IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2024AP000330

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.

On Petition For Original Action Before This Court

RESPONDENT JOEL URMANSKI'S RESPONSE IN OPPOSITION TO PETITION FOR AN ORIGINAL ACTION

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INTRODUCTION

The Petitioners seek to side-step the normal litigation process and exhort this Court to "recognize the state constitutional right to abortion now." (Pet. 26). In doing so, Petitioners ask this Court to disregard its own precedents interpreting Article I, Section 1 of the Wisconsin Constitution and take for itself power that rightly belongs to the people of Wisconsin and their elected representatives. Whatever one's policy preferences or personal values, the Wisconsin Constitution, like the U.S. Constitution, "does not take sides on the issue of abortion." *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 337 (2022) (Kavanaugh, J., concurring); *see also County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236, 246 (1999) ("On more than a few occasions we have expressly held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same[.]"). Simply put, the Petitioners are asking this Court to exercise a power it does not have: rewriting our Constitution to create a right that is not supported by the text or historical meaning of that document. *State v. Roberson*, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813 ("A state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning.").

It is precisely in a moment like this—when confronting a political and moral issue that inspires deep and intractable passions on both sides of a hyper-partisan political divide—that this Court should demonstrate judicial humility and independence by refusing to "bend the Constitution to suit the law of the hour." Cooley, Constitutional Limitations, 86-87 n.2 (6th ed.) (quoting *Greencastle Twp. v. Black*, 5 Ind. 557, 565 (1854)). For this Court to do otherwise, and to grant the Petitioners the relief they seek, would be ill-advised. *Jacobs v. Major*, 139 Wis. 2d 492, 512, 407 N.W.2d 832 (1987) ("Courts would be ill-advised to rewrite history and plain, clear constitutional language to create some new rights contrary to history."). And it would set this Court on an uncharted path that could result in any

number of unforeseen impacts on this Court's jurisprudence. *Dobbs*, 597 U.S. at 286 ("*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions.").

This Court certainly should not embark on this unprecedented course by abandoning the normal litigation process and taking the extraordinary step of exercising its original jurisdiction in an original action. Urmanski has been clear that he believes the applicability of Wis. Stat. § 940.04 to abortion presents a question of significant public importance that should be decided as soon as possible. This is one reason why Urmanski petitioned for bypass of the court of appeals in *Kaul v. Urmanski*, No. 23AP2362—to allow this Court to consider and resolve the questions presented in that case expeditiously. Nevertheless, there is a difference between Urmanski's request that this Court expedite its exercise of its primary function as an appellate court of last resort in the direct appeal in *Kaul* and Petitioners' request that this Court exercise its "extraordinary power" to "take an original action." *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶147, 334 Wis. 2d 70, 798 N.W.2d 436 (N. Patrick Crooks, J., concurring in part and dissenting in part).

Urmanski does not dispute that the issues presented by Petitioners may merit this Court's review at the appropriate time and in the appropriate context. But, "[t]here is a right way to address these issues and a wrong way." *State ex rel. Ozanne*, 2011 WI 43 at ¶152 (N. Patrick Crooks, J., concurring in part and dissenting in part). For the reasons set forth below, Urmanski respectfully submits that the Petition does not satisfy this Court's criteria for exercising original jurisdiction over a petition for an original action. Because rules and procedures should matter, and because Petitioners' claims should fail on the merits anyway, the petition for an original action should be denied.

STATEMENT OF THE CASE

I. Legal and Factual Background

Wisconsin enacted its first prohibition on abortion in 1849. *See* Revised Statutes of Wisconsin, ch. 133, § 11 (1849). It provided: "[e]very person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree." In 1858, the Legislature removed the requirement the unborn child be "quick." Revised Statutes of Wisconsin, ch. 164, § 11 (1858). The Legislature also enacted related provisions with lesser penalties (1) prohibiting persons from attempting to assist a pregnant woman to "procure a miscarriage" and (2) prohibiting a woman from attempting to procure her own miscarriage. *Id.* at ch. 169, §§ 58, 59.

Wisconsin's abortion laws remained relatively unchanged, except for modifications to their penalties, until the 1950s when the Legislature revised the criminal code. *See generally State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994) (Appendix to Dissent); Wis. Stat. §§ 340.095, 351.22, and 351.23 (1947 versions). Section 940.04 was created as part of this revision. Prior to the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), which made statutes like § 940.04(1) unenforceable, district attorneys enforced this statute and obtained convictions under it. *See, e.g.*, *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968) (upholding conviction for the crime of committing an abortion in violation of § 940.04(1)).

After *Roe*, the Legislature enacted various statutes that regulate abortion within the constitutional constraints *Roe* and its progeny imposed. But, the Legislature never expressly repealed § 940.04(1)'s abortion ban—even as it repealed other parts of § 940.04. *See* 2011 Wisconsin Act 217, § 11 (repealing §

940.04(3) and (4)). The U.S. Supreme Court has now overturned *Roe* and "return[ed] the issue of abortion to the people's elected representatives." *Dobbs*, 597 U.S. at 232. Thus, *Roe* and its progeny no longer preclude Wisconsin's district attorneys from exercising their own discretion in determining whether to prosecute violations of § 940.04(1).

