

FILED
04-25-2024
CLERK OF WISCONSIN
SUPREME COURT

No. 24AP330-OA

In the Supreme Court of Wisconsin

PLANNED PARENTHOOD OF WISCONSIN, on behalf of itself, its employees, and its patients, KATHY KING, M.D., ALLISON LINTON, M.D., M.P.H., on behalf of themselves and their patients, MARIA L., JENNIFER S., LESLIE K., and ANAIS L., PETITIONERS,

v.

JOEL URMANSKI, in his official capacity as District Attorney for Sheboygan County, Wisconsin, ISMAEL R. OZANNE, in his official capacity as District Attorney for Dane County, Wisconsin and JOHN T. CHISHOLM, in his official capacity as District Attorney for Milwaukee County, Wisconsin, RESPONDENTS.

BRIEF IN SUPPORT OF CONDITIONAL PETITION TO INTERVENE, OR, IN THE ALTERNATIVE, TO FILE AMICUS BRIEF, ON BEHALF OF WISCONSIN RIGHT TO LIFE, WISCONSIN FAMILY ACTION, AND PRO-LIFE WISCONSIN

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

RICK ESENBERG
LUKE N. BERG

NATHALIE E. BURMEISTER

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

THOMAS MORE SOCIETY

ANDREW BATH

309 W. Washington Street
Suite 1250
Chicago, Illinois 60606
Phone: (312) 782-1680

*Attorneys for Wisconsin Right to Life,
Wisconsin Family Action, and Pro-Life Wisconsin*

INTRODUCTION

Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin (“Proposed Intervenors”) move to intervene, pursuant to Wis. Stat. §§ 809.13 and/or 803.09, both to oppose this Petition for Original Action, and, if the Court accepts the Petition, to oppose its claims on the merits. In the alternative, pursuant to Wis. Stat. § 809.19(7)(b), Proposed Intervenors move to file their opposition to this Petition for Original Action as an amicus brief.

Proposed Intervenors are three of Wisconsin’s leading pro-life organizations that oppose constitutionalizing abortion: Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin. They all exist to protect the unborn, to advocate for alternatives to abortion, to encourage any woman considering an abortion to choose life instead, and to provide support for those who do, and they all expend substantial resources toward those goals. Weininger Aff. ¶¶4–17; File Aff. ¶¶4–16; Miller Aff. ¶¶ 4–14. Proposed Intervenors meet all the requirements for both mandatory and permissive intervention and should be allowed to join this lawsuit to defend their interests, as explained in more detail below.

ARGUMENT

I. Proposed Intervenors Meet the Requirements to Intervene as of Right.

Under Wis. Stat. § 809.13, “[a] person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal,” and “[t]he court may grant the petition upon a showing that the petitioner’s interest meets the requirements of s. 803.09 (1), (2), or (2m).” And Wis. Stat. § 803.09(1) and (2) allow “anyone” to move to intervene in “an action” if they meet the same requirements.

Only the first two provisions of Wis. Stat. § 803.09 are relevant here. Wis. Stat. § 803.09(2), permissive intervention, is discussed in Part

II, *infra*. But this Court need not reach that discussion because the Proposed Intervenors meet the requirements of § 803.09(1), intervention as of right. Under § 803.09(1), the Proposed Intervenors are entitled to intervene so long as they meet each factor of a four-part test:

(1) timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties.

State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). Importantly, Wisconsin courts take a “broader” and more “pragmatic approach to intervention as of right” than do many other courts. *Id.* at 548. “[T]he criteria need not be analyzed in isolation from one another, and a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well.” *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶39, 307 Wis. 2d 1, 745 N.W.2d 1 (footnote omitted).

Each factor is met here.

A. This Petition is Timely.

Wis. Stat. § 803.09(1) requires that applications for intervention of right be “timely.” While “there is no precise formula to determine whether a motion to intervene is timely,” this Court primarily considers whether “in view of all the circumstances the proposed intervenor acted promptly,” and secondarily “whether the intervention will prejudice the original parties to the lawsuit.” *Bilder*, 112 Wis. 2d at 550.

