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.	Court File No.: 62-CV-19-3868 Case Type: Civil – Other

ORDER & MEMORANDUM

This matter came before the undersigned on August 24, 2021 upon the Defendants' motion for partial summary judgment. Plaintiffs were represented by Attorneys Jess Braverman, Stephanie Toti, Melissa Shube, JuanLuis Rodriguez, and Amanda Allen. Defendants were represented by Assistant Attorney General Kathryn Iverson Landrum.

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

1. Defendants' motion for partial summary judgment is hereby **GRANTED IN PART** and **DENIED IN PART**.
2. Summary judgment is granted in favor of Defendant State of Minnesota. All claims against it are dismissed.

3. Summary judgment is granted in favor of all Defendants on FUS's claims which challenge the constitutionality of the Advertising Ban.

4. Defendants' motion for summary judgment is in all other respects denied.

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

BY THE COURT:

Dated: November 22, 2021

Gilligan, Thomas(Judge)
Nov 22 2021 10:52 AM

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

MEMORANDUM

This motion for partial summary judgment is one of three to be filed by Defendants in this case. This dispositive motion presents three justiciability arguments. First, Defendants contend that summary judgment should be granted against Plaintiff First Unitarian Society of Minneapolis ("FUS") on all claims because it lacks standing. Second, Defendants maintain that summary judgment should be granted against all Plaintiffs on their constitutional challenges to the statutory ban on advertising ("the Advertising Ban") sexually transmitted infection ("STI") treatment because Plaintiffs lack standing. Finally, Defendants argue that summary judgment should be granted on all claims against Defendants State of Minnesota ("the State"), Governor of Minnesota ("the Governor"), and the Attorney General of Minnesota ("the Attorney General") because they are not proper parties. While Defendants previously made the same or similar arguments in their 2019 motion to dismiss, they contend that there is now a more complete record to support this dispositive motion.

In opposition to this motion, Plaintiffs contend that there are genuine issues of disputed fact which preclude summary judgment. Plaintiffs maintain that FUS has associational standing for all its claims and direct organizational standing for its claim based upon religious exercise. They contend that all Plaintiffs have standing to challenge the Advertising Ban. Finally, Plaintiffs maintain that the State, the Governor, and the Attorney General are all proper parties for many of the same reasons they advanced previously in opposition to the motion to dismiss.

The court heard oral argument on August 24, 2021 and took the motion under advisement.

FACTUAL BACKGROUND

Plaintiffs filed this lawsuit against Defendants in May of 2019. Plaintiffs are health care providers, Dr. Jane Doe ("Doe") and Mary Moe ("Moe"), as well as a religious congregation ("FUS"), and a non-profit which facilitates abortion access ("Our Justice") (collectively "Plaintiffs"). Plaintiffs have alleged various challenges to Minnesota Statutes that they call "targeted restrictions on abortion providers" or "TRAP laws," (the "challenged laws") which impose criminal and civil penalties and professional discipline when those laws are violated. Plaintiffs sued Minnesota, the Governor, the Attorney General, the Minnesota Commissioner of Health (the "Health Commissioner"), Minnesota Board of Medical Practice (the "Medical Board"), and Minnesota Board of Nursing (the "Nursing Board") (collectively "Defendants"). Plaintiffs allege that the challenged laws violate the constitutional: right to privacy (Count I); guarantee of equal protection (Count II); prohibition on special legislation (Count III); right to free speech (Count IV); guarantee of due process (Count V); right to religious freedom and prohibition on religious preference (Count VI). They seek a declaration that the challenged laws are unconstitutional or otherwise unenforceable and a permanent injunction of their enforcement.

Defendants initially moved to dismiss all the claims alleged in the Amended Complaint in 2019. On June 25, 2020 this court dismissed Count V and denied the motion to dismiss any of the other claims or Defendants. The parties engaged in discovery and agreed to present dispositive motions in three stages, starting with this motion for summary judgment on issues of justiciability.

STANDARD OF REVIEW

Rule 56 of the Minnesota Rules of Civil Procedure is designed to secure a just, speedy, and inexpensive determination of an action, by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Thus, Rule 56 provides that summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, submitted show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. *See Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). The court must not weigh the evidence on a motion for summary judgment. *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995). That said, a court must view the evidence in a light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). When "determining whether a genuine issue of material fact for trial exists, the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc.*, 566 N.W.2d at 70.

STANDING ANALYSIS

"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.'" *Philip Morris*, 551 N.W.2d at 493 (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." *Webb Golden Valley*, 865 N.W.2d at 693.

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. *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.") (cleaned up). "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Webb Golden Valley*, 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 Golden Valley*, 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 in character 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. *See 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*, 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*, 2002 WL 31056699, at *4 (Minn. Ct. App. Sept. 17, 2002).

Similarly, organizations can establish standing on two grounds: associational standing or 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, 342-43 (1977)).

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"). 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* 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." 428 U.S. at 118. "Similarly, the medical association is an appropriate party to represent the claims of its individual members." *Minn. Med. Ass 'n v. State*, 274 N.W.2d 84, 87 n.2 (Minn. 1978).

I. FUS HAS STANDING

Defendants contended at the outset of this litigation that FUS did not have standing and moved to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted. This court applied the *Hunt* factors and determined that FUS made adequate allegations of associational standing to survive the motion to dismiss for the following reasons: (1) FUS is interested in "access to high-quality sexual and reproductive healthcare," and supports its members who "seek and provide" "abortion care;" (2) FUS's challenge to the

challenged law regarding the disposition of fetal tissue is a religious preference claim made "on behalf of itself and its congregants seeking access to abortion or treatment for miscarriage;" (3) the interests which FUS seeks to protect in this lawsuit are germane to its purpose; and (4) the relief requested by FUS did not require participation of its individual members to this lawsuit. (ECF No. 115).

