NO. A13-0986

STATE OF MINNESOTA
IN THE 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.

On appeal from the District Court of Ramsey County,
Honorable Kathleen Gearin, Judge Presiding.

BRIEF OF PRO-CHOICE RESOURCES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

Pursuant to the Order of this Court dated July 2, 2013, granting Pro-Choice Resources and others leave to file briefs as *amici curiae*, Pro-Choice Resources submits this *amicus curiae* brief urging the Court to affirm the District Court's dismissal of this case.[1]

II. INTEREST OF *AMICUS CURIAE* PRO-CHOICE RESOURCES

Pro-Choice Resources is a non-profit, reproductive justice organization that has been operating in Minnesota since 1967. Its mission is to ensure that all people and communities have the power and resources to make decisions about their sexual and reproductive health with self-determination and dignity. In furtherance of that mission, Pro-Choice Resources assists eligible Minnesota women in applying for public health insurance. To the extent its resources allow, it also provides financial assistance to Minnesota women seeking abortion services who are not covered by public health insurance.

Pro-Choice Resources served as a plaintiff in the litigation that established the State's obligation to pay for therapeutic abortion services through its public health insurance programs. *See Women of Minn. ex rel. Doe v. Gomez*, 542 N.W.2d 17, 20 n.2 (Minn. 1995). The relief that Pro-Choice Resources obtained in that litigation is directly at issue here because Plaintiffs are seeking dissolution of the *Gomez* injunction.[2] Pro-

[1] This brief was not authored in whole or in part by counsel for any party. Further, no one other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pro-Choice Resources filed a motion to intervene as a defendant in the District Court proceedings. Without prejudice, the District Court denied that motion as moot upon

Choice Resources has a keen interest in ensuring that all Minnesota women continue to have access to therapeutic abortion services without regard to their financial status. Further, Pro-Choice Resources seeks to ensure that those services continue to be provided on a confidential basis.

III. ARGUMENT

Plaintiffs' wholly unsubstantiated allegations of fraud and racism are a mere pretext to seek elimination of public health insurance coverage for therapeutic abortion services.[3] Plaintiffs have not alleged a credible factual basis for their conclusory allegations that State funds have been unlawfully disbursed. As explained below, there is no discrepancy between the number of abortions paid for by Minnesota's public health insurance programs on an annual basis and the data collected by the Minnesota Department of Health ("MDH") concerning women's reasons for having abortions. *See infra* at 12-15. Women are not required to provide MDH with information about their reasons for having an abortion, and many decline to do so. *See infra* at 12-13. As a result, no reasonable inferences can be drawn from the MDH data about the number of Minnesota women who have had an abortion for therapeutic reasons in a given year.

Plaintiffs' baseless allegations do not entitle them to conduct a fishing expedition

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granting the State's motion to dismiss.

[3] The prayer for relief in Plaintiffs' Complaint specifically asks the District Court to "[i]ssue preliminary and permanent injunctive relief directing DHS to cease all public expenditures for abortions until DHS can demonstrate that public funds no longer will be expended for non-therapeutic abortions;" and "[d]issolve the *Gomez* injunction because it has proven to be unworkable in practice." *See* APP 12, ¶¶ C, E.

via the discovery process into the medical records of women who have had therapeutic abortions. Nor do they provide a compelling reason to overturn the Minnesota Supreme Court's decision in *Gomez*, which was correct when it was decided and remains correct today. *See infra* at 3-7. When women who rely on public health insurance are denied access to therapeutic abortion services, their health is compromised, the stability of their families is threatened, and their rights under the Minnesota Constitution are violated. *See infra* at 9-12.

Accordingly, the District Court was correct in concluding that Plaintiffs' Complaint is legally insufficient. Its judgment should be affirmed.

A. The Minnesota Supreme Court's Decision in *Gomez* – Establishing the State's Obligation to Pay for Therapeutic Abortion Services through its Public Health Insurance Programs – Was a Correct Interpretation of the Minnesota Constitution and Commands Deference under the Doctrine of *Stare Decisis*.

