cleaned up). This presumption may be rebutted when the proposed intervenor

makes "a strong showing of inadequate representation." *Id.* at 921 (citation omitted). In the end, "the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the litigation strategy or objectives of the party representing him." *Id.* at 922. Although the *Stenehjem* decision is not binding on this court, its articulated presumption of adequate governmental representation and rebuttal burden is persuasive and makes sense.

This court has concluded on three previous occasions that the representation of Defendants was adequate. (ECF Nos. 95, 159, 382). No matter the standard applied regarding adequacy of representation, MOMS has not provided this court with a reason to draw a different conclusion here.

MOMS makes two essential contentions in support of its claim of inadequate representation. First, it contends that Defendants failed "to raise the constitutional stature of parents' rights to direct the care and upbringing of their children, instead treating these rights merely as state interests." (ECF No. 414). During briefing on the summary judgment motions, however, Defendants argued that "parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of children" and involving parents in discussions regarding abortion care "was intended to allow parents to provide emotional support and guidance and forestall irrational and emotional decision-making." (ECF No. 238). Accordingly, it was quite clear to the court that Defendants were advocating for the consideration of parents' rights during Defendants' briefing on the motions for summary judgment. (ECF No. 357). In any event, advocates decide which arguments to make, which legal authority and evidence to use to support such arguments, and what to emphasize, highlight or rebut. MOMS' criticism of the adequacy of Defendants' representation of its interest in this regard essentially amounts to a "post-hoc quibble" with Defendants' litigation strategy which does not render their representation inadequate. *Wisc. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013); *See also Stuart v. Huff*, 706 F.3d 345, 354 (4th Cir. 2013) ("There will often be

differences of opinion among lawyers over the best way to approach a case…To have such unremarkable divergences of view sow the seeds for intervention as of right risks generating endless squabbles at every juncture over how best to proceed."). Additionally, more specific interests, to the extent they exist here, "surely cannot be enough to establish inadequacy of representation since would-be intervenors will nearly always have intense desires that are more particular than the state's (or else why seek party status at all)." *Id.*

Second, MOMS contends that Defendants failed to provide adequate evidentiary support for the Challenged Laws. Specifically, it maintains that the experts which were advanced by Defendants were "tepid" and "equivocal." (ECF No. 414). It argues that, if given a chance, it would present different and more meaningful expert testimony that would protect its interest in the constitutionality of the Challenged Laws. (*Id.*) While it may be true that the presentation of different evidence could influence judicial decision-making in a different and perhaps meaningful way, that could be true in any case – especially after the case is already over. Adequacy of representation does not assess whether the current party to the litigation would present the quality and quantity of evidence in the same manner as the proposed intervenor; rather it assesses whether the representation of the proposed intervenor's interests was adequate. *See Stuart*, 706 F.3d at 353.

The adequacy of Defendants' representation of MOMS' interests is a factor that this court is in a unique position to analyze. It had the benefit of seeing the defense of the case from the beginning to its end. From the outset, Defendants sought to convince this court, and later the court of appeals, that it should not allow Plaintiffs' constitutional challenge to proceed. Over the course of three years, Defendants engaged in discovery, hired their own expert witnesses, and cross-examined each of the Plaintiffs' expert witnesses. They submitted voluminous briefs and record evidence in support of their own motions for summary judgment, and in opposition to the motions for summary judgment of the Plaintiffs. They moved to exclude consideration by this court of most of Plaintiffs' expert

witnesses. From this court's view, after spending countless hours analyzing the sophisticated and well-researched arguments made by Defendants, it is clear that their representation of the interests of all Minnesotans, including MOMS' members, was adequate. Though this court ultimately denied most of the relief requested by Defendants, they fought for years to uphold the constitutionality of the Challenged Laws – the same litigation goal of MOMS.

MOMS has not demonstrated that the representation of its interests by Defendants was inadequate.

Because MOMS has not met any of the required factors for intervention as of right, its motion under Rule 24.01 is denied.

