STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

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

ORDER & MEMORANDUM

This matter came before the undersigned on September 29, 2020 on Proposed Defendant-Intervenor Ninety-First Minnesota State Senate's motion to intervene.

Attorneys Jess Braverman, Juanluis Rodriguez and Melissa Shube appeared on behalf of Plaintiffs Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis and Our Justice. Solicitor General Liz Kramer and Assistant Attorney General Kathryn Iverson Landrum 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. Attorneys Samuel Diehl and Teresa Collett appeared on behalf of Proposed Defendant-Intervenor Ninety-First Minnesota State Senate.

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. Proposed Defendant-Intervenor Ninety-First Minnesota State Senate's motion for intervention as of right is **DENIED**.

2. Proposed Defendant-Intervenor Ninety-First Minnesota State Senate's motion for permissive intervention is **DENIED**.

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

BY THE COURT:

Gilligan, Thomas(Judge)
Oct 31 2020 12:54 PM

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

Dated: October 30, 2020

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 advertising sexually transmitted infection treatments, and related criminal, civil and administrative penalties for violating 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 alleges that the law which imposes hospitalization requirements on second-trimester

abortions is unconstitutionally vague in violation of MINN. CONST. art. I, § 7.[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, 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 as for 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, the court heard oral argument and took the motion under advisement. On June 25, 2020, the court granted the motion to dismiss on Count V of the Complaint but denied dismissal of any other claims against Defendants.

After the hearing on the motion to dismiss, the court entertained a motion for limited intervention by Proposed Intervenors Pro-Life Action Ministries, Inc. ("PLAM") and Association for

[1] This Count has since been dismissed.

Government Accountability ("AGA"). PLAM and AGA contended that the Defendants had not alleged a defense that there is no private cause of action for violating the Minnesota Constitution, which they claim was a complete defense to all claims alleged against all Defendants. As such, they sought limited intervention to assert this defense. Both Plaintiffs and Defendants timely objected to the intervention, the motion to intervene was comprehensively briefed by all sides and the court held another hearing and took the motion under advisement.

On January 28, 2020, this court issued its Order denying PLAM and AGA's motion for both limited intervention as of right and limited permissive intervention. On February 20, 2020, PLAM and AGA filed a Notice of Appeal of the January 28, 2020 Order on its motion. PLAM and AGA then 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. PLAM and AGA also filed a Petition for Accelerated Review on March 24, 2020. That petition was denied by the Minnesota Supreme Court on May 19, 2020. On October 12, 2020, the Minnesota Court of Appeals affirmed this court's denial of PLAM and AGA's motion to intervene as of right. *Doe v. State of Minn.*, A20-0273 (Minn. Ct. App. Oct. 12, 2020).

On July 29, 2020, Proposed Intervenor-Defendant Ninety-First Minnesota State Senate ("Ninety-First Senate") filed its Notice of Intervention. It contends that it "is the only institution in Minnesota's State Government that is able to defend the challenged statutes without conflict or qualification." It has questioned the Attorney General's ability and interest to defend the challenged laws, because he has made public political statements and taken positions in other matters, which indicate that he is "pro-choice." It has also suggested that his "deep and ongoing political relationships with Gender Justice and its staff" create an appearance of a conflict in the defense of this lawsuit. Plaintiffs and Defendants filed timely objections to the intervention notice. The motion to intervene

was comprehensively briefed by all sides, the court held another hearing on September 29, 2020 and took the motion under advisement.

RULE 24 INTERVENTION STANDARDS

The Ninety-First Senate moved to intervene as of right under Minn. R. Civ. P. 24.01 and alternatively for permissive intervention under Minn. R. Civ. P. 24.02.

Rule 24.01 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, the Ninety-First Senate 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 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). Parties seeking intervention of right must satisfy all of these factors. *Luthen v. Luthen*, 596 N.W.2d 278, 280-81 (Minn. Ct. App. 1999).

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. Accordingly, in order to obtain permissive intervention, 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.*

This court is not persuaded that the Ninety-First Senate has identified interests that would entitle it to intervene, nor is the court persuaded that the interest of the Ninety-First Senate would be impaired if the court does not permit intervention. Moreover, the Defendants can be ably represented by the Office of the Minnesota Attorney General to protect any legitimate interests that the Ninety-First Senate could articulate in connection with this dispute. The court therefore denies the motion to intervene.