In the current motion, Defendants argue that FUS lacks direct and associational standing for any of the claims in the Amended Complaint. They claim that FUS lacks direct standing because it did not learn of the challenged laws until shortly before this lawsuit was filed. According to Defendants, this recent awareness means that FUS has sustained no actual injury attributable to the challenged laws, nor any injury different from any other citizen of Minnesota. They also claim that FUS does not satisfy the *Hunt* factors because: (1) FUS has failed to identify any of its members who have sought spiritual guidance or assistance on the topic of abortion or any of the challenged laws; and (2) abortion regulation is not sufficiently germane to the purpose of FUS because there is no evidence that its congregants unanimously joined together to challenge abortion restrictions, and because its principles and aspirations do not "convey any intent to engage in impact litigation on abortion rights" and are so broad that FUS could have standing in any case involving social justice issues.

In addition to these general standing arguments, Defendants also focus argument on FUS's "religious freedom and neutrality" claim (Count VI) which challenges the fetal tissue disposition statutes and regulation (the "Fetal Tissue Disposition Law"). *See* Minn. Stat. §§ 145.1621-145.1622; Minn. R. 4675.2205. Defendants argue that Count VI fails *Hunt's* third factor because FUS has not produced individual member testimony to declare an actual injury,

nor has FUS experienced a direct impact from the law. Defendants maintain FUS is not unanimous in its beliefs and there may be congregants who have different beliefs about whether the Fetal Tissue Disposition Law infringes on their right to free exercise of religion. Defendants further claim that FUS's alleged tolerance of the stigma associated with the Fetal Tissue Disposition Law is a "mere interest" in the issue, as opposed to a tangible conflict with its religious beliefs or mission, or a diversion of its resources. They argue that in a free exercise claim like Plaintiffs have made in Count VI, individual congregants must participate in the litigation and explain how the challenged statute interferes with their religious practice or burdens the exercise of their beliefs.

Plaintiffs respond that there are disputed fact issues on some of Defendants' essential assertions on whether FUS has standing here. For example, Plaintiffs contend that FUS has current and former identifiable members who provide abortion care and are subject to the challenged laws, as well as identifiable members who have had abortions or miscarriages. As such, Plaintiffs contend that they have demonstrated that there is a factual basis to support FUS's claims that the challenged laws harm its members who provide and receive reproductive healthcare. Plaintiffs also dispute that FUS did not know of the challenged laws until 2018 because its clergy and individual members were aware of many of the challenged laws before then.

In any event, Plaintiffs maintain that it is unnecessary for individual members of FUS to participate in this lawsuit for two reasons. First, since FUS is seeking declaratory and injunctive relief, there is no need for the participation of individual members. Second,

Plaintiffs contend that the free exercise claim alleged in Count VI does not require individual participation of FUS's members.

Plaintiffs take issue with Defendants' implication that FUS has no creed, and therefore it has no focal, uniform, and defined set of beliefs among its membership which would provide it with a protectible interest in the challenged laws. They assert that FUS is a humanist congregation which covenants to affirm and promote specific principles and aspirations. FUS maintains that these coherent principles and aspirations promote and affirm bodily autonomy and reproductive freedom that is supported by science rather than ideology when it comes to abortion care and is free from shame, stigma, and coercion. FUS also provides examples of its advocacy and education on reproductive freedom which are germane to its purpose. It contends that FUS is entitled to deference about its own understanding of its mission and purpose.

Moreover, FUS maintains that there is no actual dispute on the unanimity of its congregants' position regarding the challenge to the Fetal Tissue Disposition Law. Contrary to the contentions of Defendants, FUS indicates that it is unaware of any members who support government restrictions on abortion care or oppose the position taken by FUS in this lawsuit. Its board of trustees was empowered to make decisions on behalf of the entire FUS congregation and voted to join this lawsuit. Plaintiffs argue that there is no Minnesota decision which mandates that member unanimity is a prerequisite for associational or direct organizational standing.

Lastly, FUS contends that it has direct organizational standing for the free exercise claim which it made on its own behalf in Count VI. It argues that as an organization, it can

establish an injury-in-fact by showing that the Fetal Tissue Disposition Law frustrates its mission and activities or forces the organization to divert its resources to counteract it because the law "assumes a level of personhood for fetal tissue, the result of abortion or miscarriage, that is not shared by the majority of [FUS] members nor is it supported by [its] theology." (ECF. No. 180). Plaintiffs also argue that the *Hunt* requirements do not apply to a claim of direct organizational standing.

A. FUS HAS ASSOCIATIONAL STANDING

The court will address the associational standing of FUS first. FUS must satisfy the *Hunt* requirements to claim associational standing, which derives from the standing of an organization's members. Under *Hunt*, FUS must establish that: (1) its members have standing as individuals; (2) the interests that FUS seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members of FUS. *Philip Morris,* 551 N.W.2d at 497-98 (citing *Hunt*, 432 U.S. at 342-43).

1. The Members of FUS Have Standing as Individuals

FUS must establish that their members have suffered an injury-in-fact that is fairly traceable to the challenged laws and would be addressed by a favorable decision. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. Ct. App. 2017). To have standing, a party need not await prosecution or be threatened with prosecution before challenging a law that applies to their conduct. *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Edina Community Lutheran Church v. State*, 673 N.W.2d 517, 522 (Minn. Ct. App. 2004) (a party may have standing to challenge a law which lacks an enforcement provision).

