No. A13-0986

State of Minnesota
In Court of Appeals

Denise Walker and Brian Walker,
on behalf of themselves and other Minnesota taxpayers,
Appellants,

v.

Lucinda Jesson, in her official capacity as Commissioner,
Minnesota Department of Human Services,
Respondent.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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STATEMENT OF INTEREST OF AMICUS[1]

The American Civil Liberties Union of Minnesota ("ACLU-MN") is a non-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties. ACLU-MN has more than 8,500 members in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and laws. ACLU-MN is the statewide affiliate of the American Civil Liberties Union ("ACLU"), a national organization with more than 500,000 members. ACLU-MN and its members have a strong interest in the continued protection of the right to privacy guaranteed in the Minnesota and United States Constitutions and the continued provision of appropriate medical care to disadvantaged Minnesotans. ACLU-MN appears regularly in Minnesota courts to protect those rights and interests.

SUMMARY OF LEGAL ARGUMENT

Appellants seek to alter by Court order the method that the Commissioner of the Minnesota Department of Human Services ("the Commissioner") uses to verify that she is upholding the constitutional rights of indigent women seeking therapeutic abortions. Because their Complaint amounts to a "generalized grievance" about the discretionary decisions of a state agency, not an action seeking to enjoin a particular unlawful expenditure, Appellants lack standing to bring their claims. Moreover, Appellants have

[1] Counsel certifies that this brief was authored in whole by listed counsel for amicus curiae the American Civil Liberties Union of Minnesota. No person or entity made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of ACLU-MN, which was granted leave to participate as amicus by this Court's order dated July 2, 2013.

misinterpreted the Minnesota Supreme Court's opinion in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), leading to incorrect assertions about the current state of the law. For these and other reasons, Appellants' Complaint fails to state a claim upon which any relief could be granted.

LEGAL ARGUMENT

I. APPELLANTS DO NOT SEEK SIMPLY TO ENJOIN AN ALLEGEDLY UNLAWFUL EXPENDITURE. RATHER THEY SEEK TO CHANGE THE METHOD THAT THE COMMISSIONER USES TO UPHOLD A CONSTITUTIONALLY PROTECTED RIGHT.

Appellants Denise and Brian Walker ("Appellants") seek extraordinary injunctive relief, which cannot be characterized as a request to enjoin an allegedly unlawful expenditure. Appellants' Complaint does not allege facts indicating that any particular abortion has been or will be illegally funded by the Commissioner. Indeed, Appellants concede that all abortions funded by the Commissioner are supported by Medical Necessity Statements, in which a patient's doctor attests that the abortion is, in fact, medically necessary. (Compl. ¶ 35 ("DHS requires that abortion providers submit a 'Medical Necessity Statement' in order to receive payment for these abortions from Public Assistance."); *see also* Compl., Ex. D ("Minnesota Health Care Programs, Medical Necessity Statement.")) Accordingly, in the absence of any allegation that any particular abortion has been or will be illegally funded, Appellants' Complaint cannot be said to seek to enjoin an unlawful expenditure.

Instead, Appellants seek a general injunction to change the very way in which the Commissioner has decided to uphold the constitutional right of indigent women to seek

therapeutic abortions. As the District Court explained: "What [Appellants] are really asking for is that [DHS] do a better job of monitoring the medical necessity statement signed by a women's doctor." (Appellants' Addendum 4.) Appellants insist that the method used by the Commissioner to verify medical necessity—requiring doctors to attest to that very fact—is insufficiently rigorous and therefore must lead to some illegally funded medical procedures. (*See, e.g.*, Compl. ¶¶ 20, 40.) But the hypothetical possibility that the procedures followed as part of that effort may result in the use of public funds for an abortion that the Commissioner is not constitutionally mandated to pay for does not transform this lawsuit into one to enjoin an illegal expenditure.