In its quest to intervene in this lawsuit, the Ninety-First Senate has advanced several theories which suggest that the Attorney General is unable to do his job in defending the challenged laws against a constitutional attack by Plaintiffs. The contentions of the Ninety-First Senate in this regard fall into two broad categories: (1) the Attorney General's "political connections" to several employees and board members of Gender Justice (which is not a party to this lawsuit, but which employs the attorneys representing Plaintiffs in this lawsuit) "appear[ ] to conflict with his defense" in this matter; and (2) a "vigorous defense" of this lawsuit "appears to conflict" with the Attorney General's "personal, political interests," because he has made statements and taken policy positions which suggest that "he does not share the pro-life goals and interests of the Senate Majority that voted to intervene." The Ninety-First Senate maintains that it wants to intervene to ensure that the "legal process is not tainted by conflicting interests," because the Attorney General's relationships and long-standing policy positions "create an appearance of divided loyalties and conflicts that would forever cloud the public's perception of this proceeding, whatever its outcome." According to the Ninety-First Senate, its intervention "will avoid any air of illegitimacy brought about by the relationships and concerns" which it has raised.

In the end, it claims to have met all of the required considerations for either intervention as of right or permissive intervention.

As for intervention as of right, the Ninety-First Senate contends that its motion is timely. It maintains, despite that this lawsuit was commenced over one year ago, it appropriately waited until this court decided Defendants' motion to dismiss to intervene. It also maintains that discovery is only in its nascent stages, so intervention now will not complicate or delay the case.

The Ninety-First Senate argues that it has multiple interests here, each of which justifies its intervention. First, it contends that as "a body that passed the statutes at issue in [this] case," it has a cognizable interest in defending the enforceability of those statutes. Second, it contends that under separation of powers, it can elect to defend its interests "by participating in the process to ensure [ ] all of the evidence is before the Court," and contends that it has an interest "in sustaining and furthering judicial deference to legislative judgment and fact-finding."

Finally, it combines the final two elements for consideration of a motion to intervene as of right. It contends that the Ninety-First Senate is unable to protect its interests unless it intervenes because "of [the Attorney General's] relationships, statements, and actions…it is beyond dispute that [the Attorney General] might not, in fact, represent the Senate's interests in this litigation, which is sufficient" to establish both that its interests will be affected by the disposition of this matter and that the representation of the Attorney General is inadequate. It suggests that "[p]roper resolution" of the case "will require both expert testimony and legal experience in representing the interests of states in regulating abortion" and questions the experience of the Office of the Minnesota Attorney General to defend the challenged laws.

Alternatively, the Ninety-First Senate contends that it is entitled to permissive intervention. It suggests that both sides of this lawsuit may represent similar interests. It also contends that it must "intervene before it can be certain whether there will be collusion on summary judgment or through a later settlement." Generally, the Ninety-First Senate echoes the arguments which it made in support of its claim of entitlement to intervention as of right.

Plaintiffs oppose intervention. Broadly, they maintain that the Ninety-First Senate's participation in this lawsuit "would undoubtedly interject partisan politics into a case concerning important constitutional issues and the rights of vulnerable people." They largely avoid addressing the contentions of the Ninety-First Senate regarding the Attorney General. But they object to any insinuation that their clients are not real parties in interest or that they are somehow colluding with Defendants.

First, Plaintiffs argue that the Ninety-First Senate's purported interests cannot warrant intervention as of right. According to Plaintiffs, the Ninety-First Senate, as a legislative body, has no interest in the challenged laws because it did not actually pass any of them. Plaintiffs also contend that legislators' general interest in defending legislation cannot support intervention as of right, because they do not stand to suffer actual injury as the result of this lawsuit. Further, Plaintiffs contend that the Ninety-First Senate's purported interest in maintaining separation of powers is also insufficient to warrant intervention. They claim that the Ninety-First Senate's insinuation of collusion between Plaintiffs and Defendants is "baseless." Finally, they contend that the Ninety-First Senate's purported interest in promoting separation of powers is a collateral, rather than a direct, interest in the subject of the lawsuit.

Second, Plaintiffs maintain that the Ninety-First Senate has not adequately demonstrated that the disposition of this lawsuit will impede its ability to protect its interests. Plaintiffs contend that the Ninety-First Senate shares an interest in defending the challenged laws with Defendants, who are State officials charged with enforcing them. They therefore argue that the challenged laws will be zealously defended whether the Ninety-First Senate intervenes in this lawsuit or not.

Third, Plaintiffs contend that the Ninety-First Senate's interests are adequately represented by Defendants, particularly because Defendants are government parties. Plaintiffs argue, therefore, that Ninety-First Senate bears a higher burden of demonstrating inadequacy of representation; for

example, by showing that its interests are not shared by the general citizenry, or where Defendants committed misfeasance or nonfeasance in protecting the public. They argue that the mere allegation that the Attorney General cannot be trusted to defend abortion laws because of his personal views on abortion is not sufficient to meet this burden.