II. The *Kaul v. Urmanski* Litigation[1]

After *Dobbs*, the Attorney General, as well as other state officials and agencies (collectively, the "State Agencies"), initiated a lawsuit that, in its amended form, names Urmanski and the district attorneys of Milwaukee County and Dane County as defendants. The State Agencies sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions based on arguments that § 940.04 had been superseded by subsequent laws or, alternatively, was unenforceable as to abortions due to disuse. Thereafter, various doctors were allowed to intervene (the "Doctor-Intervenors"). The Doctor-Intervenors also sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions, as well as a permanent injunction against the application of § 940.04 to abortions. Like the State Agencies, they claimed § 940.04 had been superseded by subsequent legislation. They also claimed § 940.04 was unenforceable because it is premised on arcane language, belies modern medicine, and contains impossible requirements.

Urmanski moved to dismiss. Urmanski argued dismissal was warranted because (1) § 940.04 (and § 940.04(1), (5), and (6) in particular) applies to and prohibits performing consensual abortions from conception until birth, subject to the exception in § 940.04(5) for abortions to save the life of the mother; (2) this prohibition has not been impliedly repealed or superseded; (3) this prohibition is not unconstitutionally vague on its face and compliance is not impossible; and (4) the State Agencies' allegations of disuse and reliance on *Roe* did not state a claim that

[1] The history in this section is also addressed, with relevant sources, in Urmanski's Petition to Bypass in *Kaul v. Urmanski*. *See* Pet. to Bypass of Urmanski, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 20, 2024).

would make the prohibition unenforceable. The circuit court denied Urmanski's motion to dismiss and ultimately granted judgment against Urmanski. The circuit court, relying on this Court's decision in *State v. Black*, concluded that § 940.04 does not prohibit consensual abortions and is a feticide statute only.

Urmanski subsequently appealed and has filed a petition to bypass with this Court. Urmanski's petition presents several issues relevant to the enforceability of § 940.04, including: (1) whether § 940.04, and § 940.04(1), (5), and (6) specifically, prohibits performing consensual abortions subject to the exception in § 940.04(5); (2) whether, if § 940.04 otherwise would apply to prohibit performing consensual abortions, that prohibition has been impliedly repealed or superseded by subsequent legislation such that it can no longer be applied to consensual abortions; (3) whether, if § 940.04 otherwise would apply to and prohibit performing abortions, that prohibition is unenforceable under the Due Process Clause because it is unconstitutionally vague on its face or compliance is impossible; and (4) whether, if § 940.04 otherwise would apply to and prohibit performing abortions, that prohibition is unenforceable because of alleged disuse and reliance on *Roe v. Wade* and its progeny. Urmanski seeks reversal of the circuit court's decision in *Kaul* and dismissal of the claims against him. Urmanski believes that Wis. Stat. § 940.04(1), properly interpreted, prohibits performing abortions (including consensual abortions) from conception until birth (subject to the exception for therapeutic abortions in § 940.04(5)); that § 940.04 does not conflict with, and was not impliedly repealed by, subsequent statutes; that § 940.04 is not unconstitutionally vague on its face and compliance with § 940.04 is possible; and that § 940.04 remains enforceable.

After Urmanski filed his petition to bypass, the State Agencies and the Doctor-Intervenors in *Kaul* both indicated their intent to argue, as an alternative ground for affirmance, that enforcing Wis. Stat. § 940.04 as an abortion ban would violate rights protected by Article I, Section 1 of the Wisconsin Constitution. *See* Intervenors-Respondents' Response to Pet. for Bypass, *Kaul v. Urmanski*, No.

23AP2362 (Wis. Feb. 22, 2024); Plaintiffs-Respondents' Supplemental Petition In Support of Request to Bypass the Court of Appeals, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 27, 2024).Urmanski has taken no position on the question of whether it would be appropriate for this Court to consider that alternative argument when deciding *Kaul*, but Urmanski has also been clear that such an argument lacks merit and that Urmanski is entitled to reversal in *Kaul*. Defendant-Appellant Joel Urmanski's Response to Supplemental Petition In Support of Request to Bypass the Court of Appeals, *Kaul v. Urmanski* No. 23AP2362 (Wis. March 12, 2024). It is Urmanski's position that Article I, Section 1 of the Wisconsin Constitution does not prevent enforcing Wis. Stat. § 940.04 as an abortion ban. *Id.*

III. Procedural Background

This Petition was filed on February 22, 2024, two days after Urmanski petitioned this Court for bypass in *Kaul*. The Petitioners are Planned Parenthood of Wisconsin ("Planned Parenthood"), which provides abortions in Wisconsin, and two of its physicians who provide abortions. The Petitioners also include four women who received abortions between 2008 and 2016, but none of whom are currently pregnant and all of whom are actively taking measures to prevent pregnancy. The Petition names Urmanski as a respondent, as well as the district attorneys for Dane County and Milwaukee County, because Planned Parenthood performs abortions in Sheboygan, Dane, and Milwaukee counties. The Petition raises claims similar to those the State Agencies and Doctor-Intervenors have told the Court they intend to raise as alternative grounds for affirmance in *Kaul*. Specifically, the Petition alleges that enforcing Wis. Stat. § 940.04 as an abortion ban would violate the rights to life, liberty, and equal protection of physicians who perform abortions and those who seek abortions. On April 16, 2024, this Court ordered Urmanski to provide a response by April 26, 2024.

