| STATE OF MINNESOTA | DISTRICT COURT |
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| COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT |

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| Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis, and Our Justice,<br><br>Plaintiffs,<br><br>vs.<br><br>State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing,<br><br>Defendants. | Court File No.: 62-CV-19-3868<br><br>Case Type: Civil – Other/Misc. |

# ORDER & MEMORANDUM

This matter came before the undersigned on October 30, 2020 on Defendants' motion to dismiss.

Attorneys Amanda Allen, Jessica Braverman, Christy Hall, Juanluis Rodriguez, Melissa Shube, Rupali Sharma and Stephanie Toti appeared on behalf of Plaintiffs Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis and Our Justice. Solicitor General Liz Kramer and Assistant Attorneys General Kathryn Iverson Landrum and Jacob Campion appeared on behalf of Defendants State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing. Attorney Erick Kaardal appeared on behalf of Proposed Intervenors Pro-Life Action Ministries, Inc. and Association for Government Accountability.

Having considered the facts, the arguments of counsel and the parties, and all of the files, records and proceedings herein,

**IT IS HEREBY ORDERED**:

1. Defendants' motion to dismiss the claims alleged by Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis and Our Justice for lack of standing is **DENIED**.

2. Defendants' motion to dismiss the State of Minnesota, the Governor of Minnesota, the Attorney General of Minnesota, the Minnesota Commissioner of Health, the Minnesota Board of Medical Practice, and the Minnesota Board of Nursing as improper defendants is **DENIED**.

3. Defendants' motion to dismiss Counts I-IV and VII for failure to state a claim upon which relief may be granted is **DENIED**.

4. Defendants' motion to dismiss Count V for failure to state a claim upon which relief may be granted is **GRANTED**.

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

**IT IS SO ORDERED**

Dated: June 25, 2020

**BY THE COURT**:

Gilligan, Thomas(Judge)
Jun 25 2020 5:18 PM

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

## MEMORANDUM

Plaintiffs Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis and Our Justice (collectively "Plaintiffs") filed this lawsuit to challenge the constitutionality of certain Minnesota laws concerning abortion and treatment of sexually transmitted infections ("STI"). The laws challenged by the Plaintiffs include targeted regulations of abortion providers, mandatory disclosure and delay requirements, a law requiring the burial or cremation of fetal tissue resulting from an abortion or miscarriage, a two-parent notification requirement for minors seeking abortion care, a ban on sexually transmitted infection treatment advertisements, and related criminal, civil and administrative penalties for violations of the challenged laws.

In the Complaint as originally filed and as amended, Plaintiffs assert seven counts, six of which allege various violations of the Minnesota Constitution. Plaintiffs are Dr. Jane Doe ("Dr. Doe"), Mary Moe ("Ms. Moe"), First Unitarian Society of Minneapolis ("FUS") and Our Justice ("Our Justice"). Dr. Doe alleges that she is a Board-certified obstetrician-gynecologist licensed to practice medicine in Minnesota. She maintains that her medical practice includes: "full-scope obstetric and gynecology care, including pregnancy care, adolescent healthcare, contraception and family planning services, and well-woman gynecology care." Dr. Doe alleges that she "provides abortions for patients with maternal or fetal indications, and she provides referrals to patients seeking abortions in other circumstances." Ms. Moe contends that she is a certified nurse midwife, licensed to practice midwifery in Minnesota. She alleges that she "specializes in providing sexual and reproductive healthcare to at-risk communities and treats patients seeking abortion care." She "seeks to provide abortion care in Minnesota herself to minimize the obstacles that her patients face in accessing that care," but currently must refer her patients to healthcare providers who meet Minnesota's requirements for providing abortions, because she does not meet those requirements. FUS alleges that it is a Minnesota nonprofit corporation which operates a religious congregation in Minneapolis. It is a member congregation of the Unitarian

Universalist Association. FUS maintains that its "vision of social justice includes access to high-quality sexual and reproductive healthcare" and that it "supports its members who seek and provide" that care, "including abortion care." Finally, Our Justice is a Minnesota nonprofit corporation which has a "mission to ensure that all people and communities have power and resources to make sexual and reproductive health decisions with self-determination." It "currently operates an abortion assistance fund…that provides financial assistance and resources to people seeking abortion care who cannot afford it." Our Justice provides support to its funded clients and for people who have had abortions. It alleges that it plans to launch a program to assist people who must travel to access abortion secure lodging.

Count I of the First Amended Complaint alleges that each of the challenged laws, except the ban on advertising STI treatments, violate the right to privacy guaranteed in MINN. CONST. art. I, §§ 2, 7, and 10. This count is alleged by Dr. Doe and Ms. Moe on behalf of their patients seeking access to abortion, FUS on behalf of its congregants seeking access to abortion and Our Justice on behalf of its clients seeking abortion access. Count II alleges that each of the challenged laws violates the guarantee of equal protection of the laws in MINN. CONST. art. I, § 2. This count is alleged by Dr. Doe and Ms. Moe on behalf of themselves and their patients seeking abortion access, and by FUS and Our Justice in the same capacities as Count I. Count III alleges that each of the challenged laws violate the prohibition on special legislation in MINN. CONST. art. XII, § 1. This count is alleged by Dr. Doe and Ms. Moe on behalf of themselves and their patients seeking abortion access, and by FUS and Our Justice in the same capacities as Counts I and II. Count IV alleges that certain mandatory disclosure requirements and the ban on advertising STI treatments violate the right to free speech guaranteed by MINN. CONST. art. I, § 3. This count is alleged by Dr. Doe and Ms. Moe on behalf of themselves. Count V that the law which imposes hospitalization requirements on second-trimester abortions is unconstitutionally vague in violation of MINN. CONST. art. I, § 7. This count is alleged by Dr. Doe

and Ms. Moe on behalf of themselves and their patients seeking abortion access, and by FUS and Our Justice in the same capacities as Counts I, II and III. Count VI alleges that the fetal tissue disposition requirement violates the right to religious freedom and the prohibition on religious preference in MINN. CONST. art. I, § 16. This count is alleged by FUS on behalf of itself and its congregants seeking access to abortion or treatment for miscarriage. Count VII seeks a declaration that all of the challenged laws are unconstitutional or otherwise unenforceable. This count is alleged by Dr. Doe and Ms. Moe on behalf of themselves and their patients seeking abortion access, by FUS on behalf of itself with regard to fetal tissue disposition and with regard to the remaining challenged laws on behalf of its congregants seeking access to abortion, and by Our Justice on behalf of its clients seeking access to abortion. Together with declaratory relief, Plaintiffs seek a permanent injunction of the enforcement of all the challenged laws.

Instead of an Answer, Defendants State of Minnesota ("State"), Governor of Minnesota ("Governor"), Attorney General of Minnesota ("Attorney General"), Minnesota Commissioner of Health ("Commissioner"), Minnesota Board of Medical Practice ("Medical Board") and Minnesota Board of Nursing ("Nursing Board") (collectively "Defendants") moved to dismiss all claims against all Defendants. Defendants asserted numerous legal defenses, including lack of standing, naming improper parties, and failure to state a claim upon which relief may be granted. The motion was comprehensively briefed by both sides and the court heard oral argument on October 30, 2019.

Just before the hearing on the motion to dismiss, Pro-Life Action Ministries, Inc. ("PLAM") and Association for Government Accountability ("AGA")(collectively "Proposed Intervenors") filed a Notice of Limited Intervention to Assert the Defense of Lack of Private Cause of Action. Proposed Intervenors contend that Defendants had not alleged a defense that there is no private cause of action for violating the Minnesota Constitution, which they claim is a complete defense to all claims alleged

against all Defendants. As such, Proposed Intervenors sought limited intervention to assert that defense. Both Plaintiffs and Defendants timely objected to the intervention.