The Minnesota Supreme Court is "extremely reluctant to overrule [its] precedent under principles of *stare decisis*." *State v. Martin*, 773 N.W.2d 89, 98 (Minn. 2009) (quoting *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005)). It requires a "compelling reason" before a prior decision will be overruled. *Id.* The Court's decision in *Gomez*, establishing the State's obligation to pay for therapeutic abortion services through its public health insurance programs,[4] was a correct interpretation of the Minnesota

[4] The specific programs at issue in *Gomez* were Minnesota's Medical Assistance ("MA") program, General Assistance Medical Care ("GAMC") program, and County Relief of Poor Act program. *See Gomez*, 542 N.W.2d at 22-23.

Constitution and commands deference under the doctrine of *stare decisis*.[5] *See Gomez*, 542 N.W.2d at 30-32. Plaintiffs' allegations fail to provide a compelling reason to overrule that landmark decision.

1. In *Gomez*, the Minnesota Supreme Court Correctly Held That the State May Not Coerce Women into Choosing Childbirth over Abortion by Selectively Excluding Therapeutic Abortion Services from Coverage by the State's Public Health Insurance Programs.

In *Gomez*, the Minnesota Supreme Court held that the selective exclusion of therapeutic abortion services from coverage by the State's public health insurance programs violates the right of privacy that is protected as fundamental by the Minnesota Constitution. *Id.* at 31. The Court began its analysis by recognizing that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate a pregnancy because that decision will have profound consequences on the subsequent course of her life. *Id.* at 27. It declared:

> We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities. We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy.

Id. Relying on its prior decisions as well as Minnesota's "long tradition of affording

[5] Of course, it is the prerogative of the Minnesota Supreme Court alone to overrule one of its prior decisions, particularly a decision that interprets the Minnesota Constitution. *See State v. Rodriguez*, 738 N.W.2d 422, 431 (Minn. Ct. App. 2007) ("[I]t is not the role of *this* court to make a dramatic change in the interpretation of the Minnesota Constitution when the supreme court has not done so.") (emphasis in original), *aff'd*, 754 N.W.2d 672 (Minn. 2008).

persons on the periphery of society a greater measure of government protection and support than may be available elsewhere," the Minnesota Supreme Court went on to hold that the Minnesota Constitution provides greater protection for this right than the U.S. Constitution.[6] *Id.* at 30.

In particular, the Minnesota Supreme Court declined to follow the U.S. Supreme Court's decision in *Harris v. McRae*, 448 U.S. 297 (1980), which held that restrictions on coverage of therapeutic abortion services did not violate the U.S. Constitution, because that decision had "the practical effect of not protecting a woman's fundamental right to choose to have an abortion" and allowed "funding decisions to accomplish . . . nullification of that right." *Gomez*, 542 N.W.2d at 31. The Minnesota Supreme Court reasoned that selective exclusion of therapeutic abortion services from coverage by public health insurance programs has a coercive effect on poor women's decisions about pregnancy, and the *McRae* Court failed to give this coercive effect sufficient weight in its analysis. *Id.* at 29-30. It quoted approvingly from Justice Brennan's dissent in *McRae* that: "The fundamental flaw in the Court's due process analysis . . . is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse

[6] The Minnesota Supreme Court has long recognized that the Minnesota Constitution is more protective of certain rights than the U.S. Constitution. *See, e.g., Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 186-87 (Minn.1994) (warrantless searches); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn.1993) (seizure of a person); *Friedman v. Comm'r of Pub. Safety,* 473 N.W.2d 828, 835 (Minn.1991) (right to counsel); *State v. Russell*, 477 N.W.2d 886, 889 (Minn.1991) (equal protection); *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn.1990) (right to religious liberty); *Jarvis v. Levine*, 418 N.W.2d 139, 147-48 (Minn.1988) (right to bodily integrity); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn.1993) (right to education); *State v. Hamm*, 423 N.W.2d 379, 382 (Minn.1988) (right to a 12–member jury) (subsequently overruled by constitutional amendment).

can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." *Id.* at 29 (quoting *McRae*, 448 U.S. at 334 (Brennan, J., dissenting)).

Ultimately, the Minnesota Supreme Court concluded that "the right to 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 (emphasis in original). As a result, "any legislation infringing on the decision-making process . . . violates this fundamental right." *Id*.

2. The *Gomez* Decision Accords with the Weight of Authority at the State Level.

The decision in *Gomez* accords with the weight of authority from other states concerning public health insurance coverage for abortion services. Indeed, the Minnesota Supreme Court considered such authority in arriving at its decision in *Gomez*. *See Gomez*, 542 N.W.2d at 28 ("Other state courts have addressed this issue, and a substantial majority of these courts have departed from *McRae*.").