ARGUMENT

Urmanski does not dispute that the question of whether Wis. Stat. § 940.04 can be applied to prohibit abortion in Wisconsin is an important legal question, the

resolution of which will have a statewide impact. To the extent Petitioners raise arguments that would resolve that question, Urmanski acknowledges such arguments might merit this Court's review in the ordinary course of the normal litigation process. *See* Wis. Stat. § 809.62(1r). Urmanski does not agree with Petitioners, however, that it is appropriate to raise these matters via an original action with this Court, which raises special considerations. As set forth below, this Court should deny the petition for several reasons: (1) there is no exigency justifying exercise of this Court's original jurisdiction; (2) the petition may raise factual disputes; and (3) the claims in the petition are of doubtful merit.

I. No Exigency Requires that this Court Decide Petitioners' Claims in the First Instance

First, although Petitioners assert their claims require a "prompt and authoritative" determination by this Court, they do not demonstrate the existence of a current exigency requiring that this Court abandon the normal litigation process. *See Petition of Heil*, 230 Wis. 428, 442-43, 284 N.W.2d 42 (1939). Indeed, the normal litigation process provided, and still provides, multiple avenues for Petitioners to press their claims. The Petitioners could have raised the claims in this petition almost two years ago, once the U.S. Supreme Court decided *Dobbs*, either by initiating their own action or intervening in *Kaul v. Urmanski* at that time. Any exigency that Petitioners believe now exists is wholly self-created.

Even now, the Petitioners could seek intervention in *Kaul* and try to press their arguments in that appeal. The State Agencies and Doctor-Intervenors in that case have indicated they intend to make similar arguments as potential alternative grounds for affirmance. While Urmanski believes such arguments must ultimately be rejected, he has taken no position at this time as to whether this Court should consider such arguments as part of the appeal in *Kaul*. If this Court does choose to consider such arguments in *Kaul*, that is plainly an available alternative for such claims to be considered that would preclude the need for this action. Finally, Petitioners could simply await the outcome of *Kaul* and initiate a new action raising

their constitutional claims in the event this Court rules in Urmanski's favor in *Kaul* and does not address these constitutional arguments in that case.

Petitioners suggest "the simple magnitude of the number of people affected by abortion access speak to the need for a swift and final decision." (Pet. 37). No doubt, the subject of abortion is one that is of immense public interest. But, simply because a case involves a matter of statewide concern does not mean an exigency exists that justifies abandoning the traditional legal process, especially when the case does not involve the sovereignty of the state. *Heil*, 284 N.W.2d at 48-49.

Petitioners assert this Court must exercise its original jurisdiction because they claim that Wisconsinites are being denied abortion care. They seem to suggest an exigency exists because not a single abortion has been performed after June 2022. (Pet. 38). This is not a true statement. As Planned Parenthood is aware, it resumed abortion services in Milwaukee and Dane counties on September 18, 2023 and in Sheboygan County on December 28, 2023.[2] In other words, abortions are currently available in Wisconsin, as the circuit court's decision in *Kaul* has not been stayed pending appeal and Planned Parenthood is providing abortions. True, if this Court rules in Urmanski's favor in *Kaul*, Planned Parenthood will, presumably, cease providing such services again. But the Petitioners fail to explain why that possibility precludes them from pressing their new constitutional claims through normal litigation procedures, either by moving to intervene in *Kaul* or by initiating a new lawsuit at the circuit court level that raises the claims they make to this Court.

Regardless, the Petitioners' claims of exigency are belied by the fact that they waited almost two years to bring these new constitutional claims. Petitioners could have pursued these claims in June 2022 after the U.S. Supreme Court issued *Dobbs*. One could speculate as to why they did not, but the bottom line is that if there was

[2] *See* Planned Parenthood of Wisconsin, Inc., *Abortion Care Resumes in Wisconsin*, available at https://www.plannedparenthood.org/planned-parenthood-wisconsin/get-involved/ppwi-resumes-abortion-services#:~:text=On%20Sept.,the%20Madison%20East%20Health%20Center.

no exigency spurring Petitioners to action then, it is hard to see why there is now an exigency requiring this Court to exercise its original jurisdiction.

Third, Petitioners argue that pregnancy is "risky," but it is difficult to understand why this alleged fact means there is an exigency that requires this Court's immediate involvement. Again, Petitioners waited almost two years to bring these claims. Whatever risks the Petitioners believe justify this Court's immediate involvement now have been present since the *Dobbs* decision was issued almost two years ago.

Fourth, Petitioners cite what they describe as "[t]he yoke of legal uncertainty" under which they claim physicians are operating. Petitioners claim physicians have borne that uncertainty "for more than 17 months since *Dobbs*" and that "[n]o longer is that uncertainty acceptable." (Pet. 39). But again, the question is why, especially when Petitioners could have pursued their claims when *Dobbs* was decided. Urmanski doubts something fundamental to Petitioners' claims has changed since *Dobbs* that requires the abandonment of the normal litigation process and this Court's immediate involvement to protect Petitioners' alleged interests. This Court should not endorse Petitioners' knowing delay in seeking legal redress.

Finally, the Petitioners argue this Court should step in now because the legal landscape is "new." Petitioners repeat the debunked talking point that *Dobbs* was unique in American history because "[n]ever before in U.S. history has an established federal right evaporated overnight." Such claims are not true. This is not the first time the Supreme Court has rolled back individual rights that it had previously held were protected by the Constitution. *See, e.g.*, *Dobbs*, 597 U.S. at 265 (explaining that *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) "signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation"). Regardless, Petitioners fail to explain why a "new" legal landscape means there is an exigency warranting a departure from the normal processes of litigation. Petitioners express frustration that policymakers have "declined to rise to the occasion" to pass new

legislation, but this Court does not assume original jurisdiction just to break legislative logjams.