Defendants also brought a motion to stay discovery, pending resolution of the motion to dismiss. This motion was opposed by Plaintiffs.

The court held a hearing on the motions for limited intervention and to stay discovery on January 24, 2020.

While the court originally stated at the October 30, 2019 hearing that it would take the motion to dismiss under advisement at time, it explained that its consideration of that motion would be affected by its resolution of issues related to the proposed limited intervention. The court then determined that it would not take the motion to dismiss under advisement until it had an opportunity to hear and decide the intervention issue. As a result, the court took both the motion to dismiss, the motion for limited intervention and the motion to dismiss under advisement on January 24, 2020.

On January 28, 2020, this court issued its Order denying Proposed Intervenor's motion for limited intervention. That same day, this court issued its Order granting Defendants' motion to stay discovery. On February 20, 2020, Proposed Intervenors filed a Notice of Appeal of the January 28, 2020 Order on its motion. Proposed Intervenors moved to consolidate its appeal with the appeal in *Jennifer Schroeder, et al. v. Minnesota Secretary of State Steve Simon*, A20-0272. That motion was denied by the Minnesota Court of Appeals on March 10, 2020. Proposed Intervenors also filed a Petition for Accelerated Review on March 24, 2020. That petition was denied by the Minnesota Supreme Court on May 19, 2020. The appeal remains pending before the Minnesota Court of Appeals.

Following the appeal of the January 28, 2020 Order on the proposed limited intervention, the court concluded that "this court's jurisdiction over this matter has been suspended during the pendency of the appeal pursuant to Minn. R. Civ. P. 108.01, subd. 2" and that "further consideration of Defendants' motion to dismiss shall re-commence following the resolution

of Proposed Intervenors' appeal by the Minnesota Court of Appeals or the Minnesota Supreme Court in accordance with the Minnesota Rules of Civil Appellate Procedure." The court later reconsidered its position on its continuing jurisdiction to consider and decide the motion to dismiss. Accordingly, it set June 26, 2020 as its deadline to issue an Order on the motion to dismiss.

**STANDARD OF REVIEW**

Defendants have moved to dismissed most of the claims against them because they contend that Plaintiffs lack standing to make them. Lack of standing deprives the court of subject matter jurisdiction. Minn. R. Civ. P. 12.02(a); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011)("Standing is a jurisdictional doctrine, and the lack of standing bars consideration of the claim by the court."); *See also* Minn. R. Civ. P. 12.08(c)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Forslund v. State*, 924 N.W.2d 25, 32 (Minn. Ct. App. 2019)(quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

Defendants also claim that Plaintiffs have disregarded Minn. R. Civ. P. 8.01, which requires a party to make "a short and plain statement of the claim showing that the pleader is entitled to relief," entitling them to dismissal of the claims against them.

Finally, Defendants contend that all of the claims alleged against them must be dismissed because they fail to state a claim upon which relief may be granted. Minn. R. Civ. P. 12.02(e). A motion to dismiss a complaint under Minn. R. Civ. P. 12.02(e) "raises the single question of whether the complaint states a claim upon which relief can be granted." *Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000)(citations omitted). "Like a battlefield surgeon sorting the hopeful from the hopeless, a motion to dismiss invokes a form of legal triage, a paring of viable claims from

those doomed by law." *Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562, 567 (D. R.I. 1996). "[I]t is immaterial whether or not the plaintiff can prove the facts alleged," and a court should not grant a dismissal under Rule 12.02(e) "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded…" *Martens* at 739-40 (internal quotes and citations omitted). In determining whether a claim survives a motion to dismiss, courts are "not bound by legal conclusions stated in a complaint." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). The district court must consider and accept as true only the facts alleged in the complaint and construe all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

**EACH PLAINTIFF HAS STANDING**

Defendants contend that each Plaintiff lacks standing to allege nearly all of their purported claims. On one hand, Defendants fault Plaintiffs for the paucity of "rudimentary factual allegations pertaining to their standing," yet on the other hand maintain that "[t]he sheer size and scope of Plaintiffs' First Amended Complaint makes a claim-specific analysis on standing impossible." Defendants, nonetheless, have offered robust standing arguments for each Plaintiff. This court will address the standing arguments by party, as raised by Defendants.

"Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996)(citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Standing is essential to a Minnesota court's exercise of jurisdiction. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989). If a plaintiff lacks standing to bring a suit, the attempt to seek court relief fails. *Id.* "The goal of the standing requirement is to ensure that the issues before the courts will be 'vigorously and adequately presented.'" *Id.* (cleaned up); *See also Webb Golden Valley, LLC v. State*, 865 N.W.2d 689,

693 (Minn. 2015). "A party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing." *Id.* (citation omitted).

Here, Plaintiffs must establish an injury-in-fact to have standing because the challenged laws do not include an explicit or implicit legislative grant of standing and they do not argue otherwise. *See Lickteig v. Kolar*, 782 N.W.2d 810, 814 (Minn. 2010)("Generally, a statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication."). "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Webb*, 865 N.W.2d at 693 (cleaned up). An injury-in-fact must not only be concrete, but must also be "'actual or imminent, not conjectural or hypothetical.'" *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005)(quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "The injury must be more than mere dissatisfaction with [the State's] interpretation of a statute." *Webb*, 865 N.W.2d at 693 (citing *In re Complaint Against Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 797 (Minn. 1992)). "A party questioning a statute must show that it is at some disadvantage, has an injury, or an imminent problem." *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003)(cleaned up).

A party claiming to have standing "must have a direct interest in the statute that is different from the interest of citizens in general." *Id.* (citation omitted). Put another way, when citizens bring lawsuits in the public interest challenging governmental conduct, they must show harm distinct from harm to the public. *See Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. Ct. App. 1999).

Ordinarily, a party must assert her own legal rights. *In re Welfare of R.L.K.*, 269 N.W.2d 367, 372 (Minn. 1978) (citing *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976)). However, courts recognize an exception to this general rule "when the litigant has suffered an injury in fact, the litigant has a close relationship with the third party, and the third party is somehow hindered from asserting his or her

own rights." *Welter v. Welter*, No. A04-710, 2004 WL 2163149, at *3 (Minn. Ct. App. Sept. 28, 2004) (citing *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)); *accord Schable v. Boyle*, No. C8-01-2271, 2002 WL 31056699, at *4 (Minn. Ct. App. Sept. 17, 2002).

Similarly, organizations can establish standing on two grounds: (1) associational standing or (2) direct organizational standing. Associational standing derives from the standing of an organization's members; it requires that: (1) the organization's members have standing as individuals, (2) the interests that the organization seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Philip Morris,* 551 N.W.2d at 497-98 (stating that Minnesota's "approach [to associational standing] is derived from the seminal case" of *Hunt v. Wash. State Apple Advertis. Comm'n*, 432 U.S. 333 (1977)); *Hunt*, 432 U.S. at 342-43 (discussing three-part test).

Direct organizational standing focuses on the entity rather than its members or constituents; it requires that the organization satisfy the injury-in-fact standing test applicable to individuals. *See Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004) ("Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing"). At the pleading stage, a plaintiff need only allege an injury resulting from the defendant's challenged conduct. *Forslund*, 924 N.W.2d at 33 ("Whether appellants can prove that the challenged statutes impinge their children's right to an adequate education (and whether such impingement states a viable claim) is more appropriately addressed in connection with the merits."). The Minnesota Supreme Court has adopted a liberal standard for organizational standing. *All. for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974)).