II. APPELLANTS' "GENERALIZED GRIEVANCE" REGARDING THE COMMISSIONER'S PROCEDURE CANNOT CONFER STANDING.

Appellants lack standing because their Complaint does not seek to enjoin allegedly unlawful payments, but rather seeks an injunction changing the method in which the Commissioner has endeavored to protect indigent women's constitutionally protected rights. Minnesota citizens do not have standing to sue when they merely disagree "with the policy or discretion of those charged with the responsibility of executing the law." *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977). The rationale for this limitation is self-evident; without it, citizens could sue every time they felt that a state procedure was not perfectly effective at detecting improper uses of state funds. Such "generalized grievances" about the operations of state agencies are "most appropriately addressed by the representative branches." *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). For this reason, Minnesota

courts have regularly denied standing to plaintiffs similarly presenting objections to the ways in which state agencies or officials have exercised their discretion. *See, e.g.*, *In re Sandy Pappas Senate Committee*, 488 N.W.2d 795, 797 (Minn. 1992) (no taxpayer standing to challenge decision of Ethical Practices Board); *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App. 2004) (no taxpayer standing to challenge funding decision by Commissioner of Finance).

As Respondent has noted, comparison of this case with those in which Minnesota courts have appropriately conferred taxpayer standing underscores the impropriety of Appellants' current request. (*See* Respondent's Br. 12–14.) In *McKee*, for example, the Minnesota Supreme Court concluded that the plaintiff had standing to challenge a "policy bulletin issued by the Commissioner of Public Welfare which allowed the coverage of elective, nontherapeutic abortions." 261 N.W.2d at 568. As the Court stated in *McKee*, "the issue which this case presents is whether expenditure of tax monies under a rule which the plaintiff taxpayer alleges was adopted by a state official without compliance with the statutory rule-making procedures, is 'injury in fact' within the meaning of the Minnesota Administrative Procedure Act." *Id.* at 570. The Court concluded that a citizen could assert taxpayer standing where he alleged that a government official had engaged in unlawful rulemaking (*i.e.*, rulemaking contrary to the Minnesota Administrative Procedure Act) and that the rulemaking led to an arguably unlawful expenditure of public funds. *Id.* at 571.

"The Minnesota courts have limited *McKee* closely to its facts," *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 175 (Minn. Ct. App.

2009), and the facts alleged in Appellants' Complaint are far different from *McKee*. Appellants do not allege that the Commissioner has taken any steps to promulgate any rule allowing for public funding of nontherapeutic abortions. The allegations relating to the Commissioner's conduct in Appellants' Complaint suggest precisely the opposite. As Appellants state, "DHS requires that abortion providers submit a 'Medical Necessity Statement' in order to receive payment for these abortions from Public Assistance." (Compl. ¶ 35 (emphasis added).) Appellants merely disagree with the procedure used by the Commissioner to comply with her constitutional and statutory obligations; they therefore lack standing.

This Court need not proceed beyond the question of standing. *See, e.g.*, *Annandale Advocate v. City of Annandale,* 435 N.W.2d 24, 27 (Minn. 1989) (noting that question of standing is "essential" to Court's "exercise of jurisdiction"). Nonetheless, Appellants have raised arguments related to the Minnesota Supreme Court's decision in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995). (*See* Appellants' Br. § II.) In doing so, Appellants have misconstrued keys elements of that ruling.[2] ACLU-MN would like to set the record straight and provide context related to Minnesota's long history of protecting privacy rights for all Minnesotans.

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[2] Appellants' Complaint fails to allege that the Minnesota Supreme Court did not correctly decide *Gomez* and that it should be overruled in this case. Even if such a claim had been pled, its omission from Appellants' opening brief constitutes a waiver of it for purposes of this appeal and any subsequent proceedings in this case. As this Court recently recognized, "issues not raised or argued in appellant's brief cannot be raised in a reply brief." *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 166 (Minn. Ct. App. 2012) (quoting *Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. Ct. App. 2009)).

III. IN *GOMEZ*, THE MINNESOTA SUPREME COURT INTERPRETED THE RIGHT TO PRIVACY BROADLY, AND THAT INTERPRETATION REMAINS CONSISTENT WITH SUBSEQUENT COURT PRECEDENT.

In *Gomez*, the Minnesota Supreme Court was faced with a narrow question: under the Minnesota Constitution, may the State reimburse the cost of childbirth-related services and some abortions, but not all therapeutic abortions, for indigent women? 542 N.W.2d at 19. The class of women who brought the lawsuit was made up of those who needed abortions for health reasons. *Id.* at 20–21. Health-related abortions might be needed, according to the *Gomez* plaintiffs, if a woman suffers from "pre-existing health conditions such as stress or malnutrition" or if she has a medical condition that is aggravated or caused by pregnancy. *Id.* at 25. Further, some health conditions are aggravated or untreatable during pregnancy. *Id.* The plaintiffs challenged the State's selective funding scheme for abortions that provided funding for comprehensive childbirth-related services and some abortions, but did not provide funding for all therapeutic abortions. 542 N.W.2d at 19. The Court held that such a scheme violated the indigent women's right to privacy because it infringed on the right of a woman to choose to have an abortion.