II. It Is Unclear Whether Petitioners' Claims May Result in Factual Disputes

This Court "generally will not exercise its original jurisdiction in matters involving contested issues of fact." *Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 N.W.2d 418. Here, the Petitioners argue their petition presents "purely a question of law" and that "[n]o fact finding is necessary," (Pet. 41). But, they simultaneously have submitted seven affidavits, including an affidavit from counsel containing 420 pages of exhibits. These submissions make a number of claims regarding the relative safety of abortions, the frequency of abortions, medical ethics, and various other matters. At this early stage in this proceeding—before this Court has decided whether it will take jurisdiction of this case, let alone set a schedule for pleading—it is difficult to divine whether any of Petitioners' various factual claims are material to the dispute or would be subject to dispute by Urmanski if this matter were to proceed. Indeed, if Urmanski were required to file a responsive pleading at this time, Urmanski would be in the position of denying many of the factual claims made in the Petition because he lacks knowledge or information sufficient to form a belief as to their truth. Wis. Stat. § 802.02(2).

Petitioners also seem to base their argument on their assertion that this Court must employ the strict-scrutiny standard of review when evaluating their claims. Petitioners are wrong on this point. As explained in more detail in Part III below, it is doubtful that Petitioners' claims have merit or that anything other than rational basis review will apply.

Moreover, even if Petitioners are right that the Wisconsin Constitution does grant them the right to obtain or perform an abortion, it does not necessarily follow that strict-scrutiny review applies. Prior to *Dobbs*, abortion restrictions were not analyzed using strict scrutiny under federal law; rather, courts used the "undue

burden" standard of review. *See Dobbs*, 597 U.S. at 220. Thus, Petitioners' argument that this Court must use strict scrutiny when assessing their claims is notable, because it demonstrates that Petitioners are asking this Court to provide even more protection for abortion rights than was provided under *Roe* and its progeny at the time the U.S. Supreme Court decided *Dobbs*. Petitioners are not simply asking this Court to find the same protections for abortion in the Wisconsin Constitution that had been recognized under federal law prior to *Dobbs*; they are asking this Court for even more. Regardless, the point remains that Petitioners seem to imply that the applicable standard of review could affect whether further factual development is necessary in this case, and it is not clear what the appropriate standard of review would be even if this Court agrees with Petitioners that the Wisconsin Constitution protects the right to an abortion.

Finally, the Petitioners argue that if this Court does find itself in need of factual development, this Court can make the necessary factual determinations or refer those issues to a circuit court or referee. (Pet. 41.) But, "such approaches are unwieldy and time-consuming" for this Court when compared to this Court's primary role of conducting appellate review after the parties have had the opportunity to flesh out any relevant factual disputes in the lower courts. *State ex rel. Ozanne*, 2011 WI 43 at ¶148. (N. Patrick Crooks, J., concurring in part and dissenting in part).

III. Petitioners' Claims Fail on the Merits

The merits of Petitioners' claims are not currently at issue. That said, this Court will not take jurisdiction over an original action in "doubtful cases." *Heil*, 284 N.W. at 51. "No trivial grounds should impel this court" to take original jurisdiction, and this Court has suggested that it is only the "flagrant and patent" defiance of constitutional commands that will justify such action by this Court. *State ex rel. Bolens v. Frear: The Income Tax Cases*, 148 Wis. 456, 134 N.W. 673, 687 (1912); *see also Heil*, 284 N.W. at 50 ("[T]his court will only take the exceptional or flagrant cases.").

Although Urmanski will not address the merits of Petitioners' constitutional claims in depth at this time, the following discussion should suffice to demonstrate that Petitioners' claims ultimately lack merit. The Petition does not present a "flagrant" violation of our Constitution as would ordinarily justify an exercise of this Court's original jurisdiction. To the contrary, if this Court adheres to precedent and does not depart from its well-established methodology for interpreting our Constitution it is clear Petitioners' claims must ultimately fail.

A. Counts I and II May Not Present Justiciable Controversies

As an initial matter, to the extent Petitioners seek to assert the alleged constitutional rights of those who may seek abortions—*i.e.*, Counts I and II of the petition—the Petitioners have a justiciability problem. The Petitioners include several individuals who have had abortions years ago—between 2008 and 2016—but none of whom are currently pregnant or are likely to become pregnant in the future. Indeed, each of these individual petitioners has averred that they are taking active measures to prevent pregnancy. *See* Pet. at 8, 18, 19, 20.

These individual petitioners do not present a controversy that is ripe for judicial determination. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶29, 309 Wis.2d 365, 749 N.W.2d 211. They are asking for a determination of their rights based on "contingent or uncertain" potential future events. *See Putnam v. Time Warner Cable of Southeastern Wisconsin, Ltd. Partnership*, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626. There is no basis from which to conclude that any of these individual petitioners faces an "imminent and practical certainty" of being pregnant, desiring an abortion, and being denied one due to Wis. Stat. § 940.04. *Putnam*, 2002 WI 108 at ¶46. Simply put, none of the individual petitioners is in a position to attack the constitutionality of Wis. Stat. § 940.04. *See also Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶73, 237 Wis. 2d 99, 613 N.W.2d 849.