RULE 24.02 PERMISSIVE INTERVENTION STANDARD

Rule 24.02 provides for permissive intervention. This rule states in pertinent part:

> 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. To obtain permissive intervention therefore, a proposed intervenor must show: (1) a timely application for intervention; (2) an interest in litigating common questions of law or fact with the main action; and (3) that the intervention will not delay or prejudice the adjudication of the rights of the parties. *Id.* The purpose of Rule 24.02 is to enhance the efficient use of overburdened courts. *Snyder's Drug Stores, Inc. v. Minn. State Bd. Of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974).

The court considers the timeliness of a Rule 24.02 motion in the same way as it would a motion made under Rule 24.01. *See Omegon*, 346 N.W.2d at 687 (citation omitted). In addition, courts may consider whether the permissive intervention will complicate the case. *Norman v. Refsland,* 383 N.W.2d 673, 677 (Minn. 1986). The court has discretion in whether to grant or deny permissive intervention. *Heller v. Schwan's Sales Enterprises, Inc.,* 548 N.W.2d 287, 292 (Minn. Ct. App. 1996).

MOMS devotes considerably less argument on its entitlement to permissive intervention than it did for intervention as of right. It contends that the permissive intervention standard is less demanding because it requires only that MOMS' defenses share a common question of law or fact with the main action, rather than an interest in the subject of the specific litigation as intervention as of right requires. (ECF No. 414). It argues that it has met this less-demanding standard. While MOMS acknowledges that intervention at this time "will no doubt delay the finality of the judgment in this case," it maintains that such delay "is not undue if the judgment is based on an inadequate defense harming the constitutional rights of the members of MOMS." (*Id.*)

Plaintiffs oppose MOMS' permissive intervention request. In addition to the other arguments they advanced against intervention as of right, Plaintiffs claim that MOMS cannot have a claim or defense that shares a common question of fact or law with the main action, if it does not have a cognizable interest in the Challenged Laws. (ECF No. 417). Last, Plaintiffs argue that this court should deny permissive intervention because allowing intervention now would be prejudicial to the existing parties who have "reasonably relied on the Court's judgment and would have to endure the burdens and delay of relitigating a case that has already been decided on the merits." (*Id.*)

Defendants also argue that MOMS cannot meet the less demanding threshold for permissive intervention. Defendants maintain that this court's focus should be on whether intervention will unduly delay the proceedings or prejudice the rights of the existing parties. (ECF No. 415). They contend that they will be prejudiced if the arguments they already made will be relitigated in this case in a different way, or if MOMS is given the opportunity to submit different evidence in support of the very same goal already advanced by Defendants. (*Id.*) They also contend that delay will prevent Minnesota and their healthcare providers from "knowing what the law is," and will negatively impact Minnesotans seeking and providing reproductive healthcare. (*Id.*)

I. MOMS' ATTEMPTED PERMISSIVE INTERVENTION IS UNTIMELY

The first factor for consideration of MOMS' motion for permissive intervention is whether it was timely made. This court has already determined that MOMS' motion to intervene as of right was untimely. In summary, this court found: 1) at the time MOMS filed its notice to intervene, the case was post-judgment and on appeal – at a stage where intervention is disfavored; 2) MOMS effectively engaged in a "wait-and-see" approach before seeking to intervene; and 3) MOMS' proposed course of action if it was allowed to intervene would significantly prejudice the existing parties. Those same factors weigh against the timeliness of MOMS' alternative motion for permissive intervention under Minn. R. Civ. P. 24.02. For that reason alone, MOMS' motion for permissive intervention is denied.

II. MOMS HAS A DEFENSE IN COMMON WITH THE MAIN ACTION, YET THAT DOES NOT JUSTIFY PERMISSIVE INTERVENTION

The second factor asks this court to evaluate MOMS' interest in litigating a defense with common questions of law or fact to the main action. Defendants have contended since the outset of this case that the Challenged Laws are constitutional. MOMS wishes to assert that identical defense, albeit with different emphasis and additional evidence. This court agrees that MOMS has established that it has a defense at law and in fact in common with the main action.