Apropos to this case, the Minnesota Supreme Court cited the United States Supreme Court's holding in *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) with favor: "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion

decision.' Similarly, the medical association is an appropriate party to represent the claims of its individual members."). *See Minn. Med. Ass 'n v. State*, 274 N.W.2d 84, 87 n.2 (Minn. 1978).

## I. FUS HAS STANDING

Defendants contend that FUS lacks standing to allege any claims. Although Defendants acknowledge that FUS contends that it is "deeply committed to promoting social justice," including "access to high-quality sexual and reproductive healthcare for all people regardless of income, race, and other socio-economic factors," they maintain that FUS has not alleged that any of its members *actually* provide abortion care or have sought abortion care. Defendants also argue that FUS has not alleged any injury or direct impact which was actually sustained by it, or its members, as a result of the challenged statutes. Defendants compare FUS's assertion of standing to the unsuccessful standing assertion made by the St. Paul Area Chamber of Commerce in its opposition to the construction of Interstate Highway 35E in *St. Paul Area Chamber of Commerce v. Marzitelli*, 258 N.W.2d 585 (Minn. 1977). They maintain that FUS's claimed interest is even broader that the rejected economic interest alleged in *Marzitelli* and warn if FUS has standing here, "it would have standing to challenge virtually any statute they contend is contrary to their vision of social justice."

FUS contends that it has associational standing and maintains that it has satisfied the three-part *Hunt* test, which was cited with approval in *Philip Morris*. *Philip Morris*, 551 N.W.2d at 497-98 ("Our conclusion is based upon the well-established notion of 'associational standing,' which recognizes that an organization may use to redress injuries to itself or injuries to its members. * * * Our approach is derived from the seminal case of *Hunt*…where the U.S. Supreme Court found standing for a state agency which, in its capacity as representative of the state apple industry, challenged another state's agricultural regulation.")(cleaned up). As for the first part of the *Hunt* test, FUS contends its allegations are sufficient to allege an injury-in-fact because it has alleged that its members both seek and provide abortion care and it has alleged that the challenged laws harm abortion

providers and patients by making it unnecessarily difficult to provide and receive care. It also maintains that the fetal disposition requirement alleges a burden on the exercise of religious beliefs by miscarriage and abortion patients. FUS contends, therefore, that its members would otherwise have standing to sue in their own right. *See Hunt*, 432 U.S. at 343. The second part of the *Hunt* test requires that the interests which FUS seeks to protect are germane to the organization's purpose. *Id.* FUS maintains that it is a nonprofit religious congregation with a commitment to ensuring access to high-quality sexual and reproductive healthcare—including abortion care—for all people, including its members. As part of its mission, FUS provides support and assistance to these members. Finally, the last part of the *Hunt* test requires that neither the claim asserted nor the relief requested require the participation of its individual members in the lawsuit. *Id.* FUS summarily concludes that it is unnecessary for its individual members to participate in this lawsuit.

As a threshold matter, the "Minnesota Supreme Court has adopted a liberal standard for organizational standing." *All. for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder Drug Stores, Inc.*, 221 N.W.2d at 166). So the court will view FUS's claimed standing through that lens.

FUS, as an organization, has done more than just allege that it is broadly interested in issues of social justice to clear the first prong of *Hunt*. Its specific interest "includes access to high-quality sexual and reproductive healthcare" and that it "supports its members who seek and provide" that care, "including abortion care." These interests and activities are therefore different than those of the general public. As a result, it is not like the plaintiff in *Marzitelli*. FUS is also a religious congregation that counts among its members those who provide and those who seek abortion care, and had FUS's individual members brought suit, they would have standing to bring the same claims. Thus, it has specifically alleged that the fetal disposition requirement violates "the right to religious freedom and prohibition on religious preference" of the Minnesota Constitution and that its challenge is made "on behalf of itself and its congregants seeking access to abortion or treatment for miscarriage."

As to the second prong of *Hunt*, the interests that FUS seeks to protect in bringing this suit are germane to its purpose. As an organization that supports members who seek and provide abortion care, this lawsuit seeks to protect those interests.

As to the third prong of *Hunt*, the relief requested does not require participation of individual FUS members in this lawsuit. Plaintiffs' First Amended Complaint seeks a myriad of declaratory and injunctive relief, none of which has an individualized bearing on a particular member of FUS. The First Amended Complaint teems with allegations which suggest that the challenged laws create impediments to the articulated mission and activities of FUS. This is sufficient, at this early stage, to establish standing.

## II. OUR JUSTICE HAS STANDING

Defendants contends that Our Justice has alleged no facts which describe how the challenged laws actually impact Our Justice or its clients. Defendants contend that, like FUS, Our Justice's beliefs regarding social justice are "insufficient to allege an interest in the lawsuit different from that of the general public."

Our Justice counters that it has standing here, just as it did when it asserted privacy and equal protection claims in *Doe v. Gomez* when it was known as Pro-Choice Resources. *See Doe v. Gomez*. 542 N.W.2d 17, 20 n.2 (Minn. 1995).[1] Our Justice is a nonprofit organization that provides direct financial assistance, resources and support to Minnesota residents seeking abortion care. It maintains that its mission is to ensure that individuals have the power and resources to make sexual and reproductive health decisions with self-determination. Our Justice contends that, since the challenged laws increase the cost of abortion procedures and decrease the availability of abortion care in Minnesota, its resources have been and will be diverted and thus result in injury-in-fact. It also claims that it has

[1] Defendants maintain that Pro-Choice Resources made much more specific and concrete assertions of injury to establish standing in the *Gomez* case.

been injured because its mission and activities have been impeded. *See Rukavina*, 684 N.W.2d at 533; *All. for Metro. Stability*, 671 N.W.2d at 914.

Our Justice also maintains that it meets the requirements for third-party standing; namely, that it has a close and confidential relationship with its clients, and provides clients who cannot afford the cost of abortion care with direct funding and individualized support. For those reasons, Our Justice argues that it will be a zealous advocate in this litigation on behalf of its clients.

Our Justice has more than a "special interest" in the challenged laws, which are at the heart of this litigation. Its interest is vastly different than that of the general public. Our Justice's articulated interest makes it well-suited to advocate here on behalf of its clients. It has adequately alleged injury-in-fact that the challenged laws increase the cost and reduce the availability of abortion care for its clients, who require its financial assistance and access to its support group. It has adequately alleged that its clients are disadvantaged by the challenged laws and have an "imminent problem." *See All. for Metro. Stability*, 671 N.W.2d at 913.

Like FUS, the First Amended Complaint is replete with allegations which suggest that the challenged laws create impediments to the articulated mission and activities of Our Justice. The members of Our Justice seek abortion care, thereby clearing the first prong of *Hunt* because its members would have standing as individuals to bring forward this litigation. As an organization that funds, counsels, and provides access to abortion care, this lawsuit is germane to Our Justice's purpose, thereby clearing the second prong of *Hunt*. Our Justice also clears the third prong of *Hunt* like FUS. Plaintiffs' First Amended Complaint seeks a myriad of declaratory and injunctive relief, none of which has an individualized bearing on a particular member of Our Justice. This is sufficient, at this early stage, to establish standing. Our Justice has also articulated sufficient allegations to meet the *Hunt* test and establish that it has standing to make its purported claims on behalf of its clients. It has also made adequate allegations for it to have third-party standing.