First, the Proposed Intervenors have acted promptly. Proposed Intervenors have filed their opposition to the petition for original action within the timeframe ordered by this Court, as well as the 14-day

timeline required by statute after this Court orders a response. 4/16/24 Order; *see also* Wis. Stat. § 809.19(7)(b); Wis. Stat. § 809.70(2).

Second, intervention will not prejudice the original parties named in the Petition. Because intervention is occurring in the context of a Petition for Original Action, the only relevant deadlines relate to briefing on the issues raised in the Petition, and those deadlines will not be altered by the addition of the Proposed Intervenors as parties.

B. Proposed Intervenors Have Multiple Interests Related to, and Imperiled by, this Petition.

Proposed Intervenors have multiple sufficient interests in this case. As a general rule, an interest is sufficient for intervention if the intervenor “will either gain or lose by the direct operation of the judgment.” *Helgeland*, 2008 WI 9, ¶45; *see also City of Madison*, 2000 WI 30, ¶11, n.9 (citation omitted). In Wisconsin, courts evaluate asserted interests “practically, rather than technically,” *Bilder*, 112 Wis. 2d at 547–48, and a proposed intervenor does not need to show that its interests would be “judicially enforceable” in a separate proceeding. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 744, 601 N.W.2d 301 (Ct. App. 1999); *see also Helgeland*, 2008 WI 9, ¶46, n.46. Proposed Intervenors have multiple interests sufficient for intervention in this action.

First, Proposed Intervenors have a legitimate and legally protectable interest in protecting Wisconsin’s unborn children and promoting alternatives to abortion in Wisconsin. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 301 (2022) (“[L]egitimate interests include respect for preservation of prenatal life at all stages of development ...”) (citation omitted). All of the Proposed Intervenors exist to protect unborn life as much as possible, and a constitutional holding in this case will make it that much more difficult for Proposed Intervenors to achieve their objectives. *Weininger Aff.* ¶6; *File Aff.* ¶6; *Miller Aff.* ¶6.

Second, Proposed Intervenors have a financial interest in this action: they spend significant resources to reduce the incidence of abortion in Wisconsin and will need to significantly increase their spending if this Court constitutionalizes abortion. Weinger Aff. ¶¶8–14, 16; File Aff. ¶¶9–13, 15; Miller Aff. ¶¶7–11, 13. Such an interest is sufficient to confer standing, and therefore sufficient for intervention under Wisconsin’s “practical[], rather than technical[]” approach to intervention. *Bilder*, 112 Wis. 2d at 547–48; see *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) (quoting *Crawford v. Marion County Election Bd.* 472 F.3d 949 (7th Cir. 2007), and explaining that if an organization will be “compell[ed] [] to devote resources’ to combatting the effects of [a] law that [is] harmful to the organization’s mission,” the organization has suffered an injury sufficient to confer standing); see also *League of United Latin American Citizens (LULAC) of Wis. v. Deininger*, 2013 WL 5230795 at *1 (E.D. Wis. September 17, 2013) (a voting rights organization that needed “to divert their resources away from their ... usual activities to deal with the effects of [a new law]” sustained an injury sufficient for standing).

Proposed Intervenors currently expend substantial financial resources to promote abortion alternatives and to reduce the incidence of abortion as much as possible. Weinger Aff. ¶¶8–12; File Aff. ¶9; Miller Aff. ¶¶7–8. Some Proposed Intervenors also expend substantial financial resources to provide direct material assistance to people affected by abortion, such as those who are recovering from abortion or to assist women who have chosen life, to make day-to-day parenthood possible. Weinger Aff. ¶11–12.