In all, at least eight state supreme courts (besides Minnesota) have held that selective exclusion of therapeutic abortion services from coverage by public health insurance programs violates rights protected by the state constitution. *See Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 34 n.3, (Ariz. 2002) ("We cannot explain the decision in *Harris* [*v. McRae*] . . . It is difficult to reconcile that decision with the basic teaching of *Roe v. Wade*. . . ."); *State Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 911 n.56 (Alaska 2001) (rejecting the reasoning

of *McRae* and noting that the U.S. Supreme Court failed to consider its own rational basis precedent in "the discriminatory allocation of government benefits cases"); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851, 854-55 (N.M. 1998) (holding that restriction on coverage of abortion services violated the New Mexico's Equal Rights Amendment, which was designed to eliminate the use of biological sex differences as pretexts for stereotyping, patriarchalism, and sex discrimination); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 666-67 (W. Va. 1993) (concluding that restriction on coverage of abortion services withheld government benefits "for no reason *other* than that a woman chooses to avail herself of a federally-granted constitutional right," and thus violated the principle of neutrality); *Right to Choose v. Byrne*, 450 A.2d 925, 935 (N.J. 1982) (holding that, once the State "undertakes to fund medically necessary care attendant upon pregnancy," it may not "force [a] woman to sacrifice her health to protect a potential life"); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981) ("[The State] may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to achieve with carrots what it is forbidden to achieve with sticks."); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781, 784, 789 (Ca. 1981) (holding that the coverage restriction could not withstand constitutional scrutiny because it "selectively with[held] . . . benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support"); *see also Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 255 (Ind. 2003) (holding that State medical assistance program must provide

coverage for abortion services necessary to avert serious health risks).

Lower courts in at least six additional states have reached the same conclusion. *See Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995), slip op. at 21 (noting that "once a state enters the constitutionally protected area of choice" by "subsidiz[ing] costs associated with child bearing or with health care generally," "the state must do so with genuine indifference or neutrality") (cited in *Gomez*, 542 N.W.2d at 28 n.12); *Doe v. Wright*, No. 91-CH-1958, slip op. at 1 (Ill. Cir. Ct. Dec. 2, 1994) (holding that restriction on abortion coverage violated Illinois Constitution) (cited in *Gomez*, 542 N.W.2d at 28 n.12); *Roe v. Harris*, No. 96977 (4th Dist. Ct. Idaho, Feb. 1, 1994), slip op at 11 (holding that the State "may not pick and choose for reasons not connected to medical necessity, especially where the choosing may invade a woman's constitutionally protected right of choice"); *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 23, 1986), slip op. at 5-7 (holding that "by precluding access by indigents to a necessary medical procedure," the restriction on abortion coverage violated the right to safety under the Vermont constitution); *Doe v. Maher*, 515 A.2d 134, 151 (Conn. Super. Ct. 1986) ("Just as the state lacks a compelling reason under due process analysis to exclude abortion from Medicaid funding at any stage of the pregnancy when the health of the woman is at stake, it also lacks such an interest for equal protection purposes."); *Planned Parenthood Ass'n, Inc. v. Dep't of Human Res. of State of Or.*, 663 P.2d 1247, 1257 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984) (holding restriction on abortion coverage violated Oregon Constitution's Equal Privileges and Immunities Clause).

B. Under *Gomez*, Public Health Insurance Programs Are Required to Cover Abortion Services for a Wide Range of Therapeutic Reasons without a Showing of Strict Medical Necessity or Concurrence by Multiple Physicians.

Prior to *Gomez*, Minnesota's public health insurance programs limited coverage for abortion to three situations: (1) the abortion is medically necessary to prevent the death of the pregnant woman and two doctors have signed a statement to that effect; (2) the pregnancy resulted from a rape that was reported to a law enforcement agency within 48 hours after it occurred or the victim became physically able to make a report; or (3) the pregnancy resulted from incest that was reported to a law enforcement agency. *See Gomez*, 542 N.W.2d at 23-24. The Minnesota Supreme Court held that coverage could not be limited in this manner and must be made available whenever an abortion is sought for therapeutic reasons. *See id.* at 19 ("[A] pregnant woman, who is eligible for medical assistance and is considering an abortion for therapeutic reasons, cannot be coerced into choosing childbirth over abortion by a legislated funding policy."). In the course of its opinion, the Court recognized a wide range of therapeutic reasons for which a woman might seek an abortion, and emphasized 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." *Id.* at 32.