## III. MARY MOE HAS STANDING

Defendants concede that Ms. Moe has sufficient standing to challenge the physician-only requirement. But they maintain that her allegations are insufficient to challenge any other law at issue in this litigation. They argue that, because Ms. Moe cannot provide abortions, no other law regulating abortion procedures apply to her and thus could not possibly impact her patients.

Ms. Moe has alleged that she is making her claims to the challenged laws on her own behalf and on behalf of her own patients who seek abortion care. She "specializes in providing sexual and reproductive healthcare to at-risk communities and treats patients seeking abortion care." Since she can't provide abortions herself as a nurse midwife, "[s]ome of her patients are unable to access care from…other providers because of financial barriers, lack of transportation, and fear of domestic violence or community retribution." Ms. Moe maintains that she faces criminal and civil liability, as well as professional discipline, for her failure to comply with the challenged laws. Since the burdens imposed by the challenged laws adversely affect Ms. Moe's ability to provide adequate care to her patients, she argues that she has alleged a sufficiently concrete injury to advance her claims. Finally, Ms. Moe contends that her position as a health-care provider, with a close relationship to her patients, also makes her well-suited to maintain third-party standing on behalf of those patients.

Ms. Moe has alleged a sufficient injury-in-fact to maintain standing to challenge the laws which affect or limit her nurse midwife practice. If she provided abortion care outside the bounds of her license, she would be subject to criminal and civil liability, as well as subject to discipline before the professional board which regulates her license. As for the remaining laws which she challenges, Ms. Moe has third-party standing. She has described the effects that the challenged laws have on her patients; specifically the impediments those challenged laws have on their access to abortion care. Her close relationship with those patients, and her role as a healthcare provider, make her suited to

advocate for her patients in this litigation. Ms. Moe has standing to allege all of the claims she has made to the challenged laws, whether on behalf of herself or on behalf of her patients.

## IV. DR. DOE HAS STANDING

Defendants' final challenge is to the standing of Dr. Doe. They claim that the First Amended Complaint is deficient with regard to her standing, because it does not allege any "factual allegations regarding Dr. Doe's actual experiences related to the challenged statutes." They contend that the allegations regarding Dr. Doe force this court to assume that because she provides abortion care, that "all abortion-related and STI advertising statutes negatively impact Dr. Doe and her patients." They also argue that Dr. Doe cannot make claims on behalf of her patients because she "has pleaded no facts about her patients or how the challenged statutes negatively impact them."

Dr. Doe responds that she provides abortions for patients with maternal or fetal indications and refers patients seeking abortions in other circumstances to other abortion providers. She contends that she has suffered an injury-in-fact because if she flouts the challenged laws, she will face criminal and civil penalties, as well as professional discipline. She also claims that she has suffered an injury-in-fact because the challenged laws "impose burdensome and unnecessary restrictions on healthcare providers, increasing the cost and decreasing the availability of sexual and reproductive healthcare in Minnesota." Dr. Doe contends that her injuries would be redressed by a court order permanently enjoining Defendants from enforcing the challenged laws.

Like Ms. Moe, Dr. Doe also maintains that she has third-party standing on behalf of her patients. According to Dr. Doe, "[i]t is well-settled that physicians who provide abortions have standing to challenge abortion restrictions which violate their patients' constitutional rights." *See Gomez*, 542 N.W.2d at 20 n.2; *Planned Parenthood of Wisc., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015). She claims that, as a physician, she has a sufficiently close relationship with her patients on whose behalf she sues. She also maintains that, as a physician, she has the ability to surmount the

litigation obstacles which would otherwise be experienced by her patients if they sought to assert their own claims. *See Singleton*, 428 U.S. at 114, 117; *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n. 3 (8th Cir. 1977).

For many of the same reasons that Ms. Moe has standing on behalf of herself and on behalf of her patients, Dr. Doe has both direct and third-party standing. Dr. Doe has alleged that if she violates the challenged laws, she faces many direct and personal consequences – from criminal liability to professional discipline. She has also alleged that the challenged laws are outdated and harm healthcare providers who are forced to ignore scientific advancements and practice medicine in accordance with obsolete standards. As such, she has adequately alleged an injury-in-fact.

Dr. Doe also satisfies the requirements for third-party standing. Like Ms. Moe, she has alleged a sufficiently close relationship with her patients on whose behalf she has filed this lawsuit. She has alleged that patients in Minnesota are harmed by the challenged laws because the burdensome and unnecessary restrictions on healthcare providers like herself, increase the cost and decrease the availability of sexual and reproductive healthcare. As an obstetrician-gynecologist, Dr. Doe is in a suitable position to vindicate the rights of her patients. Dr. Moe has standing to allege all of the claims she has made to the challenged laws, whether on behalf of herself or on behalf of her patients.

**ALL DEFENDANTS ARE PROPER PARTIES**

As a second basis for their motion to dismiss, Defendants generally contend that the Plaintiffs have not sued the proper parties. They claim that the Defendants must have a unique connection to the challenged laws and their enforcement, in order to be forced to defend them. *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998). They also argue that a person aggrieved by the application of a legal rule does not sue the rule maker, but rather sues the person whose acts hurt her. *See Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995); *Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998).

Plaintiffs generally respond that each of the Defendants in this lawsuit were properly sued because they each have a role in the administration and enforcement of the challenged laws. *See Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014). They also claim that their alleged injuries are fairly traceable to the Defendants and that the declaratory and injunctive relief they request will redress those alleged injuries. *Id.*

## I. THE STATE OF MINNESOTA IS A PROPER PARTY

Defendants contend that the State is not a proper Defendant here, because although criminal prosecutions are brought in its name, the responsibilities for prosecuting crimes lie with local prosecutors. Defendants also contend that "Minnesota courts have repeatedly concluded that the 'State of Minnesota' is not a proper party in cases such as this one." The legal authority they cite for this proposition, however, are unreported decisions from various Minnesota state and federal courts. *See, e.g.*, *Broadkorb v. Minn.*, 2013 WL 588231 at *15-17 (D. Minn. Feb. 13, 2013); *Hoch v. State*, No. 62-CV-15-3953 (2nd Jud. Dist. Ct. Jan. 14, 2016). None of these decisions are binding and this court does not find them analogous enough to be persuasive here.

Plaintiffs contend that, since it is challenging criminal laws and those laws are prosecuted in the name of the State, the State is a proper party. They cite several examples in which the State was a party in cases involving constitutional challenges. *See, e.g.*, *Minn. Med. Ass'n*, 274 N.W.2d at 94; *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 600 (Minn. Ct. App. 2005). It does not appear, however, that the propriety of the State as a party defendant was addressed in any of the cases cited by Plaintiffs. Plaintiffs also contend that suing individual local prosecutors, rather than sue the State, would not lead to complete relief, while adding significant complexity without a corresponding benefit.

In the end, the authority cited by both sides does not provide much guidance for the court on this issue of whether the State is a proper party in a constitutional challenge to its criminal laws. Fundamentally, however, when the claimed injury is traceable to the law itself and the enforcement of

that law is done in the State's name, it seems logical that a party challenging the constitutionality of the law could seek redress against the State. While Plaintiffs could have, for example, sued the prosecuting authority in their residence county, or they could have sued every county and city prosecutor in the State, it seems that the former might not result in complete redress or a fulsome discussion regarding the constitutionality of the challenged laws, and the latter would be chaos. On balance, this court concludes that since the laws are created by the State, and prosecuted in the State's name, that the State is a proper party to defend them.

