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SUPREME COURT

No. 2024AP330-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.

Original Action

## PETITION TO INTERVENE OF PROPOSED INTERVENOR-RESPONDENT JEROME E. LISTECKI, AS ROMAN CATHOLIC ARCHBISHOP OF MILWAUKEE, ON BEHALF OF HIMSELF AND THE UNBORN OF THE ARCHDIOCESE OF MILWAUKEE

Proposed Intervenor-Respondent Jerome E. Listecki, as Roman Catholic Archbishop of Milwaukee, on behalf of himself and the unborn of the Archdiocese of Milwaukee (the "Archbishop"), respectfully

petitions this Court pursuant to Wis. Stat. §§ 809.13, 809.63, 803.09, and/or its Order of July 2, 2024 assuming jurisdiction over this original action to permit him to intervene in this action as an Intervenor-Respondent, either as of right or permissively. The grounds for this petition follow and are supported by the Archbishop's affidavit.

## IDENTITY OF PROPOSED INTERVENOR-RESPONDENT

Proposed Intervenor-Respondent is the 11th Archbishop of the Roman Catholic Archdiocese of Milwaukee. Listecki Aff. ¶7. First ordained a priest of the Catholic Church in 1975, the Archbishop acquired both civil and canon law degrees before being appointed auxiliary bishop of Chicago (2000) and La Crosse (2004) by Pope John Paul II. *Id.* at ¶¶2-6. On November 14, 2009, Pope Benedict XVI appointed the Archbishop the 11th Archbishop of the Archdiocese of Milwaukee (the "Archdiocese"). *Id.* at ¶7. He was installed on January 4, 2010, at that time assuming responsibility for the spiritual well-being of those in the 10 counties of southeastern Wisconsin, including Sheboygan and Milwaukee counties, and taking on day-to-day administration of the Archdiocese. *Id.* at ¶¶7-8. The Archbishop continues to serve in that capacity today. *Id.* at ¶8. He is also a retired lieutenant colonel in the United States Army Reserves, having served in the Reserves for approximately 23 years. *Id.* at ¶9.

As a diocesan bishop, Archbishop Listecki has been entrusted with the care of the Archdiocese. *Id.* at ¶¶14-17.[1] The Archdiocese was established on November 28, 1843 and was created an archbishopric on February 12, 1875. It covers 4,578 square miles in southeast Wisconsin representing, as of November 2019, over 2 million Wisconsinites, 189 parishes, 533,962 registered Catholics, 291 diocesan priests, 393 religious order/extern priests, 65 religious order brothers, 1,173 women religious, and 176 permanent deacons. *Id.* at ¶17.

The Archdiocese states its mission as follows: "To proclaim the Gospel of Jesus Christ through His saving death and resurrection by calling, forming and sending disciples to go and make new disciples. As a people, we are called to encounter Jesus and grow as disciples through the sacramental life of the Church." *Id.* at ¶19.

As bishop, the Archbishop has many religious obligations. *Id.* at ¶20. With respect to the inhabitants of his diocese, for example, the Archbishop is obligated to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality. *Id.* Similarly, he must act with humanity and charity toward the brothers and sisters who are not in full communion with the Catholic

[1] The Archbishop's affidavit at time quotes directly from the Code of Canon Law or the Catechism of the Catholic Church. For simplicity and readability, designation of those quotations is omitted here.

Church, and must consider the non-baptized as committed to him in the Lord. *Id.*

He is bound to propose and explain to the faithful the truths of the faith which are to be believed and applied to morals. *Id.* at ¶21. He must endeavor constantly that the Christian faithful entrusted to his care grow in grace through the celebration of the sacraments and that they understand and live the paschal mystery. *Id.* "Celebration of the sacraments" includes the administration of baptism, the gateway to the sacraments and necessary for salvation by actual reception or at least by desire. *Id.* at ¶23. Through baptism, men and women are freed from sin, are reborn as children of God, and, configured to Christ by an indelible character, are incorporated into the Church. *Id.*

The Archbishop must also make provision that the message of the gospel reaches non-believers living in the Archdiocese since the care of souls must also extend to them no less than to the faithful. *Id.* at ¶22.

The Archbishop also supervises the Archdiocese's Respect Life Ministry. This office participates in various activities designed to build a culture that cherishes and protects every human life. *Id.* at ¶25.

Fulfilling these obligations—exercising his functions of sanctifying and teaching—is part of the Archbishop's day-to-day work. *Id.* at ¶¶13, 26. It is part of his exercise of religion. *Id.* at ¶26.