Last, Plaintiffs argue that the Ninety-First Senate's motion is untimely, because this matter has already been pending for well over a year.

As to the Ninety-First Senate's permissive intervention, Plaintiffs contend that it has failed to identify a common question of fact or law with the underlying action. Plaintiffs contend that the Ninety-First Senate's concerns about ostensible conflicts of the Attorney General in defending the challenged laws cannot meet this permissive intervention factor. They also argue that allowing intervention will cause the original parties to the lawsuit to suffer undue delay and prejudice. They maintain that the litigation tactics used by the Ninety-First Senate in making its motion demonstrate that permitting intervention "would increase the burdens associated with discovery, complicate motion practice, delay trial, and distract from the important constitutional issues presented by this case."

Defendants contend that the Ninety-First Senate's accusations regarding the Attorney General are inappropriate, inflammatory and baseless. They claim that the Attorney General has no conflict as a matter of law, the allegation about collusion is unsupported, and that the Ninety-First Senate's "statements to the contrary are an unfortunate political stunt wasting judicial time and resources."

To begin with, Defendants contend that the Ninety-First Senate lacks standing because a "mere interest" in a problem is not enough to show that a party is "aggrieved or adversely affected." Essentially, Defendants argue that the Ninety-First Senate has nothing to gain or lose in this litigation.

With regard to the Ninety-First Senate's motion to intervene as of right, Defendants argue that it has not satisfied any of the four factors to intervene. Similar to Plaintiffs, Defendants contend

that the motion is untimely. Defendants contend that the Ninety-First Senate has known about this litigation since June 2019, but waited a year to intervene. They contend that this court should reject the Ninety-First Senate's wait-and-see approach to intervention.

Defendants also claim, as they did in support of their argument on standing, that the Ninety-First Senate lacks a legal right or cognizable interest that will be impacted or threatened by this lawsuit. The constitutional challenges in this lawsuit do not: (1) directly challenge the Ninety-First Senate's authority; or (2) trigger an interest sufficient to intervene simply because one of its predecessor Senates passed the challenged laws. They maintain that allowing a legislative body to intervene as of right over challenges to legislation, would allow it to have the right to participate in every case involving a constitutional challenge to a state statute.

The Defendants also reject the Ninety-First Senate's separation of powers arguments as a basis for intervention as of right. They claim that the Ninety-First Senate's asserted interests in this regard – ensuring that Defendants do not concede the unconstitutionality of any of the challenged laws and protecting judicial deference to legislative judgment and fact finding – belong to other branches of government. According to the Defendants, the Senate's role is to pass legislation, not to defend or enforce it. Defendants maintain that the duty and authority of the executive branch is to defend Minnesota statutes in court and the role of the judicial branch is to determine whether statutes are constitutional. Finally, Defendants contend that the Ninety-First Senate's articulated interest in the litigation process (i.e., the defense of the laws) is insufficient to demonstrate a direct interest in the subject of the litigation (i.e., the constitutionality of the challenged laws).

The Defendants also contend that the Ninety-First Senate has not established that its interests would be adversely affected if this litigation was conducted without its participation. They contend that Defendants and the Ninety-First Senate have the exact same interest in upholding Minnesota law.

Defendants maintain that the Ninety-First Senate's proffered differing motivations between them is speculative and irrelevant, especially given Defendants' zealous defense of this lawsuit.

Last, Defendants contend that, under any measure, the Ninety-First Senate cannot demonstrate that their defense of this lawsuit has been inadequate. In fact, the Defendants observe that the Ninety-First Senate has not even asserted that the legal defense presented by Defendants is inadequate. According to Defendants, this court has already determined in connection with a prior motion to intervene by PLAM and AGA, that their defense has been zealous and therefore adequate. Defendants argue that the attack upon their defense team's experience is baseless, the alleged "true motives" of the Attorney General are irrelevant, and the Ninety-First Senate's quibbles with Defendants' litigation strategy are insufficient to show inadequacy. The Defendants contend that this court should base its decision on the adequacy of Defendants' representation on their defense of this lawsuit, rather than on the myriad speculative and unsupported arguments advanced by the Ninety-First Senate.

While Defendants concede that the standard for permissive intervention is less demanding than intervention as of right, they contend nonetheless that the Ninety-First Senate has not met that standard either. Defendants provide four reasons for denying permissive intervention, which are identical or similar to the other reasons already advanced for denial of intervention as of right. First, they contend the Ninety-First Senate's motion is untimely. Second, they contend that the Ninety-First Senate has no interest in this litigation that differs from the interest of Defendants. Third, they contend that intervention by the Ninety-First Senate would cause delay and waste of resources. Finally, Defendants argue that the Ninety-First Senate's participation here will make it far more difficult to litigate, because it will infuse additional politics into an already politically-divisive area of the law. They contend that the motion for permissive intervention should be denied.