## II. THE GOVERNOR IS A PROPER PARTY

This court draws the same conclusion on whether the Governor is a proper party in this lawsuit. Plaintiffs argue that the Governor is the chief executive officer of the State and is charged by the State Constitution to ensure that all of Minnesota's "laws [are] faithfully executed." MINN. CONST. art. V, § 3. They also contend that the Governor also has the power to direct the Attorney General to prosecute "any person charged with an indictable offense." Minn. Stat. § 8.01. They maintain it is appropriate to sue the Governor to prevent enforcement of laws criminalizing the provision of abortion services. Finally, they contend that it is the Governor's potential power to direct prosecution, rather than his actual direction of prosecution, that makes the Governor a proper defendant. *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Defendants argue that the Governor's general executive power is insufficient to add the Governor as a party defendant. *See Calzone v. Hawley*, 866 F.3d 866, 870 (8th Cir. 2017). They also claim that the Governor's connection to criminal law enforcement is too attenuated to establish a justiciable controversy. *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 478 (Minn. 1946). According to Defendants, this is because the Plaintiffs have not alleged that the Governor has applied any of the challenged laws against anyone in the past, present or future. They also suggest that "it is extremely unlikely that the Governor would attempt to enforce any criminal statute."

Given recent events, it no longer appears that the power of the Governor to order the Attorney General to prosecute a crime is hypothetical.[2] The Governor is vested with the responsibility to ensure the faithful execution of the laws under the Minnesota Constitution. The Governor is also vested with the authority under Minn. Stat. § 8.01 to direct the Attorney General to enforce the criminal laws of the State of Minnesota. It is that nexus that allows the court to draw a through line from Plaintiffs' injury to the Governor. Defendant's contention that a litigant questioning the constitutionality of a statute must make a showing that the statute is, or is about to be, applied to their disadvantage under *State ex rel. Smith* has been overruled. The United States' Supreme Court stated in *Bolton* that an abortion provider "should not be required to await and undergo a criminal prosecution" to challenge the constitutionality of criminal abortion laws. *Bolton*, 410 U.S. at 188. The Governor is therefore a proper party.

## III. THE ATTORNEY GENERAL IS A PROPER PARTY

The court draws a similar conclusion with regard to the Attorney General. Plaintiffs essentially do not differentiate, in any meaningful way, between the Governor and the Attorney General. They maintain that the Attorney General may, at the Governor's direction, prosecute "any person charged with an indictable offense," including certain challenged laws under Minn. Stat. § 8.01. Defendants emphasize that the Attorney General's authority to prosecute crimes is conditional. The Attorney General prosecutes crimes at the direction of the Governor or at the request of a county attorney.

In a recent filing in this court, however, the Attorney General has represented that he may bring an action and seek relief "requested pursuant to his authority in Minnesota Statutes Chapter 8 to sue for injunctive relief, equitable relief, civil penalties, and damages…for violations of the law of this state respecting unfair, discriminatory and other unlawful practices in business, commerce, or

[2] Amy Forliti, Walz: Minnesota attorney general to take lead in Floyd case, STAR TRIB., May 31, 2020, https://www.startribune.com/minnesota-attorney-general-to-assist-in-george-floyd-case/570910352/

trade. The Attorney General also has common law authority, including *parens patriae* authority, to bring this action to enforce Minnesota's laws, to vindicate the State's sovereign and quasi-sovereign interests, and to remediate all harm arising out of—and provide full relief for—violations of Minnesota's laws." *See* Complaint, *State v. American Petroleum Institute, et al.*, ECF No. 2, No. 62-CV-20-3837, at pp. 4-5 (2nd Jud. Dist. Ct. Jun. 24, 2020); *see also State v. Kris Schiffler, et al.*, ECF No. 3, No. 73-20-3556, at p. 3 (7th Jud. Dist. Ct. May 17, 2020).[3] Its seems clear that, as a constitutional officer of the State, the Attorney General has a general obligation to ensure the State's laws are faithfully executed and to remediate all harm arising out of violations of the State's laws. Like the Governor, that nexus allows the court to draw a through line from Plaintiffs' injury to the Attorney General. Plaintiffs need not "await and undergo a criminal prosecution" to challenge the constitutionality of criminal abortion laws. *Bolton*, 410 U.S. at 188. For these reasons, the Attorney General is a proper party to this lawsuit.

## IV. THE COMMISSIONER, MEDICAL BOARD, AND NURSING BOARD ARE PROPER PARTIES

Defendants argue that the claims alleged by Plaintiffs against the Commissioner should be dismissed because the Department of Health lacks enforcement authority and because there is no allegation that the Department of Health has taken or plans to take adverse action against Plaintiffs. Similarly, Defendants claim that the Medical Board and the Nursing Board are not appropriate defendants because there is no allegation that they have taken or plan to take adverse actions against Plaintiffs. Plaintiffs contend that the Commissioner, the Medical Board and the Nursing Board all are appropriate Defendants because they all have enforcement authority over certain of the challenged laws. They also contend that their pleading clearly designated which laws they have the authority to enforce.

[3] *See generally United Power Ass'n v. CIR.*, 483 N.W.2d 74 (Minn. 1992)(providing that courts may take judicial notice of matters in the public record).

The court agrees that the Commissioner, Medical Board and Nursing Board are all appropriate Defendants on the challenged laws they have the authority to enforce.

**DEFENDANTS' RULE 12 RELIEF IS GRANTED IN PART, DENIED IN PART**

Defendants claim that all the claims alleged by Plaintiffs fail as a matter of law and should be dismissed. The court will address the claims in the sequence raised in the First Amended Complaint.

## I. PLAINTIFFS' PRIVACY CLAIM HAS STANDING

Count I of the First Amended Complaint alleges that each of the challenged laws, except for the advertising ban on STI treatments, violate the right to privacy guaranteed by MINN. CONST. art. I, §§ 2, 7, 10 and *Gomez*, 542 N.W.2d at 27. In *Gomez*, the Minnesota Supreme Court found that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy and provides broader protection than that afforded under the federal constitution. *Id.* at 27, 30. The *Gomez* court also observed that it "is critical to note that the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then violates this fundamental right." *Id.* at 31 (emphasis in original). A "law must impermissibly infringe upon a fundamental right before it will be declared unconstitutional as violative of the right of privacy." *Id.* at 27. Laws that infringe of the abortion right are subject to strict scrutiny. *Id.* at 30.

Defendants contend that Plaintiffs have failed to allege how each of the challenged laws impact the abortion decision itself and also state that "it is not conceivable that they can overcome that burden." They maintain that some of the challenged laws "have no logical impact on a woman's decision to choose whether to abort," but rather pertain to restrictions and regulations on medical practitioners who do not have a fundamental right to perform abortions. As an example, Defendants contend that because the reporting requirements for healthcare providers involve the collection of public health data, which is anonymized and never publicly disclosed, "there is simply no basis upon

which to allege that such reporting requirements impact a woman's fundamental right to choose abortion."

Defendants also cite the fetal tissue disposition requirement as a law which does not impact the abortion choice. They maintain that the method of disposal doesn't need to be discussed with the patient and therefore "is not likely to impact her choice regarding whether to carry a fetus to term." Finally, they argue that the Eighth Circuit has already determined that the fetal tissue disposition requirement does not violate a woman's right to privacy under the federal constitution. *See Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 (8th Cir. 1990).[4]

Defendants also make similar, but cursory arguments regarding other challenged laws, because they have "no logical impact on the *patient's* right to choose." (emphasis in original).