The Court made clear that the State's obligation to cover therapeutic abortion services extends beyond cases of strict medical necessity to encompass all cases in which continued pregnancy would pose a risk to a woman's physical or mental health. For example, the Court noted that "for MA/GAMC-eligible women who typically suffer from

pre-existing health conditions such as stress or malnutrition, abortion may be necessary to preserve the health of the mother even though it is not clear to the physician that the mother would die without the abortion." *Id.* at 25. The Court recognized that many common medical conditions may be aggravated by pregnancy, such as rheumatoid arthritis, iron deficiency, hypertension, and diabetes. *See id.* And others cannot be treated during pregnancy. *See id.* ("Diseases such as . . . cancer that require radiation or chemotherapy treatment are untreatable during pregnancy, as are other conditions requiring medication that may affect the development of the fetus."). The Court also noted that: "Abortion may . . . be sought in cases in which pregnancy aggravates a pre-existing mental illness or psychiatric disability. In such cases, pregnancy increases the risk of breakdown, particularly when the woman must cease taking psychotropic medications due to the pregnancy." *Id.*

Further, the Court held that abortion services must be covered for all women who became pregnant as a result of sexual violence, regardless of whether that violence was reported to the police. *See id.* at 25-26. It noted that sexual violence is underreported in Minnesota and "many women who are victims of rape and incest do not report the incident to law enforcement authorities within the statutory reporting requirements." *Id.* at 25.

The crux of Plaintiffs' claim is that the State should engage in invasive scrutiny of a woman's decision to have a therapeutic abortion, requiring something more than a signed statement from her treating physician that the abortion is being performed for therapeutic reasons. But such scrutiny is specifically foreclosed by both the letter and

spirit of *Gomez*, which struck down the requirement that multiple physicians document the medical necessity of an abortion, as well as the requirement that a woman report incidents of sexual violence to law enforcement, and declared unequivocally 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." *Gomez,* 542 N.W.2d at 32.

C. Restricting Public Health Insurance Coverage for Therapeutic Abortion Services Would Have Devastating Consequences for Minnesota Women and Their Families.

Women who rely on public health insurance programs are financially vulnerable.[7] The very purpose of these programs is "to alleviate the hardships faced by those who cannot afford medical treatment." *Gomez*, 542 N.W.2d at 26. Denying such women coverage for therapeutic abortion services would have devastating consequences for their health and the stability of their families. At best, women would delay obtaining abortion services while attempting to save or borrow the money needed to pay for them. *See id.* But when abortion is sought for therapeutic reasons, the longer a pregnancy continues, the longer a woman is exposed to the underlying health risk. *See id.* At worst, women would be unable to obtain abortion services at all, and would be forced to bear the health

[7] As a result, they are also more likely to suffer from underlying health conditions which can complicate, or be complicated by, pregnancy. Poverty and other socioeconomic factors are known to be prominent contributing factors to poor health outcomes. It is well-documented that women who experience economic hardship are more likely to suffer physical and mental health impairments. *See generally* Adam Wagstaff, *Poverty and health sector inequalities*, World Health Organization Bulletin: Policy and Practice, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2567730/pdf/11953787.pdf.

risks of a full-term pregnancy.

Pro-Choice Resources strives to help Minnesota women who need financial assistance to obtain abortion services, but its resources are limited. In the absence of public health insurance coverage for therapeutic abortion services, it would not be able to meet the needs of all such women. Ninety percent of the women that Pro-Choice Resources assists earn incomes that fall below the federal poverty line. In 2010, 43% reported being unemployed and 17% did not have stable housing. For many of these women, obtaining therapeutic abortion services is critical to maintaining their well-being and the stability of their families.