RULE 24.01 – INTERVENTION AS OF RIGHT

I. NINETY-FIRST SENATE'S ATTEMPTED INTERVENTION IS TIMELY

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.*

This matter was commenced on or about May 29, 2019. The Ninety-First Senate filed its Notice of Intervention on July 29, 2020, more than a year later. According to the Ninety-First Senate, it made a deliberate decision to await the outcome of the motion to dismiss filed by Defendants before it intervened. If this matter was dismissed, according to the Ninety-First Senate, there would be no need to seek intervention. Indeed, the Ninety-First Senate sought intervention just over one month after this court's decision on the motion to dismiss and approximately two weeks after Defendants filed their Answer.

While both the Plaintiffs and Defendants argue that seeking intervention after a year is untimely and taking a wait-and-see approach should not be condoned, they have not established that this delay and approach, in the context of this case, was untimely. The record is unclear about when the Ninety-First Senate: (1) learned of the action; and (2) when it learned that its interests were not protected by the existing parties. *See Erickson v. Bennett*, 409 N.W.2d 884, 887 (Minn. Ct. App. 1987)(timeliness turns on how quickly the intervening party acted once it learned that its interests were unprotected). There is therefore an insufficient record for this court to determine that the intervention was untimely, especially since the notice to intervene was filed two weeks after the Defendants filed their Answer. *See Schroeder v. Minn. Sec'y of State*, 2020 WL 5359413, *4 (Minn. Ct. App. Sept. 8, 2020)(notice of intervention filed one week after defendant answered was timely). Although 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.

In addition, while the motion to intervene at this stage is somewhat distracting, the Plaintiffs and Defendants have not demonstrated that the late intervention has led to substantial prejudice to them as of today.

As a result, this factor favors intervention as of right.

II. THE NINETY-FIRST SENATE HAS NOT DEMONSTRATED AN INTEREST SUFFICIENT TO INTERVENE OF RIGHT

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

The Ninety-First Senate's primary reason for seeking intervention here is that it "is the only institution in Minnesota's State Government that is able to defend the challenged statutes without conflict or qualification." This contention is rooted in its concerns about the Attorney General's alleged "political connections" to Gender Justice, and his alleged "personal, political interests," which indicate, according to the Ninety-First Senate, that the Attorney General "does not share the pro-life goals and interests of the Senate Majority that voted to intervene." Throughout its briefs and during oral argument, the Ninety-First Senate makes allegations against the Attorney General of an "appearance of divided loyalties," "conflicts of interest," that his defense of the challenged laws "would jeopardize a number of his important political relationships," that he "might not" protect the Ninety-First Senate's interests, and that he may engage in "possible collusion." For the same reasons, it contends that without its involvement here, an "air of illegitimacy" will "cloud" the public's perception of this proceeding and its outcome. In summary, the Ninety-First Senate suggests that the Attorney General may not do his job, at least to the satisfaction of the majority of one house of the Minnesota Legislature, for political or personal reasons.

The court has carefully considered the arguments of the Ninety-First Senate and thoroughly reviewed all the documents which it has submitted in support of those arguments. The Ninety-First Senate's concerns about the Attorney General's defense of this case do not represent an interest relating to the property or transaction which is the subject of the action. Instead, they relate to a collateral, political issue, which does not represent an interest supporting intervention as of right. *See Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 287, 292 (Minn. Ct. App. 1996)(proposed intervenor did not claim that he suffered any injury as a result of consuming Schwan's ice cream, but rather "merely criticized the class attorney's fees and speculated that the settlement may increase the price of Schwan's products."). Simply because the elected Democratic Attorney General may have different personal or political views than the elected Republican majority of the Ninety-First Senate, does not indicate that he cannot zealously defend the Defendants in this lawsuit and the challenged laws without its intervention and assistance.[2] In fact, the significant litigation which has already taken place, which this court finds persuasive and predictive, suggests that the Attorney General will mount a full and complete defense. Any concern that the Ninety-First Senate has about the motivation of the Attorney General, the evidentiary record he will assemble and present to the court, or the litigation tactics he may use, is not enough to demonstrate an interest in the subject of the action.