Plaintiffs maintain that they have adequately alleged that the challenged laws infringe on the abortion right and are enough to state privacy claims under Minn. R. Civ. P. 8.01. They allege that the challenged laws infringe on the abortion right by: (1) restricting abortion access by making it harder to access care, (2) driving up the cost of abortion care, (3) imposing unnecessary burdens on abortion patients, (4) providing patients with misinformation and requiring them to delay their abortion decision, (5) causing patients to experience shame and stigma, and (6) preventing abortion providers from practicing in accordance with current medical standards. They also allege that none of the challenged laws are necessary to promote patient health or any other compelling state interest.

They reject Defendants' proposition that a law cannot infringe on the abortion right if it regulates healthcare providers or unless it actually prevents a woman from making the decision to have an abortion. Instead, they maintain that the privacy right is infringed if it increases the burden and expense that some must pay to obtain an abortion and by preventing some people from obtaining an abortion.

[4] While this authority may be persuasive, it is not dispositive on a motion to dismiss.

The problem with Defendants' argument is that it doesn't accept the pleadings as true. For example, Defendants contend that it is not "logical" for the collection and reporting of abortion data by healthcare providers would dissuade a patient from accessing abortion care. They also contend that the method of fetal tissue disposal doesn't need to be discussed with the patient and therefore "is not likely to impact her choice regarding whether to carry a fetus to term." These are simply expressions of skepticism at the actual allegations made by Plaintiffs. It is possible that there is evidence which might be produced, consistent with Plaintiffs' theory, to grant their requested relief. *Walsh*, 851 N.W.2d at 603.

Furthermore, Plaintiffs specifically allege that the reporting requirements: (1) "intrude on the privacy of abortion patients and impose heavy administrative burdens on abortion providers," (2) "subject abortion patients and providers to burdens that are not imposed on other patients and healthcare providers," (3) "infringe on the fundamental right to abortion access," and (4) "are not necessary to serve Minnesota's interest in public health or any compelling interest." Plaintiffs specifically allege that the fetal disposition requirement: (1) causes some individuals who have abortions or miscarriages to experience shame or stigma by sending a message that they are responsible for the death or a person, (2) drives up the cost of care, (3) "infringes on the fundamental right to abortion access," and (4) "is not necessary to serve Minnesota's interest in public health or any compelling state interest." Plaintiffs have alleged that the challenged laws, even though the collection of data may be anonymized and confidential, or despite that fetus disposition does not necessarily require discussion with a patient, affects the patient's decision to abort and therefore infringes on that decision-making process. On these allegations, it is conceivable that Plaintiffs will be able to produce evidence to obtain the relief they request. Plaintiffs have stated a cause of action in Count I which survives a motion to dismiss.

## II. PLAINTIFFS' EQUAL PROTECTION CLAIM HAS STANDING

Count II of the First Amended Complaint alleges that each of the challenged laws violate the guarantee of equal protection of the laws in the Minnesota Constitution. The Minnesota Constitution guarantees that "[n]o member of this state shall be disenfranchised or deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." MINN. CONST. art. 1, § 2. To state an equal protection claim in Minnesota, a plaintiff must allege that a challenged classification impermissibly treats two groups of similarly situated people differently. *Scott v. Mpls. Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000). Allegations about the existence of two "identifiable" groups who are treated differently meet the "threshold showing for an equal-protection claim." *Forslund*, 924 N.W.2d at 35. Depending on the classification, judicial scrutiny may be intermediate or strict. *See Greene v. Comm'r of Minn. Dep't of Human Svcs.*, 755 N.W.2d 713, 725 (Minn. 2008); *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015).

Defendants contend that Plaintiffs have not stated an equal protection claim, because they have not alleged "what other specific medical procedures are treated differently from abortion for purposes of their equal protection challenges." Plaintiffs contend that there is no pleading requirement, at this stage, to identify any specific medical procedures that are treated differently. They allege that it is sufficient that they have identified three impermissible classifications. First, Plaintiffs allege that the challenged laws single out abortion patients and treat them differently that other similarly situated patients. For example, Plaintiffs allege that the reporting requirements are different, the delay requirement is different, the parental notification requirement is different, and so on. Second, Plaintiffs allege that the challenged laws treat abortion providers differently than other similarly situated healthcare providers. For example, Plaintiffs allege that medical practice limitations are different, the hospitalization requirement is different, and the penalties for violating abortion laws

are harsher. Third, Plaintiffs allege that the challenged laws discriminate against women, based on antiquated laws.

Plaintiffs are not required, at the pleading stage, to identify a specific medical procedure that is different. It is sufficient that they have alleged that the challenged laws treat abortion patients and other medical patients differently, that those laws treat abortion providers and other medical providers differently, and that they treat women differently than others. Plaintiffs have stated a cause of action in Count II which survives a motion to dismiss.

## III. PLAINTIFFS' SPECIAL LEGISLATION CLAIM HAS STANDING

Count III of the First Amended Complaint alleges that the challenged laws constitute special legislation which is prohibited by the Minnesota Constitution. MINN. CONST. art XII, § 1. This article states in part:

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

"Class legislation," occurs when the legislature "selects particular individuals from a class, and imposes upon them special burdens, from which others from the same class are exempt, and thus denies them the equal protection of the laws." *State ex rel. Bd. Of Courthouse & City Hall Comm'rs of City of Mpls. & County of Hennepin v. Cooley*, 58 N.W. 150, 153 (Minn. 1893). Laws are not special simply because different rules are applied to different subjects. *Visina v. Freeman*, 89 N.W.2d 635, 651 (Minn. 1958). This provision does, however, require a law's classifications to "be based on substantial distinctions which make one class really different from another…suggesting the necessity of different legislation with respect to them." *State ex rel. Bd.*, at 153. Or, as stated in *In re Tveten*:

> While the constitutional prohibition against special legislation does not deprive the legislature of the power to create classes and apply different rules to different classes, it must adopt a proper classification basis. That classification must be based upon

> substantial distinctions, which make one class substantially different, in a real sense, from another.

*In re Tveten*, 402 N.W.2d 551, 558 (Minn. 1987)(citation omitted). If a "classification is so patently arbitrary as to demonstrate constitutional evasion, the courts will void the enactment." *Id.* Courts apply a rational basis test to assess the constitutional propriety of legislative classifications. *Id.*

A classification will be deemed constitutionally proper:

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

*Id.* (quoted source omitted).

Defendants argue that the challenged laws meet the *Tveten* test for the constitutional propriety of classification. They contend that the challenged laws are general laws, which apply to all medical providers providing abortion care and all advertisers seeking to advertise STI treatments. They also allege that regulations and laws which address specific medical conditions or procedures are not special laws. *See Kaljuste v. Hennepin County Sanatorium Comm'n*, 61 N.W.2d 757, 764 (Minn. 1987); *Kellerman v. City of St. Paul*, 1 N.W.2d 378, 380 (Minn. 1941). According to Defendants, "abortion care is distinct from other medical care, and as a result, the regulation thereof does not constitute special legislation…"

Plaintiffs contend that they allege that the challenged laws treat abortion providers, patients and women differently than other healthcare providers and patients without a valid basis. They argue that Defendants' observation that "abortion care is distinct from other medical care" is a question of fact that goes to the merits of Plaintiffs' claim, rather than something that can be resolved on a motion to dismiss. They contend that their pleading entitles them to present evidence demonstrating that the class distinctions created by the challenged laws are not relevant to the purpose of the legislation.