FUS contends that one of its members currently provides abortion care and one of its members formerly provided abortion care, and that it has current congregants who have accessed abortion care. Plaintiffs maintain that the challenged laws injure FUS's members: "because they single out and stigmatize abortion care and those who seek and provide such care; unnecessarily delay abortion access; decrease the availability and affordability of abortion care; make it more difficult to provide abortion care in Minnesota; compel abortion providers to provide misleading and ideologically charged information to their patients; target abortion providers for felony exposure; and burden FUS's free exercise of religion."

Even if true, it is of no moment that FUS was not aware of the challenged laws until 2018. The evidence in this case is that individual members of FUS were aware of many of the challenged laws prior to 2018 and could have and will be injured by the challenged laws, whether they knew about them or not. Finally, there is no requirement for FUS congregants to seek private spiritual guidance for their church to establish associational standing. It is sufficient that its members include a congregant who provides abortion care and congregants who have availed themselves of abortion care. *See Mutsch v. County of Hubbard*, 2012 WL 1470152, at *2 n.2 (Minn. Ct. App. Apr. 30, 2012) (concluding a single litigant's standing conferred associational standing onto groups of which he was a member).

This court agrees that the interest of FUS's individual members in the challenged laws is sufficient to meet the first prong of the *Hunt* test because those members would have standing to sue in their own right. *Hunt*, 432 U.S. at 342.

2. The Interests FUS Seeks to Protect Are Germane to Its Purpose

The second prong of the *Hunt* test requires the court to evaluate whether FUS's interests in the challenged laws are germane to its purpose. *Phillip Morris*, 551 N.W.2d at 497-98.

FUS is a humanist congregation of the Unitarian Universalist Association which does not have a creed, but which has a covenant to affirm and promote seven principles that makes it, in the words of Reverend Kelli Clement ("Clement"), the social justice minister of FUS and its representative in this case, "more important how we behave together than what we say we believe." Those seven Unitarian Universalist principles are: (1) affirmation and promotion of the inherent worth and dignity of every person; (2) justice, equity, and compassion in human relations; (3) acceptance of one another and encouragement of spiritual growth in Unitarian Universalist congregations; (4) a free and reasonable search for truth and meaning; (5) the right of conscience and the use of the democratic process within Unitarian Universalist congregations and in society at large; (6) the goal of world community with peace, liberty, and justice for all; and (7) respect for the interdependent web of all existence. FUS congregants also aspire to: "[1] Live joyfully and ethically in loving, reverent relationship with humanity and nature; [2] pursue wisdom through reason, science, art and the stories of civilization; [3] make the change we need for a more just, compassionate and peaceful world; and [4] support each other's journey toward meaning and connection in the here and now."

Clement testified that FUS's interest pertaining to the availability and provision of abortion care and STI treatment relates specifically to the first Unitarian Universalist principle of affirmation of the worth and dignity of every person – which she described as "bodily

autonomy." Clement indicated that FUS's interest in the availability and provision of abortion care and STI treatment also relates broadly to all of seven principles and four aspirations. For example, according to Clement:

> I can make a theological claim for all of our aspirations as touching bodily autonomy. Right? To live in loving, reverent relationship with humanity and nature is to say that – to me, reverent relationship means that nobody else gets to tell me what to do with my body. Right? To pursue wisdom through reason and science, we can say that access to contraception and abortion is good public health. Right? That's science. I could make that claim, that bodily autonomy is good science. To support one another's journey to meaning and connection, if I'm telling you what to do with your body, that does not support your journey toward meaning and wholeness.

Clement testified at length regarding the ties of FUS's seven principles and four aspirations to its interest in each of the challenged laws.

Specifically, Clement testified that: the first principle provided a religious or doctrinal basis for FUS's position on the mandatory disclosure requirements,[1] physician disclosure requirement, mandatory delay requirement, felony penalties for failure to obtain informed consent, and two-parent notification requirement; the second principle provided a religious or doctrinal basis for FUS's position on the physician-only law, reporting requirements, felony penalties for regulatory infractions, physician disclosure requirement, felony penalties for failure to obtain informed consent, Fetal Tissue Disposition Law, and Advertising Ban; the fourth principle provided a religious or doctrinal basis for FUS's position on the mandatory disclosure requirements, mandatory delay requirement, two-parent notification requirement, and Advertising Ban; the first aspiration provided a religious or doctrinal basis for FUS's position on the reporting requirements and felony penalties for regulatory infractions; the

[1] For brevity and clarity, the court refers to the statutory designations enumerated in the Amended Complaint rather than the specific statutory sections. (ECF No. 47).

second aspiration provided a religious or doctrinal basis for FUS's position on the felony penalties for failure to obtain informed consent, the Fetal Tissue Disposition Law, and the hospitalization requirements; and the fourth aspiration provided a religious or doctrinal basis for the two-parent notification requirement. In sum, Clement testified that FUS has a religious or doctrinal basis in one or more of its principles or aspirations for challenging each of the laws in this suit.

Moreover, according to Clement, the entire Unitarian Universalist Association, of which FUS is a member, has voted as a body to make statements about the accessibility and need for accessibility of reproductive health rights and justice.

Finally, FUS has religious education programming for teenage congregants, which is called "Our Whole Lives Sexuality Education." Among the topics of the program are: bodily autonomy, preventing STIs, not having shame related to sexuality and sexual expression, pregnancy, abortion, and miscarriage.

It is not the province of this court to examine the reason of religious beliefs; rather, this court may only evaluate whether a church has an interest in the litigation which is relevant to its purpose. *Hill-Murray Fed. of Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn.*, 487 N.W.2d 857, 865 (Minn. 1992). This court concludes, on this record, that the assertions of FUS about its beliefs and its purpose are held in good faith.[2]

In summary, FUS has demonstrated that its interest in the challenged laws is germane to its purpose. Clement testified at length about the connection of the seven Unitarian

[2] Because the challenged laws conflict with FUS's religious beliefs, the harm imposed on FUS by the challenged laws is "different from damage or injury sustained by the general public." *Conant*, 603 N.W.2d at 146.