This conclusion, however, does not entitle MOMS to permissive intervention. Even though there is a common question of law or fact, a district court may still exercise its discretion to deny a motion for permissive intervention. *See South Dakota ex rel. Barnett v. U.S. Dept. of Interior*, 317 F.3d 783, 787 (8th Cir. 2003) (denial of permissive intervention affirmed, despite district court's conclusion that the proposed intervenors raised common questions of law and fact); *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984) ("Permissive intervention is wholly discretionary with the district court even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied."); *North Dakota v. Heydinger*, 288 F.R.D. 423, 429 (D. Minn. 2012) ("Even though Movants'

motion is timely and contains questions of law and fact in common with the case, it fails on the primary consideration because it would result in prejudice and delay. Furthermore, Movants' intervention in this matter is unnecessary, as Defendants adequately represent their common interests. Movants' presence would not further any interests of justice and would simply serve to delay and overcomplicate this matter."); 7C Wright, Miller & Kane, Federal Practice and Procedure § 1913, at 376–77 ("If there is no right to intervene under Rule 24(a), it is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention.").

Because MOMS' motion is untimely and would unduly delay and prejudice the rights of the existing parties, any common questions of law or fact between its intended defense and this action still do not favor allowing permissive intervention.

III. PERMITTING MOMS' INTERVENTION WOULD UNDULY DELAY AND PREJUDICE THE RIGHTS OF THE EXISTING PARTIES

The third factor for consideration of MOMS' motion for permissive intervention is whether allowing intervention would unduly delay or prejudice the rights of the existing parties.

This court already considered whether allowing MOMS to intervene as of right would unduly delay the disposition of the case and would unduly prejudice the rights of the existing parties. This court concluded that the existing parties have already expended considerable time and resources in the past three years to litigating this case to its conclusion. It also determined that forcing the existing parties to essentially relitigate the case from the beginning would be inherently prejudicial to them. Finally, this court already concluded that unwinding the judgment on the Final Order would create uncertainty, which would also prejudice the existing parties. Those same factors weigh against MOMS' motion under Minn. R. Civ. P. 24.02. There is no reason for this court to draw a different conclusion on permissive intervention.

IV. JUDICIAL ECONOMY WOULD NOT BE SERVED BY PERMITTING MOMS' INTERVENTION

"It is incontrovertible that motions to intervene can have profound implications for district courts' trial management functions, as additional parties can complicate all aspects of litigation, including discovery, motion practice, settlement, and trial." *Amer. College of Obstetricians and Gynecologists v. U.S. Food and Drug Admin.*, 467 F.Supp.3d 282, 292 (D. Md. 2020) (cleaned up). In this court's opinion, it would not be a good use of judicial resources to allow intervention, after engaging in three years of litigation management and decision-making on complex and challenging motions that culminated in a Final Order and judgment, just so that MOMS could: 1) reopen the judgment; 2) conduct written and testimonial discovery; 3) file dispositive motions; and 4) have a trial for any unresolved issues. This is particularly true where this court has already determined that intervention is not mandatory in part because the interests of Minnesotans and MOMS are coextensive and have been adequately represented by Defendants. *See Stuart*, 706 F.3d at 355.

In addition, allowing intervention in a high-profile case which has already reached its conclusion would likely draw additional would-be intervenors, with differing interests, that would unnecessarily complicate the discovery, motion and trial process, consume additional resources of the court and the parties, and further delay the case's resolution.

MOMS has failed to convince this court that it would be an appropriate use of its discretion to permit it to intervene in this case.

CONCLUSION

MOMS is not entitled to intervene as of right under Rule 24.01 or to permissively intervene under Rule 24.02. Its motion to intervene is therefore denied.

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