One woman whom Pro-Choice Resources assisted in applying for public health insurance explained that:

> [both] my husband and I had lost our health insurance. I took out a temporary plan for $400 a month for 3 months. It didn't cover any costs related to pregnancy or abortion, but I had no plans of getting pregnant and was taking my birth control pills as prescribed. The next month I missed a period and realized I was pregnant. Since my temporary insurance plan did not cover any costs associated with pregnancy, childbirth or abortion, I applied for medical assistance. I am lucky enough to live in one of only 17 states that cover abortion as part of Medicaid, but first I had to qualify. One county worker told me that "if you have a baby you can make the man pay." I said, "I understand that," but inside I was thinking, "[that] man is my husband and all I want to make him do is finish college successfully." I had my abortion and charged it to my credit card. A few months later I was reimbursed through medical assistance. I have insurance now, though it still doesn't cover abortion. My abortion was a deep decision. A pregnancy and childbirth would have broken me, economically, emotionally and mentally. I'm white, heterosexual, able-bodied, thin, well-educated, married and attractive. But I'm poor. I can't even imagine how difficult the process of getting an abortion would be for a woman who isn't as privileged as I.

Another woman that Pro-Choice Resources assisted had lost her job, and with

that her health insurance. Soon thereafter she was unable to afford the mortgage payments on her house, which went into foreclosure. She was homeless when she found out that she was pregnant and couldn't afford an abortion without Pro-Choice Resources' assistance. Another woman, Juanita, described the desperation that occurs when abortion is made unaffordable, and thus inaccessible:

> When I found out I was pregnant, I knew I could not support another child. I am a mother to one beautiful child. I am also an immigrant living with no health insurance and do not have steady work. On average, I make about $180 a month. When I called to make an appointment for an abortion, they told me it would be $475 – almost three months' salary for me. I had no way to pay for it. I didn't know what to do so I decided to try to end the pregnancy on my own. I took some herbal pills that I had heard would induce a miscarriage. All it did was make me so ill that I ended up in the hospital. At the hospital, a woman told me about [Pro-Choice Resources]. I was able to have a safe abortion because of their help.

Pro-Choice Resources also serves women who have experienced physical or sexual violence. *See, e.g.*, *Gomez*, 542 N.W.2d at 25 (noting the number of women assisted by Pro-Choice Resources who were pregnant as a result of rape or incest). One woman recently served by Pro-Choice Resources had two children, worked part-time and had just fled from domestic violence she experienced from her children's father. Another was a 19-year-old single mother with an infant, who was in an abusive relationship with her child's father when she became pregnant again. As she explains,

> I was working full time as a receptionist struggling to make ends meet and in a very physically and emotionally abusive relationship with my daughter's father. My daughter had insurance through the state, which I was not eligible for, but I could not afford insurance through my employer [either]. I was getting the pill through Planned Parenthood at a reduced rate but after my car broke down one month, I had to use all the money I had to fix the vehicle or risk losing my job. My daughter's father insisted on having sex and refused to use a condom. When I refused he would get

> angry or disappear for days at a time with the car leaving me and my child stranded. Inevitably I ended up pregnant for the second time. I was in a horrible relationship, depending on state programs to make ends meet and unable to provide for my daughter in the way that she deserved. I could not handle another child. I had to pay for the abortion out of pocket which meant that I could not pay rent that month. Since my daughter's father refused to contribute financially I ended up losing the apartment and moving back in with my parents. Abortion was absolutely the right choice for me at that time. Had I stayed in that relationship and brought another child into the mix I would have continued the cycle of abuse and poverty.

As evidenced by these stories, the denial of public health insurance coverage for therapeutic abortion services creates serious risks to the health, wellbeing, and overall safety of women and their families.

D. Plaintiffs Have Not Provided a Credible Factual Basis for Their Conclusory Allegations That State Funds Have Been Unlawfully Disbursed.

It is undisputed that Defendant reimburses doctors who provide abortion services only after they have filled out a medical necessity statement listing the therapeutic reason for the abortion and submitted it to the Department of Human Services ("DHS"). APP 8, ¶ 35. Plaintiffs' claim that Defendant has unlawfully disbursed funds to pay for non-therapeutic abortion services is based solely on an alleged discrepancy between the annual number of abortions paid for with public health insurance funds and data collected by the Minnesota Department of Health ("MDH") about women's reasons for having abortions. Close scrutiny of the data, however, reveals that no such discrepancy exists. The conclusions that Plaintiffs have drawn from the data are fatally flawed for the following reasons:

First, a woman is not required to provide the reasons for her abortion to MDH.