Universalist principles and four FUS aspirations to general considerations of bodily autonomy, and the specific considerations of the challenged laws which impact availability and provision of abortion care, STI treatment, and fetal tissue disposition. The fact that FUS may have other social justice missions does not mean that it would have a limitless interest in other laws which are not the subject of this lawsuit. FUS has demonstrated that it has a sufficient interest in the claims made here that are germane to its purpose.

3. Neither the Claim Asserted, Nor the Relief Requested, Requires the Participation of Individual Members of FUS

The final *Hunt* factor for this court to consider is whether the claim asserted or the relief requested requires the participation of individual members in this lawsuit. *Hunt*, 432 U.S. at 343.

Contrary to Defendants' contentions, there is no need for the participation of individual members of FUS under the free exercise claim, nor have Defendants offered any authority for the requirement of individual members to participate in any other claim. *Harris v. McRae* does not require the participation of individual members of a religious organization for direct organizational standing in all free exercise cases. 448 U.S. 297, 321 (1980). Rather, as Plaintiffs have noted, in *Harris*, the organization which sought to establish associational standing:

> conceded to the Supreme Court that its membership held a diversity of religious views concerning what was at stake in the case. And this diversity of views no doubt impacted the Supreme Court's determination that the participation of the individual members of the organization was required in order to properly resolve their diverging free exercise claims.

Catholic Benefits Ass'n LCA v. Sebelius, 24 F.Supp.3d 1094, 1101 (W.D. Okla. 2014) (cleaned up). As noted above, there is no diversity of views of FUS congregants in this record on the Fetal

Tissue Disposition Law, the offense the burial requirement presents to its theology, or to its participation in this lawsuit. Even if there was, there is no Minnesota authority which demands unanimity among an organization in order to establish associational standing. *See Philip Morris*, 551 N.W.2d at 498 (concluding Blue Cross had associational standing against Philip Morris, despite that it had no members).

Finally, as the United States Supreme Court held in *Warth v. Seldin*:

> Whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

422 U.S. 490, 498-499 (1975) (cleaned up). The Minnesota Supreme Court has allowed associational standing where the relief sought is equitable. *Philip Morris*, 551 N.W.2d at 498.

In its claims for relief, except for its free exercise claim in Count VI,[3] FUS has invoked this court's remedial powers on behalf of its members. It seeks only declaratory relief and injunctive relief. This court can reasonably assume that a declaration by this court that the challenged laws are unconstitutional and the issuance of an injunction preventing their enforcement would benefit FUS members, particularly those discussed with regard to the first *Hunt* factor.

Neither the relief requested, nor the claim asserted, require the individual participation of FUS members. Accordingly, FUS is an appropriate representative of its members, and is

[3] The court's analysis of FUS's standing in this section will address FUS's remaining claims, except for its free exercise claim in Count VI. This court will address FUS's standing on that claim below.

entitled to invoke this court's jurisdiction under the doctrine of associational standing. This court turns next to direct organizational standing.

B. FUS HAS DIRECT ORGANIZATIONAL STANDING TO CHALLENGE THE FETAL TISSUE DISPOSITION LAW

Many of the arguments made by Defendants in support of their motion for summary judgment on the issue of FUS's direct organizational standing have already been addressed and disposed of by this court. The significant remaining argument made by Defendants regarding FUS's direct organizational standing, however, relates to whether its individual members must participate in its free exercise challenge to the Fetal Tissue Disposition Law.

The FUS board of trustees voted unanimously to join this lawsuit on behalf of the entire congregation. The board of trustees had the authority to take this action under its governing documents. According to Clement, the board of trustees were all "quite clear that reproductive health rights and justice, accessibility was something that [the board of trustees] stood for." She reported announcing the lawsuit to the congregation and received "lots of affirmations" to FUS's participation "and not a single one that disagreed fundamentally with any of the legal argument as we explained it or [FUS's] right or ability to do this or that we thought was important to stand up with." Clement admitted that while it was "possible" that some congregants disagreed with the decision to join the lawsuit, she had not heard a "whiff" of such disagreement and thought that she would have if it existed. As social justice minister and as representative of FUS, she testified that she was unaware that any congregant thought that fetal tissue had a sense of personhood, which according to FUS is the bedrock of the conflict with its religious beliefs.

First, FUS has articulated a sufficient injury for standing under the free exercise clause because it is being asked to tolerate an action (the burial or cremation of fetal tissue), and a concept (personhood of fetal tissue which mandates burial or cremation) which is not supported by its theology. *See Edina Community Lutheran Church*, 673 N.W.2d at 522.

Second, as previously noted, there is no Minnesota authority that demands unanimity among an organization to establish direct standing. Even if there was, Defendants have significantly overstated the purported lack of unanimity or cohesion among FUS with regard to the beliefs of its congregants or their support for the free exercise claim made in this lawsuit. The board of trustees had the authority to join the lawsuit and voted unanimously to do so. After announcing the lawsuit, the FUS employee who would likely be in the best position to hear dissenting voices as its minister of social justice has not become aware of any lack of unanimity or cohesion. Defendants have not demonstrated in this record any genuine issue of material fact about FUS's unanimity or cohesion for the direct organizational assertion of the free exercise challenge to the Fetal Tissue Disposition Law.

FUS has direct organizational standing to assert a free exercise challenge to the Fetal Tissue Disposition Law. Defendants' motion for summary judgment on Count VI of the Amended Complaint is therefore denied.