The next reason advanced by the Ninety-First Senate to support its interest in defending the enforceability of the challenged laws, is that it was "a body that passed the statutes at issue in [this] case." The Ninety-First Senate argues that it has a vested interest in ensuring that the constitutionality of the challenged laws will be upheld. In cases like this one, where the majority of one of the bodies

[2] The Attorney General has taken an oath "to support the Constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability." MINN. CONST. art. V, § 6. *See also* Minn. Stat. § 358.07(9)(attorneys swear an oath to "support the Constitution of the United States and that of the state of Minnesota, and will conduct [themselves] as an attorney and counselor at law in an upright and courteous manner…with all good fidelity as well as to the court as to the client…"). The Attorney General is bound, by oath and ethics, to defend the Minnesota Constitution and his client, no matter his personal opinions or beliefs.

of the Legislature seeks to defend against a challenge to state legislation, "the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place." *One Wisconsin Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015)(citing *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). The generalized interest of the Ninety-First Senate in the constitutionality of the laws of the State of Minnesota is not sufficient to demonstrate an interest sufficient to support intervention.

The Ninety-First Senate has no interest in the challenged laws that differ from any other citizen. *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975)("Once a bill has become law…[legislative] interest is indistinguishable from that of any other citizen. They cannot claim dilution of their legislative voting power because the legislation they favored became law."). One house of the Minnesota Legislature does not have a "roving commission to enter every case involving the constitutionality of statutes it has enacted." *Newdow v. U.S. Cong.*, 313 F.3d 495, 499 (9th Cir. 2002). *See also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019)("This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage."). When the constitutionality of a statute is attacked, the House or the Senate's powers and responsibility are not really under attack. *Id.* Once the two bodies of the Legislature vote to approve a proposed bill and the Governor signs it, the bill becomes law. *Id.* A public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in Minnesota. *Id.* Although a constitutional challenge may have some impact on a legislative body, it is shared generally across the government and the citizenry:

> Of course, every time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole. By the same token, the [Governor's] signing of the legislation is also

> nullified, judges, who might have felt otherwise, are bound by the decision, and citizens who relied upon or desired to have the law enforced are disappointed. Moreover, if the separate houses of [the Legislature] have standing, a challenger of a law would have to contend with fighting the [State of Minnesota] itself, and separately defending [themselves] against the Senate and the House of Representatives, each of which would be able to appear as a separate litigating party in the case.

Id. at 500.

Therefore, not only is the purported interest of the Ninety-First Senate too general and widely shared to support intervention, the proposed intervention of a legislative body also presents a prospective practical problem. As the court observed in considering the intervention of legislators in a constitutional challenge to a Wisconsin voting law:

> If a legislator's personal support for a piece of challenged legislation gave rise to an interest sufficient to support intervention as a matter of right, then legislators would have the right to participate in every case involving a constitutional challenge to a state statute. But [Federal] Rule 24 is not designed to turn a courtroom into a forum for political actors who claim ownership of the laws that they pass. The legislators' interest in defending laws that they supported does not entitle them to intervene as of right.

Nichol, 310 F.R.D. at 397.

The Ninety-First Senate has not identified an interest in defending against constitutional challenges to Minnesota laws which differs from the other branches of government or the citizens of the State of Minnesota. In addition, allowing intervention to supplement the defense of challenged legislation would "turn a courtroom into a forum for political actors who claim ownership of the laws that they pass." *Nichol*, 310 F.R.D. at 397. *See also Helgeland v. Wisconsin Municipalities*, 724 N.W.2d 208, 220 (Wis. Ct. App. 2006)("Legislators may often have a preference for how the judicial branch should interpret a statute, but such mere preferences do not constitute sufficiently related or potentially impaired interests [to allow intervention].").

Finally, the Ninety-First Senate argues that *League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636 (Minn. 2012) should guide this court's determination of whether it has an interest which would justify its intervention here. In *Ritchie*, the Eighty-Seventh Minnesota House of Representatives

and the Eighty-Seventh Minnesota Senate sought intervention as of right and permissive intervention in a dispute over certain ballot questions, when the case reached the Minnesota Supreme Court. *Id.* at 641. By the time the House and Senate sought intervention, the Minnesota Secretary of State, who was the only opposing party in the case, declined to file an opposition brief on the merits, effectively refusing to participate in a substantive way in the proceedings. *Id.* at 641-42. In essence, absent intervention, there was no party to defend against the allegations in the case. Intervention in that matter was not a litigated issue. The *Ritchie* court observed:

> With respect to the House and the Senate, petitioners do not object to the permissive intervention of these bodies. Given that the named respondent, Secretary of State Mark Ritchie, did not participate in a substantive way in these proceedings, we agreed with petitioners that it is appropriate for the House and Senate, the bodies that passed the legislation at issue in this case, to participate, and so without deciding whether those bodies may intervene as of right, we granted their motion for permissive intervention.