She may lawfully refuse to answer the question about her reasons that appears on the MDH reporting form. *See* Minn. Stat. 145.4131(b)(5)(ix). The possible reasons listed on the form include "unknown or the woman refused to answer." APP 21. And the instructions issued to abortion providers by MDH specifically state that, if a woman declines to provide the reasons for her abortion, the abortion provider may not supply the reason, even if known: "If the patient does not complete the question because she refuses to answer, then the facility or physician *must* check the appropriate response, which is "Refuse to answer." APP 23 (emphasis added). From 1999 to 2011, over 10,000 reporting forms indicated that the patient refused to answer. APP 24. These were all classified by Plaintiffs as non-therapeutic abortions. APP 6, ¶ 27.

Second, a woman may indicate that her reasons for having an abortion are not adequately expressed by any of the options on the reporting form by checking a box for "other" and writing in a reason. APP 21. From 1999 to 2011, over 9,000 reporting forms indicated "other" as the reason for an abortion. APP 24. It is impossible to ascertain from the annual reports published by MDH how many of these other reasons are therapeutic because the reports include only a sampling of them. *See, e.g.,* MDH Center for Health Statistics, *Induced Abortions in Minnesota January-December 2011: Report to the Legislature*, 20 (2012) [hereinafter "MDH 2011 Report"], *available at* http://www.health.state.mn.us/divs/chs/abrpt_/abrpt.htm.[8] But some of the reasons that appear in the sampling each year, such as abuse by a domestic partner, are plainly

[8] MDH's 1999-2011 annual reports are incorporated by reference into Plaintiffs' Complaint. *See* APP 5-6, ¶¶ 21-22, 28.

therapeutic. *See id.* Nevertheless, they were all classified by Plaintiffs as non-therapeutic. APP 6, ¶ 27.

Third, a woman may choose to report some, but not all, of her reasons for having an abortion. For example, a woman may report that she "[d]oes not want children at this time," APP 21, without reporting her reason for not wanting children is that carrying a pregnancy to term would require her to stop using an anti-depressant medication, which would negatively impact her mental and physical health.[9] MDH recognizes that its methodology for data collection—relying on self-reporting by individuals who have no obligation or incentive to provide complete information—is inherently unreliable. Indeed, its annual reports concerning abortion data include the following disclaimer about data relating to contraceptive use: "The accuracy of reporting 'Use of Contraceptives at the Time of Conception' is dependent upon self-reporting by the woman. Thus, *these data should not be interpreted as an indication of the effectiveness of any particular method of birth control.*" *See, e.g.*, MDH 2011 Report at 15 (emphasis in original). For the same reason, the data collected by MDH should not be interpreted as an indication of the annual number of abortions performed for therapeutic reasons.

Fourth and finally, every year some Minnesota women with public health insurance obtain abortion services in neighboring states. In 2011, for example, 148 Minnesota women obtained abortions in other states that were paid for with Minnesota public health insurance funds. *See* MDH 2011 Report at 23. But out-of-state abortion

[9] As discussed above, women generally must cease taking psychotropic medications during pregnancy. *See supra* at 8-9.

providers are not required to report on a woman's reasons for having an abortion. *See* Minn. Stat. 145.4133. Their reporting obligations are far more modest than those of in-state abortion providers. *Compare* Minn. Stat. 145.4131 (reporting obligations of in-state providers) *with* Minn. Stat. 145.4133 (reporting obligations of out-of-state providers). As a result, MDH collects data about the *number* of out-of-state abortions that are paid for with public health insurance funds, *see* Minn. Stat. 145.4133(1), but not the *reasons* for those abortions. This results in undercounting of therapeutic reasons for abortions paid for with public health insurance funds.

For all of these reasons, no reasonable inferences can be drawn from the MDH data about the number of Minnesota women who have had an abortion for therapeutic reasons in a given year. Thus, Plaintiffs have not provided a credible factual basis for their conclusory allegations that State funds have been unlawfully disbursed. The District Court was correct to dismiss their Complaint.

IV. CONCLUSION

For the reasons set forth above, *amicus curiae* Pro-Choice Resources respectfully asks this Court to affirm the judgment of the District Court, which dismissed Plaintiffs' Complaint.

Dated: November 4, 2013
St. Paul, MN

Respectfully submitted,

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