II. ALL PLAINTIFFS EXCEPT FUS HAVE STANDING TO CHALLENGE THE ADVERTISING BAN

Unlike the other arguments made by Defendants in support of their motion for summary judgment, Defendants' contention that none of the Plaintiffs have standing to challenge the Advertising Ban on STI treatment is an argument of first impression in this case. Defendants contend that the Plaintiffs lack standing to make any claim that the Advertising

Ban violates equal protection, constitutes special legislation, and violates free speech because: (1) no Plaintiff engages in advertising; (2) no Plaintiff has suffered an economic injury because of the Advertising Ban; (3) neither Our Justice nor FUS have identified a congregant or member who has been directly harmed by the Advertising Ban; and (4) the Advertising Ban does not affect a purpose germane to Our Justice or FUS.

Plaintiffs contend that Doe, Our Justice, and FUS have standing to challenge the Advertising Ban because they are directly affected by it.[4] Plaintiffs further maintain that they do not need to allege economic injuries to meet the injury-in-fact requirement. Doe asserts that her medical practice currently advertises that it provides treatment for the human papillomavirus ("HPV"), an STI, in violation of the Advertising Ban. Doe maintains that she is threatened with two distinct injuries-in-fact. First, she contends that the criminal prosecution of her medical practice for a violation of the Advertising Ban would stigmatize her and harm her reputation in the medical community. Second, imposition of a fine to her medical practice for violating the Advertising Ban would impact her financially as an owner of the medical practice.

Our Justice contends that it would like to use its website to provide information on where Minnesota residents can obtain STI treatments in the same way that it uses its website to provide information on where Minnesota residents can obtain abortion care and emergency contraception. It contends that the threat of criminal prosecution under the Advertising Ban chills its participation in STI treatment advertising. FUS asserts that it sponsors a sexual

[4] Plaintiffs argue that if this court reaches the conclusion that Doe has standing, it need not engage in a standing analysis for FUS and Our Justice, since one party would already have standing. *See Horne v. Flores*, 557 U.S. 433, 446 (2009). This court declines Plaintiffs' invitation to apply the "one-plaintiff rule."

education program for its adolescent congregants that provides information about how STIs are treated. FUS contends that the Advertising Ban is broad enough to encompass information from FUS instructors and congregants in its instruction and therefore subjects FUS to criminal prosecution.

The Advertising Ban provides, in pertinent part:

> Any person who shall advertise . . . in any newspaper, pamphlet, circular, or other written or printed paper . . . the treatment or curing of venereal diseases . . . or who shall advertise in any manner any medicine, drug compound, appliance or any means whatever whereby it is claimed that sexual diseases of men and women may be cured or relieved . . . shall be guilty of a gross misdemeanor and shall be punished by a fine of not less than $50 nor more than $3,000 or by imprisonment in the county jail for not more than six months.

Minn. Stat. § 617.28, subd. 1.

A. DOE HAS STANDING TO CHALLENGE THE ADVERTISING BAN

Doe is a partner in a medical practice which shares the profits the medical practice generates with its partners. She provides comprehensive obstetric and gynecological care, including treatment for HPV. The medical practice advertises HPV treatment on its website. She contends, among other things, that if her medical practice was charged with a crime for violating the Advertising Ban, "it would injure [her] reputation . . . in the medical community." She also contends that if a monetary penalty was assessed against her medical practice, it would "reduce the revenue available for profit-sharing," including her own share.

1. Stigma and Reputational Injury

Doe makes a claim of standing for the stigma and reputational damage in the medical community which she will suffer if her medical practice is charged with a crime. Defendants argue that such stigma and reputational damage is hypothetical and indirect and cannot

provide a basis for standing. Doe, however, is not simply contending that her medical practice will suffer if it is criminally charged with a violation of the Advertising Ban, but rather that she will suffer stigma and reputational damage if that occurs. Such stigma is an intangible, but direct and significant harm, to a physician. *See In re Estate of Overton*, 417 N.W.2d 653, 656 (Minn. Ct. App. 1988) (physician had standing to address a claim of undue influence regarding probate bequests because of alleged damage to his professional reputation); *see also Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (injury-in-fact to plaintiff's legitimate interest of reputation sufficient to establish standing). The stigma and reputational harm which Doe, a medical practitioner, would suffer from potential criminal prosecution exposes her to harm different from that "sustained by the general public." *Conant*, 603 N.W.2d at 146. Accordingly, Doe's assertion of stigma and reputational damage is sufficient to establish standing.

2. Economic Injury

Doe also makes a claim of standing based upon the economic injury she will suffer if her medical practice is fined for violating the Advertising Ban. Defendants contend that any such economic injury would be to Doe's medical practice, which is a division of a Minnesota corporation, and not to Doe, and therefore cannot provide a basis for standing.

As an entity distinct from its shareholders, a corporation holds a separate right to sue in its own name. *Singer v. Allied Factors, Inc.*, 13 N.W.2d 378, 380 (Minn. 1944). Thus, "Minnesota has long adhered to the general principle that an individual shareholder may not assert a cause of action that belongs to the corporation." *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995).