Nor is it clear that it would be appropriate to allow the abortion providers who are petitioners to advance claims on behalf of their future patients who might

seek abortions. Although it is true that, in the past, the U.S. Supreme Court has "permitted abortion providers to invoke the rights of their actual or potential patients," *June Med. Servs. LLC v. Russo*, 591 U.S. 299, 318-19 (2020), the ongoing validity of such precedents is in doubt after *Dobbs. See Dobbs*, 597 U.S. at 286-87. Nor would allowing providers to press the claims of their patients be consistent with Wisconsin precedents. "[C]onstitutional rights are personal and may not be asserted vicariously." *Aicher*, 2000 WI 98 at ¶73 (quoting *State v. Janssen*, 219 Wis.2d 362, 371, 580 N.W.2d 260 (1998)); *see also State v. Horn,* 126 Wis. 2d 447, 453, 377 N.W.2d 176 (Ct. App. 1985) ("A party may not rest his legal claims or defenses upon the rights of third parties."). At minimum, there is a significant question regarding whether Counts I and II of the Petition—which assert the alleged constitutional rights of women who are pregnant to seek an abortion—are currently justiciable as presented. This case is thus not a good vehicle for the Court to exercise its power of original jurisdiction over an original action.

B. Count I of the Petition Lacks Merit

In their first claim, the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates their right to life and liberty under Article I, Section 1 of the Wisconsin Constitution. This claim must fail under this Court's precedents. This Court has long interpreted Article I, Section 1 of the Wisconsin Constitution in lockstep with the Fourteenth Amendment of the U.S. Constitution, which does not protect a right to an abortion. As this Court has stated: "On more than a few occasions we have expressly held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same." *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999); *see also Mayo v. Wisconsin Injured Patients and Families Compensation Fund,* 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678 ("Article I, Section 1 has been interpreted as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution."); *Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 643, 169

N.W.2d 441 (1969) ("We deem that the constitutional guarantees of individual privileges and the restraints placed upon the legislature are of the same effect in both constitutions in deciding the issues of this case."); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 49, 132 N.W.2d 249 (1965) ("Art I, Sec. 1, of the Wisconsin Constitution … many times has been held to be substantially equivalent of the due process and the equal-protection clauses of the 14th Amendment to the U.S. Constitution."); *Haase v. Sawicki*, 20 Wis. 2d 308, 311 n.2, 121 N.W.2d 876 (1963) ("It is well settled by Wisconsin case law that the various freedoms preserved by sec. 1, art. I, Wis. Const., are substantially the equivalent of the due process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the United States constitution."); *Boden v. Milwaukee*, 8 Wis. 2d 318, 324, 99 N.W.2d 156 (1959) ("We are aware of no decision of this court which has determined that sec. 1, art. I of the Wisconsin constitution, imposes any greater restriction on the exercise of the police power than do the due process and equal protection of the laws clauses of the Fourteenth amendment.") The Petitioners do not even acknowledge these precedents, let alone provide any explanation for why this Court should turn its back on decades of its own jurisprudence interpreting Article I, Section 1 of the Wisconsin Constitution.

Even absent the above precedents, Petitioners' claim lacks merit. This Court has repeatedly reaffirmed that "the purpose of constitutional interpretation is to determine what the constitutional text meant when it was written" and that a determination of the "original meaning of the constitution" involves consideration of (1) the constitutional text, read reasonably and in context, (2) the debates and practices at the time of adoption, and (3) early legislative enactments. *Wisconsin Justice Initiative, Inc. v. WEC*, 2023 WI 38, ¶¶21-28, 407 Wis. 2d 87, 990 N.W.2d 122. Here, any argument that the constitutional text protects a right to an abortion or was understood to do so when our Constitution was adopted plainly lacks merit. From at least the beginning of statehood, Wisconsin has had legislatively enacted prohibitions on abortion. *See* Revised Statutes of Wisconsin, ch. 133, § 11 (1849;

Revised Statutes of Wisconsin, ch. 164, § 11 (1858); Revised Statutes of Wisconsin, ch. 169, §§ 58, 59 (1858). Wisconsin's ban on abortion during all phases of pregnancy except to save the life of the mother was in effect and enforced for over a century until it was held unconstitutional under the U.S. Constitution, but it is now clear that the U.S. Constitution does not preclude such a ban.

The petition hints at some arguments that Petitioners may make to try to argue for an abortion right in the Wisconsin Constitution, but Petitioners' initial suggestions are flimsy reeds on which to base their arguments.

First, Petitioners note Article I, Section 1 of our constitution "is rooted in the philosophy of John Locke." (Pet. 21). Petitioners fail to inform this Court, however, that Locke "explicitly condemned abortion." Skylar Reese Croy & Alexander Lemke, An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt, 32 U. Fla. J. L. & Pub. Pol'y 71, 82 (2021).

Second, Petitioners cite various precedents dealing with matters like a person's right to refuse life sustaining medical treatment and a right to consent to medical treatment. (Pet. 21). Petitioners fail to acknowledge, however, that abortion is fundamentally different from these other cases, or other cases in which this Court has "recognized the fundamental liberty interest of a citizen to choose whether or not to procreate." *State v. Oakley*, 2001 WI 103, ¶16, 245 Wis.2d 447, 629 N.W.2d 200. As the U.S. Supreme Court has explained, abortion is different because it destroys "fetal life"—what Wis. Stat. § 940.04(6) describes as an "unborn child." *Dobbs*, 597 U.S. at 231.