With respect to the topics of human life and abortion, the Archbishop firmly and sincerely believes what the Catholic Church teaches, including:

- that human life must be respected and protected absolutely from the moment of conception;
- that from the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life;
- that, since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being;
- that the right to life of each innocent human individual is inalienable, is a constitutive element of a civil society and its legislation, and must be recognized and respected by civil society and the political authority;
- that every procured abortion is a moral evil;
- that as a consequence of the respect and protection which must be ensured for the unborn child from the moment of conception, the law must provide appropriate penal sanctions for every deliberate violation of the child's rights;

- that the moment a positive law deprives a category of human beings—like the unborn—of the protection which civil legislation ought to accord them, the state is denying the equality of all before the law;
- and that when the state does not place its power at the service of the rights of each citizen, and in particular of the more vulnerable, the very foundations of a state based on law are undermined. *Id.* at ¶¶28-34.

For all of these reasons relating to Catholic teaching on the rights and duties of diocesan bishops and on the sanctity of human life, it is the Archbishop's religious obligation, as Archbishop, to care for and protect each unborn life of the Archdiocese of Milwaukee, including by ensuring that civil authorities respect their right to life, by obtaining for them the opportunity for spiritual growth, and by guiding them in that growth, alongside their families, through reception of the sacraments, such as baptism, and of the gospel message. *Id.* at ¶35. Indeed, if given the chance to live, each unborn person could join the Catholic Church through baptism. *Id.* Fulfillment of these obligations is part of the Archbishop's exercise of religion. *Id.* at ¶36.

## ARGUMENT

The rules of appellate procedure permit intervention via "petition to intervene." *See* Wis. Stat. §§ 809.13, 809.63; *see also* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 6.12 (9th ed. 2022) (noting that "[t]he rules governing intervention, although phrased in terms of appeal, apply equally to other appellate court proceedings"). To obtain intervention as of right or permissively, the Archbishop must show that his interests meet the requirements of § 803.09(1) or (2), respectively. Wis. Stat. § 809.13.

The Archbishop will not belabor the general explication of these requirements since this Court already addressed them in one of its July 2, 2024 orders, the same day that it authorized further requests to intervene. Briefly, however, intervention as of right requires the following:

> (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).

Permissive intervention requires the following: (1) timeliness; (2) a "claim or defense" that has a "question of law or fact in common" with the "main action"; and (3) that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2).

Notably, it is not clear that "standing" in the formal sense is a requirement for intervention by the Archbishop in this case. In *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶39 & n.19, 410 Wis. 2d 1, 998 N.W.2d 370, this Court, referencing federal law, indicated that standing by one petitioner meant that intervention by an intervenor-petitioner could occur without any need to examine the intervenor-petitioner's standing. *Cf. also Horne v. Flores*, 557 U.S. 433, 445-47 (2009) (holding similarly with respect to intervenors aligned with a party defendant). Regardless, the Archbishop meets all applicable requirements and has adequate standing to intervene.

## I. The Archbishop meets the requirements for intervention as of right.

### A. The Archbishop's petition is timely.

Whether a petition is timely is left to this Court's discretion and depends primarily on whether the proposed intervenor acted promptly

and secondarily on whether intervention will prejudice the original parties to the suit. *Bilder*, 112 Wis. 2d at 550.

The Archbishop acted promptly. This petition was filed within 2 weeks of the issuance of this Court's July 2 order first taking jurisdiction of this matter, the date the public was first on notice that merits proceedings before this Court had actually been instituted (as opposed to the mere filing of a request for such proceedings). Further, the Archbishop filed this petition within the period this Court established in its order for the filing of petitions to intervene. *See, e.g.*, *C.L. v. Edson*, 140 Wis. 2d 168, 178-180, 409 N.W.2d 417 (Ct. App. 1987) (intervention motion brought 9 months after judgment was timely under the circumstances).

Allowing intervention will not prejudice the original parties to the suit. Since this Court accepted jurisdiction of this suit, no proceedings have yet occurred. *See Armada Broad., Inc. v. Stirn,* 183 Wis. 2d 463, 469, 471-72, 516 N.W.2d 357 (1994) (motion to intervene timely where filed prior to the commencement of the first hearing on mandamus action). Further, the Archbishop does not object to the Petitioners' request to proceed using pseudonyms, does not intend to file any motion requesting recusal of any justices of this Court, *see* Chisholm Intervention Br. in Opp. 5-6, and generally agrees that the parties should

be able to brief the legal issues presented without fact-finding. So intervention by the Archbishop does not harm the original parties to the suit at all. *See Edson*, 140 Wis. 2d at 179 (bare interest in concluding a lawsuit not sufficiently prejudicial to outweigh interest of proposed intervenor).