If a shareholder asserts a cause of action belonging to the corporation, the shareholder must seek redress in a "derivative" action on behalf of the corporation. *Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999). By doing so, the shareholder, in effect, steps into the corporation's shoes and seeks restitution that the shareholder could not demand on its own. *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 550 (Minn. 2008). In bringing a derivative action, the shareholder must, among other things, comply with the procedural requirements of Minn. R. Civ. P. 23.09. *In re Medtronic, Inc. S'holder Litig.*, 900 N.W.2d 401, 406 (Minn. 2017). A direct claim, on the other hand, alleges an injury to a shareholder that is not shared by the corporation. *Id.* The procedural requirements of Minn. R. Civ. P. 23.09 are inapplicable to direct claims. *Id.*

To determine whether claims are direct or derivative in nature, courts look to "whether the complained-of injury was an injury to the shareholder directly, or to the corporation, looking not to the theory in which the claim is couched, but instead to the injury itself." *Id.* at 407 (cleaned up). "When the corporation is injured, any injury to shareholders is only by reason of injury to the corporation." *Id.* (internal citations omitted). Ultimately, the analysis is focused on two basic questions: (1) who suffered the injury alleged; and (2) who would receive the benefit of any recovery. *Id.* at 407-08.

Under this analysis, the only way Doe could allege a claim of economic injury sufficient to create standing would be if she made a direct claim. A direct claim is an injury to a shareholder that is not shared by the corporation. Doe is claiming that her medical practice would be economically harmed by the imposition of a fine for a violation of the Advertising Ban. The resultant harm to Doe – a profit share diminished by a fine to the medical practice

– could only occur if the medical practice was harmed. Accordingly, the only way Doe could suffer economic injury is if the corporation suffered economic injury. Doe's harm is therefore derivative, not direct, and cannot provide a basis for standing. *See, e.g.*, *Pittsburgh & W.V. R. Co. v. United States*, 281 U.S. 479, 487-88 (1930).

In summary, while Doe has not alleged an economic injury which would entitle her to challenge the Advertising Ban, she has alleged stigma and reputational harm which constitutes an injury-in-fact for standing purposes.

B. OUR JUSTICE HAS STANDING TO CHALLENGE THE ADVERTISING BAN

Our Justice maintains a website which provides information on how people can obtain support to access abortion care and how people can help advance Our Justice's mission. It also publishes information on its website regarding STIs and their risks, prevention, and the importance of screening and treatment. Our Justice does not, however, "provide a detailed list of referrals to healthcare providers that offer these vital sexual health services" because of the Advertising Ban. Our Justice also asserts that: "[i]n the absence of the ban on advertising STI treatments, [it] would share advertisements informing people of what STI treatments are available and where they can seek them," just as it does for healthcare providers that offer abortion care, emergency contraception, and pregnancy options counseling. Our Justice argues that the chilling effect of the Advertising Ban constitutes an injury-in-fact for standing purposes.[5]

[5] Since Our Justice does not argue that it has associational standing, there is no need for this court to address Defendants' arguments on that point.

Defendants argue that Our Justice's intended website referral for STI treatments is not an advertisement. They also argue that Our Justice has not suffered an economic injury caused by the Advertising Ban, which Defendants maintain is a necessary predicate to demonstrate an injury-in-fact.

Though the drafters of the Advertising Ban likely could not have conceived of the internet as an advertising medium, it seems quite clear from the text of the statute that the Legislature intended to criminalize the advertisement "in any manner" the "treatment or curing" of "venereal" and "sexual" diseases. While the intended conduct of Our Justice in publishing "advertisements informing people of what STI treatments are available and where they can seek them" is not a commercial pursuit, the Advertising Ban is not limited to those advertisers who intend to make money by treating STIs. The conduct of posting STI advertisements for healthcare providers on the Our Justice website is arguably covered by the Advertising Ban.

"An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Webb Golden Valley*, 865 N.W.2d at 693 (citation omitted). Although one way to demonstrate an injury-in-fact is to show an economic injury, it is not the only way as Defendants suggest. *Compare Meadowbrook Women's Clinic, P.A. v. State*, 557 F. Supp. 1172, 1175 (D. Minn. 1983) (finding economic injury was sufficient to constitute injury-in-fact) *with Webb Golden Valley*, 865 N.W.2d at 693 (finding that the lost opportunity to bid on a lot was sufficient to constitute injury-in-fact); *Annandale Advoc.*, 435 N.W.2d at 27 (holding that harm to reputation and privacy was sufficient to constitute injury-in-fact); *and Edina Community Lutheran Church*, 673 N.W.2d at 522-23 (finding the infringement of religious exercise sufficient to

constitute injury-in-fact). Here, Our Justice has engaged in the advertising of healthcare providers that offer abortion care, emergency contraception, and pregnancy options counseling, but it has refrained from similar advertising for STI treatment because of the Advertising Ban. The chilling effect that the Advertising Ban has had on Our Justice is sufficient to demonstrate a "concrete and particularized invasion of a legally protected interest" to constitute and injury-in-fact. Moreover, the Advertising Ban imposes on Our Justice harm "different from damage or injury sustained by the general public." *Conant*, 603 N.W.2d at 146. Our Justice has standing to challenge the constitutionality of the Advertising Ban.

C. FUS DOES NOT HAVE STANDING TO CHALLENGE THE ADVERTISING BAN

FUS argues that its sexual education program for adolescent congregants, which includes information about how STIs are treated, is broad enough to fall within the Advertising Ban. As a result, it contends that its members who teach the class are threatened by the prospect of criminal prosecution. Defendants argue that the curriculum of the sexual education program does not constitute an advertisement. Defendants also argue, like they did for Our Justice, that FUS has not suffered an economic injury and therefore cannot demonstrate an injury-in-fact. Last, Defendants argue that FUS cannot establish associational standing to challenge the Advertising Ban because FUS has not identified any congregant directly harmed by the Advertising Ban.

Unlike Our Justice, there is no reasonable construction of the educational programming of FUS on this record which could be characterized as being covered by the Advertising Ban. Educating teenagers about STIs and their prevention and treatment is

considerably different than publishing advertisements which direct those teenagers to healthcare providers to obtain STI treatment. The Advertising Ban is not so broad that it would criminalize the speech covered by FUS's sexual education programming.