Third, Petitioners assert that at the time the Wisconsin Constitution was ratified, women could obtain abortifacient medicines and manuals promoting them, but Petitioners' point is unclear. Perhaps this is another way of making their argument that common law did not consider abortion to be a crime prior to quickening. (Pet. 26). Even if it was legal at one time under the common law for women to obtain and use such medicines, which it certainly was not after 1858, that does not mean our founders recognized a constitutional right to such access. Our

Constitution does not place off limits for legislation every form of conduct that was legal at the founding. *See, e.g.*, *Dobbs*, 597 U.S. at 253 ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so."). Indeed, our Constitution expressly contemplates that the common law can be altered by the Legislature. Art. XIV, § 13. Even if, as Petitioners contend, the common law allowed for abortions prior to quickening, that does not mean such abortions are a constitutional right beyond the scope of legislative prohibition.

Next, Petitioners point to amendments that Wisconsin voters made to Article I, Section 1 in 1982, to make the language of that provision gender neutral. (Pet. 68). But, Petitioners fail to explain why such amendments were anything other than stylistic changes that had no substantive effect on the underlying meaning of Article I, Section 1. *Cf. Members of the Medical Licensing Bd. of Ind. v. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.*, 211 N.E.3d 957, 981-84 (Ind. 2023).

Last, Petitioners direct the Court to decisions in nine other states that Petitioners assert recognized the right to an abortion under their own state constitutions. As an initial matter, at least one of the decisions on which Petitioners rely—*Gainesville Woman Care v. State*, 210 So. 1243, 1254 (Fla. 2017)—has since been overruled. *See Planned Parenthood of Southwest and Central Florida v. State*, --- So. 3d ----, Nos. SC2022-1050, SC2022-1127, 2024 WL 1363525, at *14-15 (Fla. April 1, 2024). And, of course, Petitioners fail to mention courts that have rejected the existence of a broad abortion right in their state constitutions that Petitioners claim here. *See, e.g.*, *Planned Parenthood Great Northwest v. Idaho*, 522 P.3d 1132 (2023). The bottom line remains, however, that regardless of what courts in other states have held under the language of their own constitutions, this Court has repeatedly held that it interprets Article I, Section 1 in lockstep with the Fourteenth Amendment (which does not protect the right to an abortion). Petitioners make no argument for departing from that precedent. And, even absent that

precedent, under this Court's well-established methodology of constitutional interpretation, there is no basis for recognizing a fundamental right to an abortion in Article I, Section 1 of the Wisconsin Constitution.

Because there is no fundamental right to an abortion under the Wisconsin Constitution, Wis. Stat. § 940.04 is subject only to rational basis review. *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. And, the statute must ultimately be upheld under such review, because the State has rational bases for the proscription on abortions in that statute: "respect for and preservation of prenatal life at all stages of development," among others. *Dobbs*, 597 U.S. at 300-01; *see also Planned Parenthood Great Northwest*, 522 P.3d at 1195-96.

C. Count II of the Petition Lacks Merit

In their second claim, the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates the equal protection rights of those who seek or may seek abortion services. Petitioners assert that "[t]he scope of the federal Equal Protection Clause does not limit Wisconsin's own" and again cite to the general principle that Wisconsin's Constitution can afford greater protection to individuals than that mandated by the U.S. Constitution. Again, however, merely invoking that general principle does not ask the right question, which "is whether [the] state constitution *actually* affords greater protection." *Roberson*, 2019 WI 102 at ¶56 (emphasis added). And, again, on this point this Court has been clear: "The equal protection clause in the Wisconsin Constitution requires the identical interpretation as that given to the parallel provision of the United States Constitution." *State v. Heft*, 185 Wis. 2d 288, 293 n.3, 517 N.W.2d 494 (1994); *see also State v. Cissell*, 127 Wis. 2d 205, 223, 378 N.W.2d 691 (1985) ("We previously have held that the due process and equal protection clauses of our state constitution and the United States Constitution are essentially the same.").

In *Dobbs*, the U.S. Supreme Court explained why regulations of abortion procedures are not subjected to heightened scrutiny under the federal Equal Protection Clause. 597 U.S. at 236-37. Here, Petitioners provide no explanation—

other than, perhaps, their dissatisfaction with the outcome of *Dobbs*—for why the reasoning in *Dobbs* should not also carry the day here. *Cissell*, 127 Wis. 2d at 223. Absent any explanation for why this Court should depart from the above precedents, Petitioners' equal protection claim on behalf of those who may seek abortions will fail. Their claim should not be subject to heightened scrutiny, and as already discussed Wis. Stat. § 940.04 serves legitimate state interests.