In striking down the unconstitutional law, the Court recognized a broad privacy interest in the Minnesota Constitution. The Court had previously recognized similarly broad privacy interests by ruling, for example, that Minnesota citizens have an expansive privacy right to be free from unreasonable searches and seizures. With respect to roadblocks, the Court held that "roadblocks where law enforcement officers stop all drivers in an effort to apprehend drunk drivers violate Article I, Section 10" of the

Minnesota Constitution. *Ascher v. Comm'r of Public Safety*, 519 N.W.2d 183 (Minn. 1994). And, in *In re Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993), the Court recognized that a seizure occurs when a reasonable person feels she is not free to leave.

This broad privacy interest remains an important part of Minnesota jurisprudence, which importance is reflected in privacy cases since *Gomez*. The Minnesota Supreme Court has, for example, held that social guests enjoy a reasonable expectation of privacy. *See In re Welfare of B.R.K.*, 658 N.W.2d 565 (Minn. 2003). People also have a reasonable expectation of privacy in their fish houses. *State v. Larsen*, 650 N.W.2d 144, 149 (Minn. 2002). Privacy interests also extend to areas the public can access. For example, a drug-detection dog sniff outside a storage unit is a search under the Minnesota Constitution and requires a reasonable, articulable suspicion for a warrantless search. *State v. Carter*, 697 N.W.2d 199, 211–12 (Minn. 2005). A reasonable, articulable suspicion of illegal activity is also necessary for a warrantless dog sniff outside the door of an apartment. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). In the years before and since *Gomez*, the Minnesota Supreme Court has repeatedly and expressly interpreted the Minnesota Constitution to protect broadly the privacy rights of Minnesotans.

Rather than recognize the broad privacy interest the Court articulated in *Gomez*, Appellants argue that the decision "specifically" prohibits the use of taxpayer money for elective, non-therapeutic abortions. (*See* Appellants' Br. 13.) Appellants use this misguided view of *Gomez* in an attempt to have the Court impose an unworkable policy on the Commissioner, one that requires unnecessary oversight by the judicial branch and would be a dangerous encroachment on the privacy rights enshrined in the Minnesota

Constitution. (*See id.* at 14.) But, as explained above, the Court did not resolve whether the State must pay for elective, non-therapeutic abortions; it resolved only whether the State must pay for all therapeutic abortions. Thus, Appellants are incorrect that the import of the Court's holding in *Gomez* involves *limiting* a woman's right to have an abortion.

IV. THE COURT'S CONCLUSION IN *GOMEZ* THAT "THE DIFFICULT DECISION WHETHER TO OBTAIN A THERAPEUTIC ABORTION WILL NOT BE MADE BY THE GOVERNMENT, BUT WILL BE LEFT TO THE WOMAN AND HER DOCTOR," IS PART OF ITS HOLDING AND IS NOT "DICTA."

In the final paragraph of its *Gomez* opinion (the paragraph containing the holding), the Court states that "the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor." 542 N.W.2d at 32. Appellants mischaracterize this central part of the *Gomez* holding as "dicta." (*See* Appellants' Br. 12–13.)

First, the "difficult decision" *is* the protected right. Indeed, in describing the scope of the privacy interest, the Court stated, "[i]t is critical to note the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort." *Id.* at 31. A decision about whether or not to abort a pregnancy is not made in a vacuum but instead is made by a woman through consultation with her doctor. Justice Brennan, whose dissent in *Harris v. McRae* played an essential role in *Gomez*, recognized the central role a woman's doctor plays with respect to a woman's right to privacy:

> [T]he State's interest in protecting the potential life of the fetus cannot justify the exclusion of financially and medically needy women from the benefits to which they would otherwise be entitled solely because the treatment *that a doctor has concluded* is medically necessary involves an abortion."