Proposed Intervenors’ interest in continuing these efforts will be directly and adversely impacted if abortion is constitutionalized, which will undoubtedly increase the number of women considering and seeking abortions in Wisconsin and cast doubt on the validity and enforceability of Wisconsin’s current abortion-related laws. Weinger Aff. ¶¶13, 15; File Aff. ¶¶12, 14; Miller Aff. ¶¶10, 12. In response to these

consequences, Proposed Intervenors will be required to significantly increase their financial expenditures to ensure that the public remains informed about the realities of abortion, the availability of abortion alternatives, and how to access abortion alternatives and resources. Weininger Aff. ¶¶13–14, 16; File Aff. ¶¶12–13, 15; Miller Aff. ¶¶10–11, 13. And, if this Court constitutionalizes abortion in Wisconsin in a way that expands access compared to nearby states, women may come to Wisconsin for abortions, further increasing the costs to Proposed Intervenors. Proposed Intervenors will also face the added cost of participating in the litigation challenges and/or legislative battles that will invariably ensue over the validity and enforceability of the abortion-related statutory requirements that will be called into question. Weininger Aff. ¶16; File Aff. ¶15; Miller Aff. ¶13.

Put simply, Proposed Intervenors are Wisconsin “organizations that have worked for years on the problem of [abortion] and are bracing for a real-world impact on their specific core mission[s] and lawful work.” *Lawson*, 937 F.3d at 956; see Weininger Aff. ¶4, 8–14, 16–17; File Aff. ¶¶4, 9, 11–13, 15–16; Miller Aff. ¶¶4, 7–8, 10–11, 13–14. Proposed Intervenors have an interest in participating in this action to ensure that abortion is not constitutionalized.

Third, Proposed Intervenors have legitimate concerns about the stare decisis effect that constitutionalizing abortion would have on their ability to protect the unborn in Wisconsin. Weininger Aff. ¶15; File Aff. ¶14; Miller Aff. ¶12. “[C]oncern with the stare decisis effect of a decision can be a ground for intervention.” *Flying J., Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) (citations omitted); see *N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (“We are not persuaded by the contention ... that the [proposed intervenors] may protect their interests after an adverse decision in the instant case by attacking any new regulation on [a variety of] grounds. Such contention ignores the possible stare decisis effect of an adverse decision.”). Because constitutionalizing abortion would directly affect

Proposed Intervenors' interest in protecting the unborn by declaring abortion a constitutional right and calling into question a myriad of policy measures that Proposed Intervenors have supported, Proposed Intervenors have a sufficient interest in this action. Weininger Aff. ¶¶16–17; File Aff. ¶¶15–16; Miller Aff. ¶¶13–14.

Finally, Proposed Intervenors have an interest in protecting various abortion-related laws that they have advocated for and publicly defended. Proposed Intervenors have long supported many of Wisconsin's currently enacted abortion restrictions—the validity and enforceability of which will be called into question if abortion is constitutionalized. For example, Wisconsin Right to Life (founded in 1968), has supported many of the current laws, including the ultrasound requirement, the Safe Haven for Newborns Act, and the prohibition on taxpayer-funded abortions. Weininger Aff. ¶¶4, 17. Wisconsin Family Action (founded in 2006) and Pro-Life Wisconsin (founded in 1992) have made similar efforts. File Aff. ¶¶4, 16; Miller Aff. ¶¶4, 14.

Courts have recognized that public interest groups who have played important roles in achieving certain policy measures have an interest in intervening to protect those policies from subsequent challenges. *See, e.g., Idaho Farm Bureau Fed'n, v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (“A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.”); *Mausolf v. Babbitt*, 85 F.3d 1295, 1296–97 (8th Cir. 1996) (granting intervention as of right to conservation groups who had consistently engaged in prior proceedings to defend challenged restrictions at a national park); *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 629–30 (9th Cir. 1982) (granting intervention of right to public interest group that had sponsored challenged legislation).