Since this court has drawn the conclusion that FUS lacks standing because its conduct does not fall within the scope of the Advertising Ban, there is no need for the court to address the other arguments made by Defendants. FUS does not have standing to challenge the Advertising Ban.

PROPER PARTY ANALYSIS

In this motion, Defendants again contend that the Plaintiffs have not sued the proper parties. They claim that the State, the Governor, and the Attorney General have never enforced the challenged laws against Plaintiffs and have no direct responsibility for enforcing those laws. Defendants contend the State is an improper party because criminal prosecutions are delegated to city and county attorneys, who represent the general public and not the State.

Plaintiffs contend that the State is a proper party because relief granted against it would ensure statewide relief. Plaintiffs further claim that the State, the Governor, and the Attorney General all have enforcement power over the challenged laws and that they do not need to wait for specific enforcement action prior to bringing suit. Plaintiffs also argue that the declaratory and injunctive relief they seek against the State, the Governor, and the Attorney General will provide complete relief without burdening the court with "evasive and unnecessary named parties." After further consideration, this court concludes that the State is not a proper party; however, its decision that the Governor and the Attorney General are proper parties remains unchanged.

I. THE STATE OF MINNESOTA IS NOT A PROPER PARTY

Previously, this court denied the Defendants' motion to dismiss the State and reasoned:

> In the end, the authority cited by both sides does not provide much guidance for the court on th[e] 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, [ ] the state is a proper party to defend them.

(ECF No. 115). Here, Plaintiffs have sued various officials, a state agency, and several state boards, who they contend have a relationship to the challenged laws because part of their responsibility is to enforce those laws – criminally, civilly, or administratively. As this court will discuss below, each of these parties have a "special relation to the particular statute[s] alleged to be unconstitutional." *Ex parte Young*, 209 U.S. 123, 157 (1908). Suing an officer, agency, or board of the state with a connection to the enforcement of an allegedly unconstitutional act avoids "merely making [them] a party as a representative of the state, and thereby attempting to make the state a party." *Id.* In other words, a plaintiff challenging an unconstitutional act cannot merely sue *some* state officer as a placeholder or surrogate for making the state a party. The plaintiff must sue *the* state officer who has "some connection with the enforcement of the [unconstitutional] act." *Id.* This makes sense, because *some* state officer should not be responsible for the consequences of an unconstitutional statutory scheme and would not be in a position to provide redress for any injury which that statutory scheme has caused. It stands to reason then that it would be just as inappropriate to sue the

State, which does not have any means to enforce the challenged laws, nor any means to provide redress for any injury caused by the challenged laws, as it would be to sue an officer without a special relation to the challenged laws. *Ex parte Young* directs litigants to avoid suing the state and ensure that suit is commenced against a state officer whose responsibility it is to enforce the unconstitutional act and who can remediate any injury caused by that act.

Plaintiffs here have not demonstrated that the State is a proper party here, or has an interest, or claims any interest, which would be affected by an injunction of the challenged laws or by a declaration that they are unconstitutional.[6] *See Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008).

II. THE GOVERNOR IS A PROPER PARTY

Previously, this court denied the Defendants' motion to dismiss the Governor and reasoned:

> The combination of the Governor's mandatory responsibility to ensure the faithful execution of the laws and his potential power to direct the enforcement of criminal laws, are enough to draw a through line from Plaintiffs' injury to the Governor. In any event, the United States' Supreme Court in *Bolton* stated 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. In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

(ECF No. 115).

[6] Even if the State were a proper party, this court would not have the power to hear this suit without the State's consent. *Alden v. Maine*, 527 U.S. 706, 754 (1999); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890). Although the State has waived its immunity in limited circumstances, it has not waived immunity for this type of action. *See, e.g.*, Minn. Stat. §§ 3.751, subd. 1 (contract claims); 1.05 (certain federal statutes); 13.08 (data practices).

In their motion for summary judgment, Defendants broadly argue that the Governor's limited criminal authority and his constitutional duty to ensure that laws are faithfully executed are insufficient to make him a party. They also contend that any injury to Plaintiffs is "purely hypothetical" since the Governor has never enforced or threatened to enforce any of the challenged laws. Finally, they contend that this court made both an error of law and an error of fact in its prior determination that the Governor was a proper party.[7]

Plaintiffs argue that this court should not reconsider its prior decision that the Governor was a proper party. They argue that the constitutional and statutory authority of the Governor is broader than Defendants contend, and therefore provide a sufficient connection to the enforcement of Minnesota's criminal statutes to make him a proper party to address the constitutionality of the challenged laws. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 365 (Minn. 2010); *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 616 (Minn. 1995); *Northland Baptist Church of St. Paul, Minnesota v. Walz*, 2021 WL 1195821, at *5 (D. Minn. Mar. 30, 2021). Plaintiffs also argue that actions and statements of a former Minnesota Governor and current statements of gubernatorial candidates give Plaintiffs "ample reason to reasonably fear gubernatorial enforcement of the challenged statutes." (ECF No. 182). Last, Plaintiffs maintain that whether the record is considered under *Doe* or *Haveland* and its progeny, Plaintiffs meet each of their justiciability requirements.

[7] Defendants are correct on both points. First, the United States Supreme Court in *Doe v. Bolton*, 410 U.S. 179, 188 (1973) did not "overrule" the standard of injury-in-fact necessary to invoke jurisdiction which the Minnesota Supreme Court articulated in *State ex rel. Smith v. Haveland*, 25 N.W.2d 474, 478 (Minn. 1946). Nonetheless, *Bolton* does provide the controlling standard for consideration of injury-in-fact questions involving challenges to abortion laws. *Bolton*, 410 U.S. at 188. Second, the Governor did not order the Attorney General to prosecute the officers involved in the death of George Floyd.