448 U.S. 297, 329 (1980) (emphasis added).

Appellants argue that *Gomez*'s statement regarding decision-making by a woman and her doctor is dicta, but that argument reflects a lack of understanding about the nature of the privacy right at issue in that case. That a woman has a fundamental right to privacy in deciding whether to have an abortion (which decision necessarily includes consultation with her doctor) is a critical part of the holding in *Gomez*. Thus, to the extent Appellants argue that the District Court erred in relying on that language, they are mistaken. (*See* Appellants' Br. 12–13.)

As the *Gomez* Court explained, this fundamental right follows logically from past precedent related to privacy. Individuals have a constitutionally protected right of privacy to make intimate and personal decisions about procreation. *See Gomez*, 542 N.W.2d at 27. This right "protects against unduly burdensome interference with procreative decision-making, and only a compelling interest can justify state regulation impinging upon that right." *Id.* at 26. Making decisions about procreation is "one of the basic civil rights of man" and is "fundamental to the very existence and survival of the race." *Id.* at 27 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). Few decisions are more private than a woman's decision about whether or not to carry a child to term. *Id.* The right to privacy in the Minnesota Constitution, the *Gomez* Court

observed, is "fundamental" and includes the right of women to choose to have an abortion. *Id.* at 27.

Second, it is logical that this difficult decision will be made between a woman and her doctor. The Court held that the State cannot refuse to pay for abortions for eligible women "when the procedure is necessary for therapeutic reasons." *Id.* at 32. In stating this holding, the Court did not prescribe a process for determining whether a therapeutic abortion is "necessary," but neither did the Court imply that a woman has the independent expertise to evaluate whether a therapeutic abortion is necessary. Instead, the Court acknowledged a logical, practical import of its holding: The decision about whether to have an abortion would be made by a woman and her doctor. *Id.*

Thus, it is the *decision* whether to abort that is so important, and the Court's statement in *Gomez* regarding who makes that decision (a woman and her doctor) is part of its holding.

V. DISMISSAL WAS ALSO WARRANTED UNDER RULE 12.02(E) BECAUSE APPELLANTS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Dismissal of this action was also proper because Minnesota courts do not recognize a claim that a state agency could be doing more to prevent potential unlawful or improper payments. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 454 (Minn. 2006) (Rule 12.02(e) dismissal appropriate where facts alleged in complaint give rise to no cognizable legal claim under Minnesota law). In an effort to satisfy the Rule 12.02(e) standard, Appellants have asserted for the first time in this appeal that "DHS has a statutory duty to independently review 'whether medical care to be provided to eligible

recipients is medically necessary.'" (Appellants' Br. 14 (quoting Minn. Stat. § 256B.04, subd. 13).) A cursory examination of the subdivision that they quote (which Appellants quote in full only two lines later) demonstrates that Appellants have misconstrued that provision. Subdivision 13 is a conflict of interest rule that applies only to "person[s] appointed by the commissioner." *Id.* It does not require the Commissioner to determine with certainty the medical necessity of each and every medical procedure that she funds.[3] To do so would be an exceedingly tedious undertaking, the cost of which would quickly subsume any benefit.

In the absence of any legal requirement for the Commissioner to do more than she currently does to confirm the medical necessity of state-funded abortions, Appellants are left with their own opinion that the Commissioner *could* be doing something more. The simple and limitless speculation that something more *could* be done cannot be a sufficient basis to challenge payments made in accordance with procedures designed to protect indigent women's constitutionally protected decisions. If it were, every payment by the Commissioner (and indeed every other state agency) would be susceptible to cognizable legal claims. Of course, with unlimited time and resources, the Commissioner (along with every other state official and agency) likely could do "something more" to scrutinize each and every payment. But in a reality of limited resources, the system would collapse upon

[3] For the same reason, Subdivision 13 does not create, as Appellants suggest, a duty on medical providers to abstain from performing one of their most basic job duties—deciding "whether medical care is medically necessary" for their patients. (*See* Appellants' Br. 15.) Moreover, as Respondent notes, this provision applies only to *prospective* decisions, such as decisions for "prior authorization" of medical procedures. (*See* Respondent's Br. 17–18.)

itself if individual taxpayers could sue to stop any such payments, asserting only the threadbare claim that the State or one of its agencies could be doing "something more" to ferret out improper payments. Moreover, despite their assertion that the Commissioner's process for funding therapeutic abortions is somehow insufficient, Appellants fail to allege that this procedure is any less rigorous than the process followed by the Commissioner to determine the medical necessity of any other state-funded outpatient medical procedures.