C. The Existing Parties Do Not Adequately Represent the Proposed Intervenor's Interests.

Intervention as of right is also appropriate when the existing parties do not “adequately represent” the “movant’s interest[s].” Wis. Stat. § 803.09(1); *see Helgeland*, 307 Wis. 2d 1, ¶87. None of three named Respondents—District Attorneys Joel Urmanski, Ismael Ozanne, and John Chisholm—adequately represent the Proposed Intervenor’s Interests, given the positions they’ve taken in a similar case.

As this Court is aware, in a related case in which all three Respondents are also parties, both Attorney General Josh Kaul and some intervening doctors have asked this Court to consider a similar question to those presented in this Petition—namely, “whether Wis. Stat. § 940.04 would be unconstitutional if construed as applicable to abortion,” under various provisions of the Wisconsin Constitution. *See* Pls.-Resps.’ Suppl. Bypass Pet. at 8, *Kaul v. Urmanski*, No. 23AP2362 (filed Feb. 27, 2024); Resps.-Intervenors’ Resp. to Bypass Pet. at 4, *Kaul v. Urmanski*, No. 23AP23362 (filed Feb. 22, 2024). Respondents Ozanne and Chisholm, in their response, did not oppose the late and procedurally improper request to add a constitutional claim to that case, nor did they indicate any opposition, on the merits, to the attempt to use that case as a vehicle to create a constitutional right to abortion in Wisconsin. *See* Resp. of Ozanne and Chisholm to Bypass Pet., *Kaul v. Urmanski*, No. 23AP2362 (filed Mar. 5, 2024). Respondent Urmanski, in his response, “[took] no position at this time on the question of whether this Court should consider as part of this appeal whether Wis. Stat. § 940.04, if applied to abortion, would be unconstitutional.” Resp. of Urmanski to Suppl. Bypass Pet. at 5, *Kaul v. Urmanski*, No. 23AP2362 (filed Mar. 12, 2024). Thus, unless any of the Respondents change their position in this action,

no party represents the position that this Court should not take on this question.¹

Even if one or more of the named District Attorney Respondents take a position similar to that of Proposed Intervenors, they still do not adequately represent Proposed Intervenors' interests. A few district attorneys do not represent the interests of the *entire* state at large, much less with respect to the monumental question of whether the Wisconsin Constitution protects the right to abortion. Nor do these district attorneys represent the interests of Proposed Intervenors, who are all statewide organizations with special charitable, social, and political interests not encompassed within the duties of a district attorney and which operate throughout the state. *See Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255–56 (10th Cir. 2001) (citing a variety of federal circuit court cases and concluding that “the government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor ... This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest.”). At most, the district attorneys represent the interests of their constituents in Sheboygan, Dane, and Milwaukee Counties, and a ruling for Petitioners in this action obviously has implications far beyond those three counties.

¹ While the attorney general, who typically represents the state in challenges to statutes—and who has a *duty* to defend their constitutionality, *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 34–35, 232 Wis. 2d 612, 605 N.W.2d 526—could theoretically seek to intervene in this action, he has already taken the position that the statute that is the focus of the Petition (Wis. Stat. § 940.04) is unconstitutional. Pls.-Resps.’ Suppl. Bypass Pet., *Kaul v. Urmanski*, No. 23AP2362 (filed Feb. 22, 2024).

More importantly, even if the district attorneys argue against a constitutional right to abortion in Wisconsin, it is unclear if they will make that argument in the same way as the Proposed Intervenors. As Proposed Intervenors explain in the accompanying Proposed Response, if this Court takes up the constitutional question, it will not only need to decide whether the Wisconsin Constitution protects abortion, but also how and to what extent. For example, will the Court adopt a “viability” standard? Will it permit exceptions, and if so, which ones? The Proposed Intervenors intend to argue that the Wisconsin Constitution does not protect a right to abortion at all, and that even if it does, it is as limited as possible. Proposed Intervenors are a coalition of the leading pro-life organizations in Wisconsin; their voice should be represented in this litigation if the Court takes on the constitutional question.