To the contrary, intervention by the Archbishop will aid the parties and this Court. As this Court has explained, one public policy favoring intervention is the "speedy and *economical* resolution of controversies, *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶40, 307 Wis. 2d 1, 745 N.W.2d 1 (quoting *Bilder*, 112 Wis.2d at 548) (emphasis added), for example, by ensuring that multiple lawsuits are not required to settle a controversy and that a judgment is not open to later collateral attack or invalidation on the ground that necessary parties or issues were not heard or considered. As explained further below, the Archbishop's claimed interests are weighty and merit judicial consideration. Consideration of those interests now, as opposed to in some subsequent lawsuit, will therefore reduce rather than increase delay in the adjudication of the original parties' rights.

### B. Disposition of this action may as a practical matter impair or impede the Archbishop's ability to protect interests he claims relating to the subject of this action.

Next, intervention of right requires the Archbishop to "claim[] an interest relating to the property or transaction which is the subject of the action" and show that he "is so situated that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest." Wis. Stat. § 803.09(1). Put differently, he must show that he will "gain or lose by the direct operation of the judgment," such as by demonstrating he has a need to "protect a right that would not otherwise be protected in the litigation." *Helgeland*, 307 Wis. 2d 1, ¶45 (quoting *City of Madison v. Wisconsin Employment Relations Commission*, 2000 WI 39, ¶11 nn.8-9, 234 Wis. 2d 550, 610 N.W.2d 94 (2000)). However, such an interest need not 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).

The Petitioners in this case ask this Court to "recognize [a] state constitutional right to abortion." Pet. 26. Resolution of this issue in the Petitioners' favor will impair or impede the Archbishop's ability to protect three significant interests. Before examining these interests, however, some context is necessary.

The Supreme Court's decision in *Dobbs* recognized that the State has a legitimate interest in "respect for and preservation of prenatal life at all stages of development." *Dobbs v. Jackson Women's Health*

*Organization*, 597 U.S. 215, 301 (2022). So, for that matter, did the decision in *Roe v. Wade*. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 155, 162 (1973) (agreeing that "at some point the state interests as to protection of . . . prenatal life . . . become dominant"). So did the dissent in *Dobbs*. *Dobbs*, 597 U.S. at 369 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("defending" *Roe*'s "invo[cation]" of "powerful state interests" in "protecting prenatal life," interests "operative at every stage of the pregnancy").

While acknowledging the State's interests, *Dobbs* did not reach a conclusion one way or the other "about if and when prenatal life is entitled to any of the rights enjoyed after birth." *Dobbs*, 597 U.S. at 263. The Petitioners' original action petition, in declining to extend to the unborn what they themselves describe as a "sacred" and "inherent" "right to life," clearly assumes that the answer to this question is "no." Pet. 5; *cf. also Dobbs*, 597 U.S. at 263 (noting that the dissent's position is that "the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed"). The Archbishop contends that the answer to this question is "yes."

For purposes of assessing the Archbishop's grounds to intervene, then, two important points must be kept in mind: (1) that abortion

concerns the disposition of "prenatal life" is settled law; (2) whether "prenatal life" is entitled to legal (and in particular constitutional) rights is an open question. This Court, in addressing the Archbishop's petition to intervene, could not narrow this first proposition or resolve the second one without prejudging this case. Thus the Petitioners should not be heard to object, at this early stage, to claimed interests that depend on the Archbishop's view that the unborn are human persons. Just as an alleged First Amendment harm does not mean that a First Amendment violation will ultimately be proven, what matters at this stage is what the Archbishop alleges—in the words of the intervention statute, "claims." Wis. Stat. § 803.09(1); *see, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) ("[A]lthough federal standing 'often turns on the nature and source of the claim asserted,' it 'in no way depends on the merits of the [claim].'" (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (second alteration in original)); *Booker-El v. Superintendent, Indiana State Prison*, 668 F.3d 896, 900 (7th Cir. 2012) (rejecting argument that "conflates standing with the merits of the case," instead requiring only a "colorable claim," and explaining "[w]ere we to require more than a colorable claim, we would decide the merits of the case before satisfying ourselves of standing.").