Appellants' failure to present a cognizable legal claim under Minnesota law is an independent basis for dismissal of Appellants' Complaint.

VI. THE RELIEF SOUGHT BY APPELLANTS IS UNWORKABLE AND WOULD REQUIRE A DANGEROUS INTRUSION INTO PATIENTS' PRIVATE AND CONSTITUTIONALLY PROTECTED DECISIONS.

Appellants are dissatisfied with the current process that the Commissioner employs in determining when to fund particular medical procedures. (*See* Appellants' Br. 12.) The main thrust of Appellants' argument is that the Commissioner should not defer to the medical decisions of trained medical doctors and, impliedly, that the Commissioner should add additional layers of review and investigation to further scrutinize those decisions. (*Id.*) As discussed in Sections II and V above, mere disagreement with the procedures used by a state agency to carry out its legal duties does not give rise to standing and cannot survive a Rule 12.02(e) analysis. Nonetheless, even if Appellants had standing to raise such a challenge and could state a legally cognizable claim, the relief sought by Appellants would be impracticable and lead to impermissible intrusions into the constitutionally protected decisions of indigent women.

By seeking a permanent injunction, Appellants are essentially asking that a Minnesota court to act as auditor and investigator to ensure that the Commissioner conducts even more thorough vetting of state-funded medical procedures. (*See* Complaint ¶ 54.) Any such injunction would prove utterly unworkable and, as the District Court explained, "would require the Court to become excessively involved in the operations and policies of the Department of Human Services." (Appellants' Addendum 5.) The Court would be put in the position of inquisitor, determining whether women making private decisions in consultation with their doctors have made the correct choice. Such injunctive relief would be unprecedented and would require an extraordinary and practically impossible second guessing by the courts of every decision to pursue a therapeutic abortion.[4]

Not only is Appellants' court-as-inquisitor approach impracticable, it would also be unconstitutional. The right to decide to have an abortion is, after all, a right protected under the United States and Minnesota Constitutions. Adding additional layers of court oversight and administrative bureaucracy to further scrutinize a woman's private decision to seek an abortion certainly would not survive strict scrutiny as applied by Minnesota courts, *see Gomez*, 542 N.W.2d at 31, and would also fail the undue burden test applied

[4] Further, to the extent Appellants argue that the Commissioner should rely on data from a Minnesota Department of Health form ("Report of Induced Abortion") to investigate whether expenditures for abortions were "illegal," that requirement would be impracticable. First, the form itself does not contain the patient's name or information that would allow the Commissioner to determine the patient's name. (*See* Respondent's Br. 9–10.) Second, the form does not contain any category titled "therapeutic" or sufficient detail to allow the Commissioner to determine with certainty that any particular abortion was or was not performed for "therapeutic" reasons.

by the United States Supreme Court, *see Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992).

Appellants' pursuit of ever more judicial and administrative scrutiny into indigent women's private medical decisions offends the core privacy principles repeatedly affirmed by the Minnesota Supreme Court. Minnesota doctors are already required to provide personal information about their patients necessary to satisfy the requirements of the Medical Necessity form. Appellants ask the Court to require government officials to further invade, scrutinize, and second guess the private decisions made by patients in consultation with their doctors. Such a result would run afoul of *Gomez*, which the Court itself explained to mean that "the difficult decision whether to obtain a therapeutic abortion *will not be made by the government*, but will be left to the woman and her doctor." 542 N.W.2d at 32 (emphasis added).

CONCLUSION

Appellants' generalized grievance does not provide them with standing. In their attempt to fashion a legally cognizable claim, Appellants have misconstrued key elements of the Minnesota Supreme Court's holding in *Gomez.* They have failed to point to a single authority supporting the proposition that the Commissioner must do more than she already does to confirm the propriety of DHS payments for therapeutic abortions, and they do not allege that the Commissioner's procedure for confirming the medical necessity of state-funded abortions is any less rigorous than procedures employed to determine the medical necessity of other procedures. Finally, the relief sought by Appellants would require a radical intrusion into medical patients' privacy by the courts

and government officials, intrusions which would offend the very privacy rights protected by the Minnesota Constitution as explained in *Gomez*. For all of these reasons and those provided by Respondent, this Court must affirm the District Court's dismissal of this case.

Dated: November 4, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). The brief was prepared Microsoft Word 2007 (using the Word 97–2003 file format), which reports that the brief contains 4,701 words.