This is all that is required to demonstrate inadequate representation, a “minimal” burden that is met so long as the movant shows that representation “may be” inadequate. *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 749, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)) (inadequate representation where intervenor was “in a position to defend [challenged] decision more vigorously than the [existing party]” and “may have more at stake than the [existing party]”); *Trbovich*, 404 U.S. at 539 (Secretary of Labor did not adequately represent union member because although the Secretary was charged with protecting the individual’s rights against his union, the Secretary also had “an obligation to protect the ‘vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member’” (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 475 (1968))); *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 471–72, 516 N.W.2d 357 (1994) (public school district could not, in defending against demand by records requestor to release employee records, adequately represent

proposed employee intervenor who had interest in preventing disclosure of those records).

The possibility that the Proposed Intervenors' and the named district attorneys' interests are or may become adverse is too great to permit exclusion of the Proposed Intervenors from this suit.

II. Alternately, if This Court Accepts Respondents' Newly-Proposed Constitutional Question, Proposed Intervenors Meet the Requirements to Intervene Permissively.

Even if this Court concludes that the Proposed Intervenors may not intervene as of right, it may nevertheless allow intervention in its discretion under Wis. Stat. § 803.09(2). Under that provision, intervention is permissible so long as the “movant’s claim or defense and the main action have a question of law or fact in common,” the motion is timely, and intervention will not “unduly delay or prejudice the adjudication of the rights of the original parties.” The Proposed Intervenors have already discussed timeliness, lack of delay, and lack of prejudice. And their defense shares with the main action the legal question of whether the Wisconsin Constitution protects abortion.

In exercising its discretion as to whether to permit the Proposed Intervenors to join this lawsuit, this Court should consider the historical importance of the constitutional question raised by this Petition and the need to hear from *all* interested parties to ensure a just resolution. The Proposed Intervenors represent a coalition of the leading pro-life groups in Wisconsin, and their voice should be included if this Court entertains the attempt to radically transform the abortion landscape in Wisconsin. This issue is *the* issue they exist for: to advocate for life. Their inclusion in this suit will aid this Court in its disposition of this significant constitutional question.

III. Finally, if This Court Denies Intervention, It Should Accept the Proposed Response as an Amicus Brief.

Finally, if this Court denies both intervention as of right and permissive intervention, it should accept the Proposed Intervenors' proposed response as an amicus brief, pursuant to Wis. Stat. § 809.19(7). Proposed Intervenors have filed their motion and brief within 14 days of the Court's order for filing a response to this Petition as required by Wis. Stat. § 809.19(7)(b); *see also* § 809.70(2).

Again, Proposed Intervenors are a coalition of the leading pro-life groups in Wisconsin. They exist to protect the unborn, to advocate for alternatives to abortion, to encourage any woman considering an abortion to choose life instead, and to provide support for those who do. Weininger Aff. ¶¶4–17; File Aff. ¶¶5–16; Miller Aff. ¶¶4–14. Their voices are important ones on this subject, and their proposed brief will assist this Court in deciding whether to constitutionalize abortion in Wisconsin.

CONCLUSION

For the foregoing reasons, this Court should permit the Proposed Intervenors to intervene in this Original Action, or, at the very least, accept their Proposed Response as an amicus brief in opposition to the Petition for Original Action.

Dated: April 25, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

Electronically signed by Luke N. Berg

Richard M. Esenberg (#1005622)

Luke N. Berg (#1095644)

Nathalie E. Burmeister (#1126820)

330 East Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Luke@will-law.org
Nathalie@will-law.org

THOMAS MORE SOCIETY

Andrew Bath (#1000096)

309 W. Washington Street
Suite 1250

Chicago, Illinois 60606

Phone: (312) 782-1680

abath@thomasmoresociety.org

*Attorneys for Wisconsin Right to Life,
Wisconsin Family Action, and Pro-Life
Wisconsin*

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.81 for a brief produced with a proportional serif font. The length of this brief is 3,327 words.

Dated: April 25, 2024.

Electronically Signed by Luke N. Berg

LUKE N. BERG