With this context in mind, the Archbishop will now discuss the three interests he possesses that are jeopardized by this litigation.

**i. The Archbishop has an interest in vindicating the Fourteenth Amendment rights of the unborn of the Archdiocese to life and to equal protection of the law as well as any state constitutional right to bodily integrity, autonomy, and self-determination they may possess.**

First, the Archbishop seeks to vindicate the federal constitutional rights of the unborn in the Archdiocese of Milwaukee, specifically their rights to life and to equal protection of the law under the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 (declaring that a State may not "deprive any person of life . . . without due process of law" and may not "deny to any person within its jurisdiction the equal protection of the laws"). Each unborn life is a human "person," and the Fourteenth Amendment prohibits States from treating the lives of one category of human persons as disposable at will and without process. For the same reason, any claimed state constitutional right of each "person[]" to "bodily integrity, autonomy, and self-determination," Pet. 4, 31, applies equally to the unborn.

As *Dobbs* suggests, consideration of whether prenatal life is constitutionally entitled to such rights is inseparable from the question of whether someone is constitutionally entitled to abort that life; they

are two sides of the same coin. *See Dobbs*, 597 U.S. at 263. Yet to date in this case, the interests of the unborn are unrepresented and their constitutional rights are not being asserted.

While "litigants typically lack standing to assert the constitutional rights of third parties," *United States v. Hansen*, 599 U.S. 762, 770 (2023), an exception exists where a litigant can make two showings (in addition to demonstrating injury in fact, which is discussed below in conjunction with the Archbishop's other claimed interests): (1) "the party asserting the right has a 'close' relationship with the person who possesses the right"; and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also Racine Steel Castings, Div. of Evans Prod. Co. v. Hardy,* 144 Wis. 2d 553, 563, 426 N.W.2d 33 (1988) (citing federal law for proposition that employer had third-party standing to challenge constitutionality of statute treating class unequally even though he was not a member of that class). Indeed, the Petitioners appear to be relying heavily on this doctrine themselves in claiming to represent the interests of patients, employees, and women not party to this lawsuit.

If this Court—as it should at this stage—assumes without deciding that prenatal life *may be* entitled to the protection of the Fourteenth

Amendment and any state constitutional right claimed by the Petitioners, these lives are plainly hindered in their ability to protect their own interests by their own lack of development (the first requirement for third-party standing). The question then becomes: who has a sufficiently close relationship with the unborn to represent their interests in this case (the second requirement for third party standing)? This question is complicated by the fact that those mothers who oppose the recognition of prenatal rights—the only ones whose unborn would be endangered by this decision—would have no interest in seeking to intervene on behalf of the unborn. *Cf. Racine Steel Castings*, 144 Wis. 2d at 564 (allowing employer to challenge statutory classification of health care providers in part because those providers would "have no incentive to ever challenge the constitutionality of the statute"). And, as discussed below, no other party in this suit currently claims to be able to represent this interest.

In this unique context, this Court should conclude that the Archbishop has a relationship sufficiently close to the unborn of his diocese that he may advance Fourteenth Amendment arguments on their behalf, for two reasons. First, he has a religious obligation to care for and protect each unborn life of the Archdiocese of Milwaukee, including by ensuring that civil authorities respect their right to life, by

obtaining for them the opportunity for spiritual growth, and by guiding them in that growth, alongside their families, through reception of the sacraments, such as baptism, and of the gospel message. *See* Listecki Aff. ¶¶35-36. Indeed, the prospect of a loss of salvation for infants who die without receiving baptism makes the Church's call not to prevent little children coming to Christ through the gift of holy baptism urgent for the Archbishop. *Id.* at ¶24. Second, and conversely, the unborn of the Archdiocese, if given the chance to live, would have the opportunity to join the Catholic Church through Baptism and in fact would have a First Amendment right to do so. *See id.* at ¶¶23, 35; *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). Again, the reception of baptism is ordinarily necessary for salvation. *Id.* at ¶23.

In other words, this case threatens the important relationship between a pastor and his flock. A ruling enshrining a state constitutional right to abortion would interfere with the ability of the unborn, after birth, to enter the Church through baptism, just as it would interfere with the Archbishop's ability to facilitate that process and the spiritual development of these souls as is his religious obligation. Listecki Aff. ¶¶35-38. While some of the unborn, if permitted to live, would not join the Catholic Church, statistically a large number of them would. *See* Listecki Aff. ¶17 (533,962 registered Catholics in the Archdiocese as of

November 2019 out of a population of 2.3 million). This Court should permit the Archbishop to attempt to protect his relationship with these souls by allowing him to assert the constitutional rights of those who cannot do so. *Cf. U.S. Dep't of Lab. v. Triplett*, 494 U.S. 715, 720 (1990) ("When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist.").