In *Ex parte Young*, the Supreme Court made it clear that if an officer of the state was to be made a defendant in order to challenge the constitutionality of a law, "such officer must have *some* connection with the enforcement of the act . . . ." 209 U.S. at 157 (emphasis added). 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. By statute, the Governor also has the power to direct the Attorney General to prosecute "any person charged with an indictable offense." Minn. Stat. § 8.01. The essential question is whether the Governor has "some" connection with the enforcement of the challenged laws. *See Ex parte Young*, 209 U.S. at 157. This court does not find persuasive Defendants' argument that the Governor's broad enforcement responsibility to ensure that laws are faithfully executed is too remote to make the Governor a real party in interest here. This duty gives the Governor some connection with the enforcement in the challenged laws. Nor does the court find persuasive the Defendants' argument that at least to date, the Governor has not attempted to prosecute the violation of the challenged laws. There is enough evidence in the record to demonstrate that it is possible that this Governor or the next one may prosecute a violation of the challenged laws. *Bolton*, 410 U.S. at 188 (stating that an abortion provider "should not be required to await and undergo a criminal prosecution" to challenge the constitutionality of criminal abortion laws). As this court previously concluded, the combination of the Governor's mandatory constitutional responsibility to ensure the faithful execution of the laws and his potential power to direct the enforcement of criminal laws are enough to draw a through line from Plaintiffs' injury to the Governor. The Governor is therefore a proper party.

III. THE ATTORNEY GENERAL IS A PROPER PARTY

Previously, this court denied the Defendants' motion to dismiss the Attorney General and reasoned:

> It 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.

(ECF No. 115).

Defendants contend that any alleged injury from the Attorney General is hypothetical and remote. They argue that the Attorney General has not enforced or threatened enforcement of any of the challenged laws and has no direct and independent authority to enforce them. Defendants also argue that the Attorney General's civil enforcement authority, including its *parens patriae* authority, is irrelevant because Plaintiffs sued the Attorney General based solely on his conditional criminal authority.

Plaintiffs contend that the Attorney General is a proper party because Minn. Stat. § 8.01 provides that the Attorney General may enforce criminal laws at the request of the Governor or a county attorney, or "in all cases . . . whenever, in the attorney general's opinion, the interests of the state require it." *Id.*; *see also Edina Community Lutheran Church*, 673 N.W.2d at 522 ("A law may be enforced in a variety of ways, even absent a specific penalty provision."); *State ex rel. Hatch v. Am. Family Mut. Ins. Co.*, 609 N.W.2d 1, 3 (Minn. Ct. App. 2000) ("The attorney general may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of this state, the preservation of order, and the protection of legal right."). Plaintiffs also argue that the Attorney General's authority to

enforce Minnesota law is not limited to Section 8.01 because he may take all actions and proceedings necessary for the enforcement of the laws of the state, the preservation of public order, and the protection of public rights. *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961).

The Attorney General may not, in most cases, appear in criminal cases without a request from a county attorney or prosecute criminal matters without a written request from the Governor. Plaintiffs have not limited this case to the Attorney General's contingent criminal enforcement authority, contrary to Defendants' claims. Plaintiffs broadly contend that the Attorney General should be permanently enjoined from enforcing the challenged laws, including civil and administrative enforcement. *See, e.g.*, (ECF No. 47 ¶ 12) ("At the request of the Governor or a county attorney, the Attorney General may enforce any of the criminal laws challenged in this case."); (ECF No. 47, pp. 45-47) ("Plaintiffs respectfully ask the Court to: * * * Permanently enjoin Defendants . . . from enforcing [the challenged laws]"). Not all of the challenged laws have criminal penalties. Others give rise to civil liability or administrative licensure consequences for a violation. The Attorney General's office, as alleged by Plaintiffs, under Minn. Stat. § 8.06, acts as the attorney for "all state officers and all boards or commissions created by law . . . ." And as Plaintiffs have argued, the Attorney General has expansive powers as the "chief law officer of the state:"

> His powers are not limited to those granted by statute but include extensive common-law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Slezak, 110 N.W.2d at 5.

Similar to this court's analysis for the Governor, the essential question is whether the Attorney General has "some" connection with the enforcement of the challenged laws. *See Ex parte Young*, 209 U.S. at 157. This court does not find persuasive Defendants' argument that the Attorney General's contingent criminal enforcement authority is too remote to make the Attorney General a real party in interest here, particularly in light of the expansive civil enforcement authority of that office. This comprehensive authority gives the Attorney General some connection with the criminal and civil enforcement in the challenged laws. Moreover, the Attorney General, as the chief law officer of the state, and as counsel for DHS, the Medical Board and the Nursing Board, is the government official who has the ultimate responsibility of enforcing many of the challenged laws. Accordingly, the authority of the Attorney General in this regard is independent from the constitutional responsibility of the Governor to ensure that the laws of the State are faithfully executed. Nor does the court find persuasive the Defendants' argument that at least to date, the Governor has not requested the Attorney General to criminally prosecute the violation of the challenged laws. The Plaintiffs need not await enforcement or threatened enforcement of the challenged laws to address their constitutionality. *Bolton*, 410 U.S. at 188. The Attorney General is a proper party.

CONCLUSION

Defendants' motion for summary judgment is granted with regard to FUS's challenge to the Advertising Ban because FUS lacks standing to assert a challenge to that law. Defendants' motion for summary judgment on behalf of the State is granted as to all claims made against it. It is not a proper party to this lawsuit. Defendants' motion for summary judgment on all other issues is denied.

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