This court agrees that whether abortion care is different than other medical care is a fact issue. Plaintiffs bear a substantial burden to demonstrate that the classifications among patients, providers and women, are "patently arbitrary" or turn on "substantial distinctions." That is not a burden, however, that they bear at the pleading stage. Plaintiffs have stated a cause of action in Count III which survives a motion to dismiss.

## IV. PLAINTIFFS' FREE SPEECH CLAIM HAS STANDING

In Count IV of the First Amended Complaint, Dr. Doe and Ms. Moe allege that the mandatory disclosure requirements and the ban on advertising treatment for STIs violate their right to free speech guaranteed by MINN. CONST. art. I, § 3.[5] The First Amendment of the United States Constitution states that "Congress shall make no law…abridging the freedom of speech." U.S. CONST. amend. I. Article I, Section 3 of the Minnesota protects the rights of "all persons" to "freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. I, § 3. The right to free speech under the Minnesota Constitution is co-extensive with the right to free speech under the U.S. Constitution. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014).

"It is…a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." *Agency for Intern. Development v. Alliance for Open Society Intern., Inc.*, 570 U.S. 205, 213 (2013)(citations omitted). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). This is so, because mandating speech that a speaker would not otherwise say necessarily alters its content. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Thus, speech compelled by the government is typically considered content-based regulation. *Id.*

[5] . The Defendants' motion to dismiss Count IV is limited to the mandatory disclosure requirements. Accordingly, this court's analysis is limited to that claim only.

Minn. Stat. § 142.4242 requires abortion providers to make several different disclosures to their patients. Subdivision (a)(1) requires the physician who is to perform the abortion or a referring physician to tell the patient 24 hours before the abortion:

> (i) the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility;
>
> (ii) the probable gestational age of the unborn child at the time the abortion is to be performed;
>
> (iii) the medical risks associated with carrying her child to term; and
>
> (iv) for abortions after 20 weeks gestational, whether or not an aesthetic or analgesic would eliminate or alleviate organic pain to the unborn child caused by the particular method of abortion to be employed and the particular medical benefits and risks associated with the particular anesthetic or analgesic.

Minn. Stat. § 145.4242(a)(1)(i-iv). The patient must certify in writing that the required disclosures have been made as a condition for obtaining an abortion. Minn. Stat. § 145.4242(a)(3).

In their First Amended Complaint, Dr. Doe and Ms. Moe claim that "[s]ome of the information that the mandatory disclosure requirements compel abortion providers to tell their patients is irrelevant, misleading, and/or ideologically charged." For example, they contend that there is no credible scientific evidence which supports a claim that having an abortion increases a person's risk of breast cancer or that a "previability fetus can feel pain." So Dr. Doe and Ms. Moe maintain that the "mandatory disclosure requirements compel healthcare providers to say things to their patients that are incompatible with accepted medical standards and bioethical principles" and that the mandatory disclosure requirements "turn the traditional informed consent process for medical treatment on its head."

Defendants argue that a nearly identical Pennsylvania statute was challenged by abortion providers as a violation of the First Amendment in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992). Defendants claim that the United States Supreme Court found the Pennsylvania disclosure statute did not violate the providing physician's First Amendment rights. *Id.* at 884. They

therefore argue that because the United States Supreme Court has already found that "a nearly identical disclosure statute does not violate a physician's free speech rights," and because the Minnesota Constitution provides the same free speech guarantees as the United States Constitution, Count IV should be dismissed.

Defendants also contend that the mandatory disclosure statutes contain qualifying language, which places the discretion of the content to be disclosed to the physician. Specifically, they contend the phrase "when medically accurate," provides the physician with the option to make or not make disclosures about the risks of "breast cancer, danger to subsequent pregnancies, and infertility." Similarly, they contend that the phrase "whether or not" anesthetic or analgesic will eliminate or alleviate fetal pain gives the physician discretion in the informed consent provided to the patient. At oral argument, Defendants suggested that the Legislature expected that the litany of disclosures might be accurate when the statute was drafted, but not so in the future.

Dr. Doe and Ms. Moe argue that the Minnesota mandatory disclosure statute at issue here differs in critical ways from the statute upheld in *Casey*. They claim there was no reference to breast cancer risk, danger to subsequent pregnancies or infertility in the Pennsylvania disclosure statute. They also claim there was no reference to fetal pain or treating any alleged fetal pain in the statute considered in *Casey*. In sum, they contend that the subject Minnesota disclosure statute is different enough from that at issue in *Casey* that their free speech claim survives a motion to dismiss.

Moreover, Dr. Doe and Ms. Moe contend that they should be entitled to present evidence to support their allegation that the mandatory disclosures are neither "truthful," nor "nonmisleading" information. *Id.* at 882. They have specifically alleged that some of the statutory disclosures are "debunked" and "false" claims.

Although *Casey* addressed an abortion disclosure much like the disclosure at issue here, it is different in enough significant ways so that it does not dispose of Dr. Doe and Ms. Moe's free speech claim at this stage.

Further, the argument of Dr. Doe and Ms. Moe is that some of the risks or treatments referenced in the mandatory disclosure are "debunked" and "false" and therefore not "truthful" and not "nonmisleading." Even if Defendants are correct about the intention of the Legislature when it drafted the statute, the allegation raised by Dr. Doe and Ms. Moe is that the inclusion of a "debunked" risk in the statute (or in the materials issued by the Health Commissioner) is itself misleading, whether optional or not. Moreover, the fetal pain disclosure requires the physician to discuss "whether or not" anesthetics or analgesics will eliminate or alleviate pain to the fetus as a result of the abortion procedure. The statute presumes that a previability fetus can feel pain, which Dr. Doe and Ms. Moe contend is a "debunked" and therefore "false" premise. This does not give the physician a choice of discussing fetal pain with the patient. The only discretion for the physician in the statute appears to be her advice on the efficacy of anesthetic or analgesic on the disputed previability fetal pain. At this stage, therefore, Claim IV states a cause of action which survives a motion to dismiss.

## V. PLAINTIFFS' VAGUENESS CLAIM DOES NOT HAVING STANDING

Count V of the First Amended Complaint alleges that the hospitalization requirements in Minn. Stat. § 145.412, subds. 1(2), 3(1) violate the prohibition on vague laws embodied in MINN. CONST. art. 1, § 7. That constitutional provision states that no person: "shall be held to answer for a criminal offense without due process of law * * *. And it has been held that due process requires that criminal statutes be sufficiently clear and definite to warn a person of what conduct is punishable. The goal is to prevent arbitrary, standardless enforcement." *State v. Davidson*, 481 N.W.2d 51, 56 (Minn. 1992)(cleaned up).

"The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015)(cleaned up). "Even when speech is not at issue, the vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)(cleaned up). The most important element of a vagueness analysis is "whether any imprecision in the statute promotes arbitrary and discriminatory enforcement." *Davidson*, 481 N.W.2d at 56 (citation omitted). "A statute must offer guidance to law enforcement officials limiting their discretion as to what conduct is allowed and what is prohibited." *Id.* (citation omitted).

Minn. Stat. § 145.412, subd. 1 provides, in pertinent part, "[i]t shall be unlawful to willfully perform an abortion unless the abortion is performed: * * * (2) in a hospital or abortion facility if the abortion is performed after the first trimester." Minn. Stat. § 145.411, subd. 4 defines an "abortion facility" as "those places properly recognized and licensed by the state commissioner of health under lawful rules promulgated by the commissioner for the performance of abortions." The licensing regulations, however, were declared unconstitutional in 1977 and the Health Commissioner does not administer any program through which abortion clinics may become licensed. *See Hodgson v. Lawson*, No. 4-74-155, slip op. at 7 (D. Minn. Mar. 4, 1977).