Certainly this relationship is at least as valuable as others that have supported the application of third party standing. *Id.* (attorney asserting right of clients to challenge fee restrictions); *Carey v. Population Services*, 431 U.S. 678, 682-84 (1977) (mail-order contraceptive distributor raising rights of potential customers to challenge contraception distribution restrictions); *Craig v. Boren*, 429 U.S. 190, 192-93 (1976) (store owner raising rights of potential customers to challenge beer sale restrictions); *Racine Steel Castings*, 144 Wis. 2d at 563-64 (employer raising rights of health care providers); *cf. McCollum v. California Dep't of Corrections and Rehabilitation*, 647 F.3d 870, 879 (9th Cir. 2011) (assuming without deciding that relationship between Wiccan chaplain and inmates supported third-party standing to

challenge chaplaincy hiring program but declining to apply doctrine because inmates could and had sought to protect their own interests). If vendors can vindicate the rights of potential customers, a minister should be able to vindicate the rights of potential members of his Church.[2]

Moreover, denying the Archbishop permission to assert the Fourteenth Amendment right of the unborn would independently work multiple constitutional harms. First, concluding that abortion providers like the Petitioners can assert the rights of those to whom they claim to provide care while religious ministers cannot would violate the First and Fourteenth Amendments' command that States may not "treat[] religious exercises worse than comparable secular activities" absent the most compelling justification. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 21 (2020) (Gorsuch, J., concurring); *cf., e.g.*, *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 534 (2021) ("A law also lacks general applicability if it prohibits religious conduct while

[2] It is worth emphasizing that the doctrine of third-party standing is prudential in the federal courts, *see, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), and equally so in Wisconsin where standing is a question of "sound judicial policy" rather than jurisdiction. *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. The Archbishop agrees that this does not mean that this Court should treat the concept of standing as a technicality; it does mean, however, that this Court has the ability to recognize and appropriately address unique problems of standing in a unique area of the law.

permitting secular conduct that undermines the government's asserted interests in a similar way."); *cf. National Ass'n for Advancement of Colored People v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

Second (and again if this Court assumes without deciding for present purposes that prenatal life may enjoy certain constitutional rights), it would deny the unborn their right to be heard in this case—their right to due process. *See Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 681 (1930) ("[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.").

Thus, the Archbishop meets the two requirements referenced in *Kowalski* justifying third-party standing. As noted above, in addition to these two requirements, as in every case, third-party standing requires the Archbishop to show that he is also threatened with an injury in fact,

thus "giving him . . . a 'sufficiently concrete interest' in the outcome." *Powers*, 499 U.S. at 411 (quoting *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)); *see also, e.g.*, *Food and Drug Admin. v. All. for Hippocratic Med.,* 602 U.S. 367, 393 n.5 (2024). The Archbishop meets this requirement through damage to the important relationship just discussed. But he also meets it through harm to the two additional interests he asserts in his own right, interests which independently support intervention and will now be discussed.[3]

**ii. The Archbishop has an interest in preventing violation of his state and federal constitutional rights to the free exercise of religion.**

The Archbishop also has an interest in preventing violation of his own state and federal constitutional rights to the free exercise of religion. As discussed in more detail above, the Archbishop has a religious obligation to care for and protect each unborn life of the Archdiocese of Milwaukee, including by ensuring that civil authorities respect their right to life, by obtaining for them the opportunity for spiritual growth, and by guiding them in that growth, alongside their families, through reception of the sacraments, such as baptism, and of the gospel message.

[3] To the extent a "personal stake" in the litigation is necessary and not already encompassed within the other factors, *see Racine Steel Castings*, 144 Wis. 2d at 564, that requirement is similarly met because of interference with the relationship between the Archbishop and the unborn of the Archdiocese and with the Archbishop's own constitutional rights.