D. Count III of the Petition Lacks Merit

Next, in their third claim the Petitioners assert that Wis. Stat. § 940.04, if it is an abortion ban, violates the equal protection rights of physicians who provide abortions. This claim also has no merit. In assessing this claim, "the threshold question is whether a fundamental right is implicated or whether a suspect class is disadvantaged by the challenged legislation." *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90. The class that Petitioners identify—physicians who provide abortion services—is not a suspect class. And, as already discussed, Wis. Stat. § 940.04 does not implicate a fundamental right to an abortion; there is no such right. Again, rational basis review will apply to this Court's review of this claim. *Smith*, 2010 WI 16 at ¶ 12. And, Wis. Stat. § 940.04 is rationally related to the state's legitimate interest in protecting the life of the unborn. *Id.* at ¶ 16 ("[A]s a practical matter, the rational basis analysis applicable to Smith's substantive due process challenge is also relevant to his equal protection challenge."); *see also Raidoo v. Moylan*, 75 F.4th 1115, 1125 (9th Cir. 2023) ("Even assuming that doctors who perform abortions are otherwise similarly situated to doctors who perform other medical services, it was rational for Guam legislature to treat them differently because abortion presents different considerations than other medical procedures.").

E. Count IV of the Petition Lacks Merit

Finally, Petitioners' fourth claim presents the question of whether Wis. Stat. § 940.04's abortion ban violates Wisconsin physicians' right to liberty under Art. I, Sec. 1, by infringing on their right to practice their chosen profession. The answer is plainly no. As an initial matter, Petitioners appear to rely on the U.S. Supreme

Court's decision in *Bd. of Regents of State College v. Roth*, 408 U.S. 564 (1972), to claim that "[t]he constitutional guarantee of liberty also includes the fundamental right to practice one's chosen lawful profession." (Pet. 24). *Roth* was a procedural due process case, however, and the "occupational liberty" of the type claimed by Petitioners is not a fundamental liberty interest that commands heightened scrutiny. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 721 (2010) ("[W]e have held for many years … that the 'liberties' protected by substantive due process do not include economic liberties."); *In re Crawford*, 194 F.3d 954, 961 (9th Cir. 1999) ("While the pursuit of a profession has been recognized as a protected liberty interest, in the post-*Lochner* era a restriction on the conduct of a profession will run afoul of substantive due process rights only if it is irrational." (citing *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955))); *Zorzi v. Cty. of Putnam*, 30 F.3d 885, 895 (7th Cir. 1994) ("Occupational liberty … is not protected by substantive due process.").

Moreover, Wis. Stat. § 940.04 simply does not deprive anyone of their ability to be a physician or to practice that occupation. *Cf. Goulding v. Feinglass*, 811 F.2d 1099, 1102-03 (7th Cir. 1987) (no deprivation of liberty interest when plaintiff could still practice law). It just precludes physicians from performing abortions except when necessary to save the life of the mother. The statute is plainly the type of occupational, health or safety legislation that, although it might impose some limitation on how physicians can practice, is nevertheless subject to rational basis scrutiny. *See, e.g.*, *Porter v. State*, 2018 WI 79, 382 Wis.2d 697, 913 N.W.2d 842. And, again, rational bases exist that support § 940.04, as already discussed.

IV. If the Court Takes Original Jurisdiction, It Should Consider Petitioners' Claims Only If *Kaul* Is Decided in Urmanski's Favor.

Next, if this Court grants leave to commence an original action on one or more of Petitioners' claims, this Court must reject Petitioners' request that the Court decide their constitutional claims before the statutory-interpretation questions in *Kaul* are resolved. As this Court is aware, the appeal in *Kaul* presents multiple

statutory-interpretation questions that could resolve the issue of the applicability of Wis. Stat. § 940.04 to abortion without the need for examining the constitutionality of that statute. *See* Pet. to Bypass of Urmanski, *Kaul v. Urmanski*, No. 23AP2362 (Wis. Feb. 20, 2024).

To be sure, it is Urmanski's position that consideration of Petitioners' constitutional claims will likely be necessary at some point, because Urmanski is correct on the statutory interpretation questions presented in *Kaul*. Wis. Stat. § 940.04(1), properly interpreted, prohibits performing abortions (including consensual abortions) from conception until birth (subject to the exception for therapeutic abortions in § 940.04(5)). And, Wis. Stat. § 940.04(1) does not conflict with, and was not impliedly repealed by, subsequent statutes that impose restrictions on abortion in ways that would comply with *Roe* and its progeny. *Cf. Planned Parenthood Arizona, Inc. v. Mayes*, --- P.3d ----, No. CV-23-0005-PR, 2024 WL 1517392 (Ariz. April 9, 2024) (rejecting argument that a subsequently enacted statute prohibiting physicians from performing elective abortions after fifteen weeks' gestation impliedly repealed a broader pre-*Roe* ban on abortion unless necessary to save the life of the woman).

It nevertheless is possible this Court (or the court of appeals, if this Court declines to grant bypass) will disagree with Urmanski on one or more of the statutory-interpretation questions in *Kaul*, and conclude that Wis. Stat. § 940.04(1) does not apply to abortions either because it was never an abortion statute in the first place or because its applicability to abortion was impliedly repealed by subsequent legislation. If the circuit court's decision in *Kaul* is ultimately affirmed on such grounds, resolution of Petitioners' claims in this action would be unnecessary as each of Petitioners' claims here presumes that Wis. Stat. § 940.04 is interpreted as an abortion ban. Thus, this Court's well-established doctrine of constitutional avoidance counsels against consideration of Petitioners' constitutional claims in this action until after this Court addresses the statutory-interpretation questions in *Kaul*, and only if this Court agrees with Urmanski that, as a matter of statutory

interpretation, Wis. Stat. § 940.04(1) does still apply to prohibit performing abortions. *See generally State v. Scott*, 2018 WI 74, ¶12, 382 Wis. 2d 476, 914 N.W.2d 141 ("We adhere to the doctrine of constitutional avoidance: A court ordinarily resolves a case on available non-constitutional grounds."); *Adams Outdoor Advertising, Ltd. v. City of Madison*, 2006 WI 104, ¶91, 294 Wis. 2d 441, 717 N.W.2d 803 ("This court does not normally decide constitutional questions if the case can be resolved on other grounds.").