Id. at 642. This court does not find *Ritchie* helpful or persuasive. Here, unlike *Ritchie*, the existing parties: (1) are defending against the attack on the challenged laws; (2) are being represented by the Office of Minnesota Attorney General; and (3) all parties on both sides of this case are objecting to both intervention as of right and permissive intervention. *Ritchie* does not hold that one house of the Legislature should be allowed to intervene in cases where it "passed the legislation" at issue in the case. *See also Bethune-Hill*, 139 S. Ct. at 1950. *Ritchie* is limited to its unique facts where legislative bodies were allowed to intervene after a governmental defendant's default representative dropped out of the case.[3] *See also Kaul*, 942 F.3d at 800.

Here, the Ninety-First State wants to act as an additional voice for the State of Minnesota, not as its exclusive surrogate and advocate as the Legislature did in *Ritchie*. The problems with allowing multiple representation for the State of Minnesota are myriad. As the *Kaul* court observed, allowing multiple representation would:

[3] *Ritchie* also suggests that if the procedural posture of this case changes, the Ninety-First Senate may have an opportunity to seek permissive intervention on appeal.

> subject the district court to the intractable procedural mess that would result from the extraordinary step of allowing a single entity, even a state, to have two independent parties simultaneously representing it. If the Legislature was allowed to intervene as right, then it and the Attorney General could take inconsistent positions on any number of issues beyond the decision whether to move to dismiss, from briefing schedules, to discovery issues, to the ultimate merits of the case. The district court would, in that situation, have no basis for divining the true position of the State of Wisconsin…

Id. at 801. Accepting the interest arguments of the Ninety-First Senate, or for that matter motions to intervene by the Ninety-First House or individual legislators as the agents of either body, could "flood a district court with a cacophony of voices all purporting to represent the state." *Id.* at 802. *See also Helgeland*, 724 N.W.2d at 219-20.

Concerns about the apparent political or personal motivations or beliefs of the Attorney General, or the litigation tactics he may use to defend against the constitutional challenge presented by this lawsuit, is not "an interest relating to the property or transaction which is the subject of the action." Minn. R. Civ. P. 24.01. The court has significant reservations about accepting disputes about personal or political motivation, bias, litigation strategy or tactics as an interest sufficient to merit intervention. Moreover, as the majority of one house of the Minnesota Legislature, the Ninety-First Senate has no more interest in the defense of the challenged laws than either of the other branches of government or the general citizenry. Thus, it has no particularized interest which would be sufficient to require intervention. The Ninety-First Senate has not established an interest sufficient to intervene of right.[4]

[4] Defendants have also contended that the Ninety-First Senate does not have standing. For the same reasons that it lacks an interest in the subject of this lawsuit, the Ninety-First Senate appears to lack standing. However, it does not appear that Minnesota courts have passed judgment on the issue of whether standing is necessary for intervention under Minn. R. Civ. P. 24.01 or 24.02. *But see Diamond v. Charles,* 106 S. Ct. 1697, 1706-07 (1986)("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24.02(a)(2) but also the requirements of Article III."); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996)("the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court."); *Compare Day v. Sebelius*, 376 F.Supp.2d 1022, 1030 (D. Kan. 2005)("this court finds itself in agreement with those courts that have determined intervenors need not make a showing of standing.");

III. THE NINETY-FIRST SENATE HAS FAILED TO DEMONSTRATE AN INTEREST THAT WOULD BE IMPAIRED OR IMPEDED BY THE DISPOSITION OF THIS LAWSUIT

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 interest analysis in the second factor is inextricably intertwined with the protection of the interest analysis in the third factor. Because the Ninety-First Senate lacks an interest in the subject of the action, it also lacks an interest which is subject to protection.

Even momentarily putting aside the court's conclusion on the Ninety-First Senate's lack of interest in the subject of this lawsuit, the Ninety-First Senate's sole focus in its contention that its interests will not be protected, is on the Attorney General. While the Attorney General is a party to this matter, and the Office of the Minnesota Attorney General is providing a defense to all of the Defendants, the Ninety-First Senate ignores that there are other parties, such as the Governor, the Commissioner, the Medical Board and the Nursing Board, all of which have separate and specific interests in ensuring that the challenged laws are upheld. There is no reason for this court to conclude, on this record, that an elected constitutional officer, an appointed executive branch official and two disciplinary boards, in addition to the Attorney General will not protect whatever interest the Ninety-First Senate has in the challenged laws.

