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STATE OF WISCONSIN
SUPREME COURT
Case No. 2023AP002362

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD and CLARENCE P. CHOU, MD,

Plaintiffs-Respondents,

CHRISTOPHER J. FORD, KRISTIN J. LYERLY and JENNIFER J. MCINTOSH,

Intervenors-Respondents,

v.

JOEL URMANSKI, as DA for Sheboygan County, WI,

Defendant-Appellant,

JOHN T. CHISHOLM, as DA for Milwaukee County, WI and ISMAEL R. OZANNE, as DA for Dane County, WI,

Defendants-Respondents.

On Appeal from Circuit Court of Dane County
The Honorable Diane Schlipper, Presiding
Case No. 2022CV001594

**ASSOCIATION OF PROSECUTING ATTORNEYS' AMICUS
CURIAE BRIEF IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST

The Association of Prosecuting Attorneys (“APA”) is a national non-profit organization created by prosecutors from across the country to strengthen their efforts in ensuring safer communities and improving their performance in the criminal justice system. The APA provides resources such as training and technical assistance to develop proactive and innovative prosecutorial practices. It acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and with other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including by submitting briefs as *amicus curiae* in appropriate cases. The APA’s board of directors includes current prosecutors from states throughout the nation. The APA has fifteen attorneys on staff with over 350 years of collective criminal justice experience.

The APA files this brief in support of Respondents to explain that (1) prosecutorial discretion is essential to a strong judicial system and strong communities, and therefore, the APA has an interest in ensuring that prosecutorial discretion is defined and used appropriately, (2) the use of prosecutorial discretion does not apply to the issues in this case where consensual abortion is not covered by Wis. Stat. § 940.04, and (3) this Court

should affirm the Dane County Circuit Decision and Order declaring Wis. Stat. § 940.04 does not apply to abortions.

Because the APA routinely grapples with and advocates for these critical issues in contexts around the country - including in Wisconsin - its participation as *amicus curiae* will provide valuable, informed insight that will benefit this Court.

ARGUMENT

The Association of Prosecuting Attorneys (APA) is a leading nationwide organization of federal, state, local and tribal prosecutors; justice system professionals; and community partners. APA advances prosecutorial excellence and serves as the national clearinghouse for innovative and effective prosecutorial practice.

APA submits this brief to share its perspective in this case, where the concept of prosecutorial discretion has been invoked by several different parties for different purposes. Here - where the issue before the Court is the interpretation of a clear and unambiguous statute - prosecutorial discretion is not relevant. Wis. Stat. § 940.04 is a feticide statute which does not apply to consensual abortion. This Court should affirm the Dane County Circuit Court ruling holding Wis. Stat. § 940.04

does not apply to consensual abortions and issue a broad and unambiguous ruling based on the language of the statute.

I. Prosecutorial discretion is essential to a strong judicial system and strong communities.

The United States is the only nation with locally elected prosecutors. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1549 (2012). America's prosecutors are accountable to their communities and are "administrators of justice." CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.2 (a), (b) (AM BAR ASS'N 2017) ("ABA STANDARDS"); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Peters v. State*, 70 Wis. 2d 22, 41, 233 N.W.2d 420 (1975). Their duty "is to seek justice within the bounds of the law, not merely to convict." ABA STANDARDS 3-1.2. "Prosecutors are stewards of public safety, community trust, and procedural justice." <https://www.apainc.org/press-release-addressing-disparities-to-reproductive-health-advisory-committee-releases-statement-on-the-criminalization-of-reproductive-health/> (last visited Sept. 16, 2024).

Prosecutors serve the public interest by pursuing criminal charges with adequate severity and by exercising discretion to not pursue charges when appropriate. The National District Attorney Association standards direct prosecutors to "screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not

in the public interest.” *National Prosecution Standards*, NATIONAL DISTRICT ATTORNEY ASSOCIATION IV.4-1.3, <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf> (last visited Sept. 14, 2024) (“NDAA STANDARDS”).

The ABA Standards for the Prosecution Function provide that “the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support.” ABA STANDARDS 3-4.4. Protecting the rights of all those who interact with the criminal legal system sometimes means dismissal or diversion, a negotiated plea, or trial. Prosecutors must have the discretion to weigh the many interests at stake and determine the appropriate course of action. And prosecutors must revisit these interests as a case progresses and continually ensure that justice is being served.

Discretion also allows prosecutors to create safer communities by making the legal system more just and equitable. Prosecutors follow their professional standards to distribute limited prosecutorial resources. For example, prosecutors must consider whether there is a history of non-enforcement of an applicable law, whether the accused has already suffered substantial loss in connection with an alleged crime, and whether the extent of the harm caused by an offense is too small to warrant a sanction. *See* ABA STANDARDS 3-4.4; NDAA STANDARDS 4-1.3.

Prosecutorial discretion is central to the administration of justice, equity and fairness.

In Wisconsin, district attorneys are endowed with great discretion in deciding whether to prosecute in a case. *County of Kenosha v. C & S Mgmt.*, 223 Wis. 2d 373, 400, 588 N.W.2d 236 (1999); *State v. Peterson*, 195 Wis. 351, 359, 218 N.W. 367 (1928); *State v. Karpinski*, 92 Wis. 2d 599 (1979).