The Petitioners point out that constitutional avoidance "is 'a matter of judicial prudence' and does not apply where the constitutionality of a statute is 'essential to the determination of the case.'" (Pet. 30 (quoting *Gabler v. Crime Victim Rts. Bd.*, 2017 WI 67, ¶52, 376 Wis. 2d 147, 897 N.W.2d 384).) This case does not necessarily call for application of that exception, however, because there would not be any need to address the constitutional claims raised by Petitioners if this Court rules against Urmanski on the statutory-interpretation questions presented in *Kaul*. *Cf. Gabler*, 2017 WI 67 at ¶53 ("Even if we agreed with the Board's non-constitutional arguments, we would nevertheless need to decide [the constitutional question]."). If this Court rules against Urmanski on the statutory-interpretation questions in *Kaul*, and concludes that Wis. Stat. § 940.04 is not a currently effective abortion ban, it will be unnecessary to decide Petitioners' claims (which assume Wis. Stat. § 940.04 is "an abortion ban").

The Petitioners assert that, even if this Court accepts bypass in *Kaul* and affirms the circuit court's decision, their "constitutional question regarding section 940.04 is likely to recur" because, in their view, "Legislative efforts to restrict abortion continue." Petitioners do not demonstrate a likelihood that, if this Court decides *Kaul* on statutory-interpretation grounds, new legislation similar to Wis. Stat. § 940.04 will be enacted. Indeed, our Governor has declared that he will veto any such legislation,[3] and has even vowed to veto measures that would allow for

[3] Associated Press, *Evers in State of the State Address Vows to Veto Any Bill That Would Limit Access to Abortions*, U.S. News & World Report (Jan. 23, 2024), available at

abortions in the first fourteen weeks of pregnancy and provide broader exceptions than those provided in Wis. Stat. § 940.04.[4]

Finally, Petitioners' suggestion that "[d]eclaring what the Wisconsin Constitution protects would guide the Legislature should it consider amending current statutes or passing new statutes governing abortion," (Pet. 30), is a clear and inappropriate request for an advisory opinion. Such requests do not provide grounds for an original action. *See, e.g.*, *State ex rel. State Central Committee of Progressive Party v. Bd. of Election Commissioners of Milwaukee*, 240 Wis. 204, 214, 3 N.W.2d 123 (1942).

V. If the Court Takes Original Jurisdiction, Urmanski Should Be Allowed the Opportunity to Submit a Responsive Pleading and Affidavits Prior to Merits Briefing

Urmanski understands this Court's April 16 order as requiring a response from him on the question of whether this Court should take original jurisdiction in this matter. *See* Wis. Stat. § 809.70(2). Thus, Urmanski does not understand the merits of this case to be at issue now. Nor has Urmanski prepared a responsive pleading at this time. Wis. Stat. § 809.70(3) (stating that the Court may establish a schedule for pleading, briefing and submission if it grants the petition). If this Court does take original jurisdiction, however, Urmanski respectfully suggests the following path forward for the Court's consideration:

- The Court should treat the numbered paragraphs and relief sought at pages 7-35 of the Petition as the complaint in this action;
- Urmanski should be allowed at least 45 days to prepare a responsive pleading, including any affidavits Urmanski would like to submit, *cf.*

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https://www.usnews.com/news/best-states/wisconsin/articles/2024-01-23/evers-in-state-of-the-state-address-vows-to-veto-any-bill-that-would-limit-access-to-abortions.

[4] Jessie Opoien, *Assembly passes referendum on 14-week abortion ban that faces certain Evers veto*, Milwaukee Journal Sentinel (Jan. 25, 2024), available at https://www.jsonline.com/story/news/politics/2024/01/25/wisconsin-assembly-passes-14-week-abortion-ban-that-faces-certain-veto/72343075007/.

Wis. Stat. § 802.06(1) (state officers receive 45 days to answer a complaint); and

- The Court should then set an appropriate briefing schedule for the parties to brief the merits of this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for an original action. Alternatively, if the Court does grant the petition, it should treat the numbered paragraphs and relief sought at pages 7-35 of the petition as the complaint, allow Urmanski forty-five days to submit a responsive pleading and affidavits, and then set an appropriate briefing schedule for the parties to brief the merits of this case. In no event should this Court decide the constitutional questions presented in this case before the issues in *Kaul v. Urmanski* are resolved, and subject to the nature of this Court's resolution of those issues. And, regardless, of how this Court chooses to hear these issues, this Court must reject Petitioners' claims and conclude that Wis. Stat. § 940.04 is constitutional and can be enforced as an abortion ban.

Dated this 26th day of April, 2024.

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CERTIFICATION

I hereby certify this Response conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (8)(bm), and (8)(g). The length of this response is 7859 words. Word processing software (Microsoft Word) was used to determine the length of this response. The word count above is inclusive of all words in the Introduction, Statement of the Case, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 26th day of April, 2024.

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