Last, the Ninety-First Senate has not identified an interest which is different from the Defendants and which will be impeded without its intervention. *Gruman v. Hendrickson*, 416 N.W.2d 497, 499 (Minn. Ct. App. 1987)(the purpose of Rule 24 is "to protect nonparties from having their interests adversely affected by litigation conducted without their participation."). The Ninety-First Senate and the Defendants have both articulated the same litigation goal: upholding the constitutionality of the challenged laws. *See Planned Parenthood of Wisconsin, Inc. v. Kaul*, 384 F. Supp. 3d 982, 986 (W.D. Wis. 2019)("the Wisconsin legislature's interest – defending the constitutionality of

the challenged statutes and regulations – is the *same* as that of the defendants."). *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981), on which the Ninety-First Senate heavily relies, is inapposite. There, the court explicitly determined that the owner of a group home did not represent the interests of the group home's residents and allowed intervention so the residents could protect their unprotected interests. *Id.* at 28. The Ninety-First Senate has not identified a unique and different interest which will not be protected by the current Defendants.

This factor does not favor the Ninety-First Senate's intervention as of right.

IV. THE NINETY-FIRST SENATE HAS FAILED TO DEMONSTRATE THAT DEFENDANTS' REPRESENTATION IS INADEQUATE

The final factor for consideration by this court relates to the adequacy of the representation of the Ninety-First Senate's interest by existing parties. Here, the Ninety-First Senate 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).

The Ninety-First Senate contends that it must carry only a "minimal" burden of showing that the existing parties "may" not adequately represent their interests. *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990)(citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972); *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir. 1977)). The Plaintiffs and Defendants, however, contend that this court should apply the more demanding standard for adequate representation found in *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015) because the Defendants here are governmental parties. *Id.* ("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.* (citation omitted). The courts of Minnesota have

not yet adopted the *Stenehjem* standard, nor has this court's research found any rejection of it. *But see Schroeder*, 2020 WL 5359413, *7 n. 10 ("Because we conclude that [appellant] failed to satisfy the interest requirement, we need not decide whether [the *Stenehjem*] heightened standard applies or whether the district court erroneously relied on it."). For reasons which this court will explain, applying the *Stenehjem* standard is the better rule of law and should be applied when the representative party is a governmental body with a legal responsibility to protect the interest of the proposed intervenors. Even so, under the default *Faribo Farms* standard, which this court will apply, the Ninety-First Senate has failed to demonstrate that it is not adequately represented by existing parties.

As a threshold matter, this court will not revisit the reasons given by the Ninety-First Senate for questioning the representation of the Attorney General of the Defendants. However, the fact that the Attorney General may not "share the pro-life goals and interests of the Senate Majority that voted to intervene" is of no moment to the determination of inadequacy of representation. The personal or political goals of an intervenor or an existing party is not a relevant consideration for intervention as of right. The goal shared by the Ninety-First Senate and the Defendants is identical – upholding the challenged laws. The Defendants have demonstrated a commitment to achieving that goal in more than a year of litigation. The identity of this goal suggests that the representation here is adequate.

Second, the Ninety-First Senate has not demonstrated, without resorting to conjecture and conspiracy, that the representation of either Defendants or their shared interest of upholding the challenged laws, has been in any way inadequate. For example, the Ninety-First Senate indicates that it has "engaged counsel who [sic] experience defending abortions [sic] regulations" and expresses a lack of awareness of whether the attorneys of the Office of the Minnesota Attorney General have similar experience. Such a contention, however, is not sufficient, even if true, to establish inadequacy of representation. This court has observed nothing in the representation of Defendants here which

would suggest that their attorneys were not up to the job. In fact, the opposite appears to be true. The adequacy of representation is not measured by gilded diplomas, resources, years of experience or point of view; but rather by capability and competence. The Ninety-First Senate's arguments on this point do not support a finding of inadequacy.

Third, while the Ninety-First Senate has spent a great deal of time arguing about whether the representation of the Defendants by the Attorney General is inadequate, the actual focus of the final factor is on whether the "existing parties" adequately represent the interests of the proposed intervenor. The "existing parties" to this matter include the State of Minnesota and constitutional officers, such as the Governor and Attorney General, who are charged with the execution and enforcement of the challenged laws. *See* MINN. CONST. art. V, §§ 1, 3; Minn. Stat. § 8.01; *State ex rel. Spannaus v. Nw. Bell Tel. Co.*, 304 N.W.2d 872, 877 (Minn. 1981)(citation omitted). The Defendants here have given no indication in this matter that, as constitutional officers of the executive branch, that they are not invested in defending the challenged laws. The Ninety-First Senate has failed to demonstrate that none of the existing parties represent its interest in upholding the constitutionality of the challenged laws.

Fourth, the Ninety-First Senate vows cooperation with the Attorney General; however, it also contends that "[t]he Senate must ensure that the right evidence is presented and the right issues are before the Court at the time this case is determined." It also contends that it wants to use its intervention "to prevent any use of tactics short of a full and appropriate defense of the" challenged laws. As indicated above, however, the Ninety-First Senate has identified no conflict which would render the Defendants' representation of their shared interest in upholding the challenged laws inadequate. Instead, they appear to anticipate that they will disagree with the litigation tactics and strategy of Defendants. Anticipated disagreement with litigation tactics and strategy, rather than with the objective of the litigation, is not sufficient to support intervention as of right. *See Stenehjem*, 787

F.3d at 922; *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658-59 (7th Cir. 2013); *Nichol*, 310 F.R.D. at 399.