Minn. Stat. § 145.412, subd. 3 provides, in pertinent part, "[i]t shall be unlawful to perform an abortion when the fetus is potentially viable unless: (1) the abortion is performed in a hospital * * *."

Failure to comply with the hospitalization requirements is a felony. Minn. Stat. § 145.412, subd. 4. Failure to comply with these requirements also subjects licensed physicians and nurse

midwives to professional discipline. *See* Minn. Stat. § 147.091, subd. 1(f) and Minn. Stat. § 148.261, subd. 1(18), (26).

Defendants contend that there is no ability in Minnesota, outside the context of speech, to facially challenge the constitutionality of a criminal statute, because such vagueness challenges must be examined in light of the defendant's actual conduct. *See State v. Becker*, 351 N.W.2d 923, 925 (Minn. 1984)(citation omitted). They also contend that Minn. Stat. § 145.412, subds. 1 and 3 are not vague as a matter of law. They argue that the fact the Department of Health does not currently define the phrase "abortion facility" does not render the statutes void for vagueness. Rather, Defendants contend that a person of ordinary intelligence would conclude that if not performed in a hospital, a second or third trimester abortion could be deemed in violation of Minn. Stat. § 145.412, subd. 1(2) and 3(1), unless and until the Department of Health issues a regulation stating otherwise.

Plaintiffs cite several cases in which the United States Supreme Court has declared laws which do not burden speech void-for-vagueness on their face. *See, e.g.*, *Johnson*, 135 S. Ct. at 2563; *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). They contend that Defendant's argument in this regard is dispelled by the Court's pronouncement in *Johnson*: "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2560-61 (emphasis in original).

Plaintiffs also argue that the hospitalization statutes create uncertainty which "threatens to inhibit the availability of abortion care after the first trimester and thereby inhibit the exercise of constitutional rights…" According to Plaintiffs, the statutes do not meet the "minimal guidelines to govern law enforcement" required by due process. *Kolender*, 461 U.S. at 358 (quotation omitted).

While Plaintiffs have brought their vagueness challenge under MINN. CONST. art. 1, § 7, the Minnesota Supreme Court routinely looks to United States Supreme Court jurisprudence for guidance

on addressing such challenges. Such facial vagueness challenges are allowed under the United States Constitution. The cases cited by Defendants do not address whether a facial vagueness challenge to a non-speech statute is prohibited in Minnesota. It appears doubtful, therefore, that the Minnesota Supreme Court intended to provide less due process rights under the Minnesota Constitution than those available under the United States Constitution. Plaintiffs may make a facial challenge to the hospitalization statutes.

Having found that the Plaintiffs may make a facial vagueness challenge to the hospitalization statutes, the court will address whether that challenge states an adequate claim. The thrust of Plaintiffs' vagueness challenge centers on the inclusion of the option of a second trimester abortion in "an abortion facility," as an alternative to an abortion in a hospital. *See* Minn. Stat. § 145.412, subd. 1(2). As all parties seem to agree, there is no abortion facility in Minnesota, as defined by Minn. Stat. § 145.411, subd. 4, because the Health Commissioner does not administer any program through which an abortion facility could become licensed. Plaintiffs contend that this provision is vague because it is unclear whether and to what extent an abortion provider may provide abortion care in an outpatient setting after the first trimester.

While Minn. Stat. § 145.412, subd. 1(2) certainly provides a false choice for those seeking an abortion, simply because there are no "abortion facilities" licensed to perform second trimester abortions on an outpatient basis, the statute is not vague for that reason. It seems fairly clear, when viewed together with Minn. Stat. § 145.411, subd. 4, that a second trimester abortion may only take place in a hospital or a licensed abortion facility. Patients, providers and law enforcement, therefore, would understand that an abortion facility would require a license to perform outpatient abortions. Though this statute might be unconstitutional for other reasons, it is not unconstitutionally vague.

Moreover, Plaintiffs' vagueness challenge to Minn. Stat. § 145.412, subd. 3(1) is somewhat difficult to understand. That provision clearly states that the only option for a patient seeking an

abortion "when the fetus is potentially viable," is to have the abortion performed in a hospital. Plaintiffs do not explain in their First Amended Complaint or in their argument in opposition to the motion to dismiss, how this provision is unconstitutionally vague. Again, while this provision may be unconstitutional for other reasons, it is not unconstitutionally vague. Count V, therefore, is dismissed.

## VI. PLAINTIFFS' DECLATORY RELIEF REQUEST HAS STANDING

Finally, Count VII of the First Amended Complaint requests declaratory relief under the Uniform Declaratory Judgments Act. *See* Minn. Stat. §§ 555.01, *et seq.* They seek a declaration that all of the challenged laws are unconstitutional or are otherwise unenforceable. "A declaratory judgment is a procedural device through which a party's existing legal rights may be vindicated so long as a justiciable controversy exists." *Cruz-Guzman v. State*, 916 N.W.2d 1, 13 (Minn. 2018)(cleaned up).

In support of their motion to dismiss Count VII, Defendants emphasize Minn. Stat. §§ 555.11, which provides in part: "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." As discussed further above, Defendants contend that the failure of Plaintiffs to join the city and county attorneys who are responsible for prosecuting crimes, is a "fatal defect" because those prosecutors are interested parties. *See Unbank Co., LLP v. Merwin Drug Co.*, 677 N.W.2d 105, 107 (Minn. Ct. App. 2004). In the absence of those interested parties, Defendants claim the case is not justiciable. *See Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 276 (Minn. Ct. App. 2001).

Plaintiffs contend that they do not need to sue every non-party who might be impacted by a ruling in this case. First, they cite *Cruz-Guzman* as an example of the Minnesota Supreme Court's rejection of a similar argument made by the State. In that case, the State contended that school districts and charter schools were necessary parties under section 555.11 because the relief that the appellants sought would affect matters controlled by those school districts and charter schools, such as funding

allocation, class assignments, teacher assignments and discipline. *Cruz-Guzman*, 916 N.W.2d at 14. According to the State in that case, those matters fell within the discretion of the individual school districts or charter schools, not the State. *Id.* (citations omitted). Appellants contended that the school districts and charter schools were unnecessary parties because they were seeking remedies from the State, not individual school districts or charter schools. *Id.* The Minnesota Supreme Court agreed with appellants that the relief sought from the State did not require the joinder of school districts and charter schools. *Id.* It reasoned that: "[e]ven if the school districts and charter schools might eventually be affected by the actions potentially taken by the State in response to this litigation, those possible effects are not enough to require that the school districts and charter schools be joined as necessary parties." *Id.* The *Cruz-Guzman* court reiterated the district court's rationale with favor: "many non-parties are bound to be affected by a judicial ruling in an action regarding the constitutionality of state statutes or state action, but they cannot all be required to be a part of the suit." *Id.*

This court will follow the rationale and holding of *Cruz-Guzman*. Even though city and county prosecutors are bound to be affected by a judicial ruling here regarding the constitutionality of the challenged laws, they cannot all be required to be a part of this lawsuit. The relief requested by Plaintiffs does not require the joinder of Minnesota's city and county prosecutors. Their absence is not a "fatal defect." Defendants' motion to dismiss Count VII is therefore denied.

**CONCLUSION**

The parties must meet and confer on a discovery plan and shall submit a proposed scheduling order for consideration by the court by July 2, 2020.

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