Respondent District Attorney Ozanne's brief highlights the importance of discretion, noting he "continues to participate in this appeal, in part, to protect his discretion and the discretion of other district attorneys in Wisconsin to make prosecutorial decisions that are appropriate under the particular circumstances of each case." (Ozanne Resp. 6.) Respondent District Attorney John T. Chisholm echos this sentiment, arguing that "[m]ost important to Defendant-Respondent John Chisholm is that district attorneys throughout Wisconsin have clear and unambiguous law(s) that inform them in ways that they can appropriately exercise the discretion which is inherent in their official duties." (Chisholm Resp. 9.)

But prosecutorial discretion is not a basis for discriminatory enforcement of law. *Cnty. of Kenosha*, 223 Wis. 2d at 400. Nor may a prosecutor charge a person when the evidence "is clearly insufficient to support a conviction" or to threaten a person with severe (but unfounded)

charges to get them to plead guilty to a lesser charge. *State v. Karpinski*, 92 Wis. 2d at 609. These parameters make sure that prosecutorial discretion remains an effective part of our justice system.

II. Prosecutorial discretion is not relevant here.

Though it is broad, prosecutorial discretion does not apply to conduct that is not criminalized by statute. A prosecutor may strike hard blows, but “is not at liberty to strike foul ones.” *U.S. v. Young*, 470 U.S. 1, 7, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Where, as here, a statute is clear and unambiguous, principles of prosecutorial discretion do not apply. Thus, it is important for the Court to be clear that Respondent Urmanski’s convoluted statutory interpretation is not an exercise of prosecutorial discretion. To hold otherwise would be to erode the foundation of the role prosecutors play in appropriately exercising discretion.

a. Section 940.04 prohibits feticide, not abortion, which is governed by the later-enacted Section 940.15.

Respondents’ briefs are clear and need not be repeated here. But it is important to highlight that the relevant law leads to only one conclusion: Wis. Stat. § 940.15 is governing law and allows consensual abortion. Wis. Stat. § 940.04 was enacted in 1849 and requires abortions to be performed in a “licensed maternity hospital,” a facility which no longer exists. Wis. Stat. § 940.04((5)(c); *See* Wis. Stat. ch. 50 and Wis. Admin. Code ch. DHS

124. Section 940.04 has not been applied for 50 years. In 1985, 11 years after Section 940.04 was last applied and 39 years ago, Wis. Stat. § 940.15 was enacted. That statute explicitly prohibits only an abortion “after the fetus or unborn child reaches viability,” and exempts abortions “necessary to preserve the life or health of the woman.” Wis. Stat. § 940.15(2), (3).

It is axiomatic that where two statutes conflict, the latter prevails. *See State v. Amato*, 126 Wis. 2d 212, 217, 376 N.W.2d 75, 78 (Ct. App. 1985) (emphasis added), quoting 2A Sutherland, Statutory Construction § 51.05 (4th ed. 1973). Although this leaves no ambiguity, had there been any question, this Court’s decision in *State v. Black* would have answered it clearly. 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

In *Black*, interpreting section 940.04(2)(a), this Court stated, “We conclude that the words of the statute could hardly be clearer. The statute plainly proscribes feticide, the action alleged of Black.” *Id.* at 642. Both subsections (1) and (2) refer to “[a]ny person, other than the mother,” and the conduct of “intentionally destroy[ing] the life of an unborn” child. Wis. Stat. § 940.04(1),(2). Because the words that the Court noted “could hardly be clearer,” are the same in both sections, the Court’s interpretation of those words must also be the same. The only acceptable reading of Sections 940(1) and (2)(a) is that they prohibit only feticide.

b. No exercise of prosecutorial discretion could change the plain meaning of Section 940.15 and *State v. Black*.

It is important to note that prosecutorial discretion has a function within the parameters established by Section 940.15 and *State v. Black*. If a feticide occurs, the prosecutor must determine whether it is in the public interest and the interest of victims to bring charges, and what prosecutorial resources to devote to the case. It is well within a Wisconsin prosecutor's discretion to make these decisions. But no prosecutor may reach beyond the parameters set by the law and bring charges for a consensual abortion allowed under Section 940.15.

Urmanski's arguments are not an exercise in and should not be confused with prosecutorial discretion. If Urmanski had used Section 940.04(1) to charge persons with a crime for a medical abortion, his actions would not have been an exercise of discretion, but a mistake of law.

CONCLUSION

For the reasons articulated in the Respondents' briefs, the Court should affirm the final judgment of the circuit court declaring that Wis. Stat. § 940.04(1) is unenforceable as to abortion. The Court can and should reach that result without any reference to prosecutorial discretion because prosecutorial discretion is not relevant to the statutory analysis.

Dated this 18th day of September, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm), and (c) for a brief, as well as this Court's July 2, 2024 order setting a word limit of 4,400 words for a brief produced with a proportional serif font. The brief is set in 13-point Book Antiqua. The length of this brief is 1,661 words.

CERTIFICATE OF EFILING/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of September, 2024.

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