As this court previously observed, the Defendants have been zealous in their defense of this case. At the start of this litigation, they brought a motion to dismiss all claims against all defendants. While not successful overall, the arguments they made in support of their motion were plausible, well-framed and well-supported in law and fact. They have opposed injunctive relief sought by Plaintiffs. They are engaging in discovery. For all of these reasons, the Ninety-First Senate has not demonstrated that the representation of its interest by the Defendants is inadequate under the default standard of *Faribo Farms*.

Alternatively, as this court reasoned in its consideration of the motion to intervene filed by PLAM and AGA, applying the more demanding *Stenehjem* standard here makes sense. This standard provides a strong presumption of adequacy "when one of the parties is an arm or agency of the government, and the case concerns a matter of sovereign interest…because in such cases the government is presumed to represent the interests of all its citizens." *Stenehjem*, 787 F.3d at 921 (citation omitted). This strong presumption is rebuttable if the proposed intervenor makes a showing of gross negligence or bad faith. *See Kaul*, 942 F.3d at 799.

There does not seem to be any dispute that the Governor and Attorney General are charged with the faithful execution or defense of the challenged laws, or whether they have done so to date in this litigation. While the Ninety-First Senate has argued that the Attorney General has personal or political conflicts which merit its intervention, which this court has rejected, it has not demonstrated or even argued that the existing parties have acted with gross negligence or bad faith in their defense of this matter. For these reasons, under *Stenehjem*, the Ninety-First Senate has not rebutted the strong presumption of adequate representation.

For all of these reasons, the Ninety-First Senate has not demonstrated entitlement to intervention of right under Rule 24.01.

RULE 24.02 – PERMISSIVE INTERVENTION

The court reaches the same conclusion on Ninety-First Senate's alternative motion for permissive intervention under Minn. R. Civ. P. 24.02.

The first factor to be considered for permissive intervention is whether there was a timely application for intervention. This is the identical factor which this court considered in the Ninety-First Senate's motion for intervention of right. This court has already determined that the Ninety-First Senate made a "timely application."

The second factor asks this court to evaluate Ninety-First Senate's interest in litigating common questions of law or fact with the main action. The Ninety-First Senate makes essentially the same arguments for this factor as it did on the interest factor for intervention as of right. The court has rejected those arguments for the reasons it has already explained. Even under the less demanding standard of Rule 24.02, the Ninety-First Senate has not met its burden under this factor for permissive intervention.

The final factor requires this court to assess whether the intervention will delay or prejudice the adjudication of the rights of the parties. The Ninety-First Senate argue it intervention "is necessary and helpful to this action," and that it "will help to move this case as long as it finally begins the discovery phase of this suit." It also argues that, although Plaintiffs and Defendants raise the spectre of delay, complication and politicization, they have offered no specific evidence to support these concerns.

Under Minn. R. Civ. P. 1, the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." It is also the responsibility of the court to ensure that "the process…[is] proportionate to…the complexity and importance of the issues." *Id.*

The Ninety-First Senate, after devoting most of its argument in support of intervention on questioning the ethics, political motivations and good faith of the Attorney General, suggests that if it is allowed to intervene, it will then be cooperative and helpful. However, all of the concerns raised by the Ninety-First Senate will remain – from apparent "conflicts," to possible "collusion," to differing political philosophies, to a failure to share its same "pro-life goals and interests" – despite the conclusion of this court that they are not interests which are germane to this case. It seems unlikely, given the briefing and argument here, that all the issues which the Ninety-First Senate has raised will disappear and not present a significant sideshow in this case. Allowing the intervention of the Ninety-First Senate is likely to prejudice the original parties and slow down a case which has already experienced significant delays, most of which is not due to any fault of the existing parties. *See Nichol*, 310 F.R.D. at 399.

In addition, as the *Nichol* court cautioned:

> In cases like this one, where a group of plaintiffs challenge state legislation, the court should evaluate requests to intervene with special care, lest the case be swamped by extraneous parties who would do little more than reprise the political debate that produced the legislation in the first place.

Id. at 397. In the end, this court remains concerned that allowing the Ninety-First Senate to intervene would reprise the political debate over the challenged laws, rather than produce a record focused on whether they are constitutional.

The Ninety-First Senate's motion for permissive intervention under Rule 24.02 is therefore denied.

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