Listecki Aff. ¶¶33-34. A ruling that these unborn lives can be discarded will substantially burden this exercise by ending these lives prematurely and preventing the Archbishop from teaching and sanctifying them. *Id.* at ¶¶36-38.[4]

This harm is of state and federal constitutional significance. *See* U.S. Const. amend. I; Wis. Const art. I, § 18; *James v. Heinrich*, 2021 WI 58, ¶39, 397 Wis. 2d 517, 960 N.W.2d 350 (under Wis. Const. art. I, § 18, burden on sincerely held religious belief requires compelling state interest that cannot be served by a less restrictive alternative); *Kennedy*, 597 U.S. at 524-25 (same under Free Exercise Clause if challenged law is not "neutral" or "generally applicable").

Whether or not a state constitutional right to abortion could survive strict scrutiny, rational basis, or any other standard justified by this burden on the Archbishop's religious exercise, *see, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 468, 488-89 (2020) (invalidating application of state constitutional provision as inconsistent

[4] Permitting the Petitioners to minimize, reject, or ignore the Archbishop's sincerely-held religious belief would violate the Religion Clauses of the First Amendment and their state counterparts in the Wisconsin Constitution by putting this Court in the role of religious arbiter. *See* U.S. Const. amend. I; Wis. Const. art. I, § 18; *see also, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457-58 (1988) ("[T]he dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.").

with First Amendment), is a merits question that would necessarily require examination of whether the prenatal lives whose abortion the constitutional provision permits have constitutional rights of their own. At this stage, then, the Archbishop has standing to assert the Free Exercise question.

### iii. The Archbishop has an interest in preventing violation of his right to practice his chosen profession.

The Archbishop's third interest is the mirror image of one claimed by some of the Petitioners. If this Court permits the Petitioners to ground *their* standing on the "fundamental right to practice one's chosen lawful profession," Pet. 24, this right grants the Archbishop standing as well. If this Court rules in favor of a right to abortion, it will, for reasons already discussed, substantially burden the Archbishop's ability to minister to those in his diocese to the full extent of his education, training, and ability. Listecki Aff. ¶39. It will prevent him from ministering to particular souls entirely. *Id.*

The Petitioners claim to be engaged in professions aimed at healing and caring for the human person. *See* Pet. 25. So does the Archbishop. Listecki Aff. ¶39. As noted above, treating a secular profession more favorably than a comparable religious profession, *see id.*

at ¶40, is unconstitutional, absent some compelling justification that the Petitioners cannot provide.

As with the Archbishop's right to free exercise, resolving this claim on the merits—applying any kind of constitutional scrutiny—requires a threshold determination of whether the unborn possess independent rights or not.

### C. Existing parties do not adequately represent the Archbishop's interests.

Finally, the Archbishop meets the "minimal" burden to show that representation by the existing parties "may be" inadequate. *Wolff*, 229 Wis. 2d at 747 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)).

None of the existing parties to the suit adequately represent the Archbishop's interests. Certainly the parties arguing for a state constitutional right to abortion do not. The respondent district attorneys, in turn, are local governmental officials who does not purport to (and in fact have no authority to) represent the personal constitutional rights of the Archbishop to the free exercise of religion and to practice a chosen profession or of the unborn to life, equal protection and bodily integrity, autonomy, and self determination (and in any event, any such authority would not extend outside their counties). And it is not clear how a

government official bound by the Establishment Clause of the First Amendment could possibly advance any of the Archbishop's interests, infused as they are with religious significance (though not only religious significance).

Further, Respondent Urmanski has already adopted the position that the federal and state constitutions "[do] not take sides on the issue of abortion." Urmanski Resp. to Pet. 6 (quoting *Dobbs*, 597 U.S. at 337 (Kavanaugh, J., concurring)). This is not mere disagreement over strategy—it appears to be a renunciation of any intent to advance the constitutional rights the Archbishop seeks to protect.

Thus, while Urmanski and the Archbishop share one objective—namely, obtaining a declaration that the Wisconsin Constitution does not protect a right to abortion—they do not have all objectives in common. *See, e.g.*, *Wolff*, 229 Wis. 2d at 749 (inadequate representation where proposed intervenor "may have more at stake" than existing party); *Trbovich*, 404 U.S. at 539 (inadequate representation where existing party was government official who had duty to the public as a whole in addition to duty to intervenor).

## II. The Archbishop meets the requirements for permissive intervention.

Even if the Archbishop does not have a *right* to join this litigation, there are good reasons for this Court to permit him to do so and all underlying requirements for permissive intervention are met.

### A. Permissive intervention will help this Court reach a just decision.

This is a historic case involving a matter of great public concern. As Justice Karofsky noted in her concurrence to the order granting leave to commence this action, "it is undeniable that abortion regulation is an issue with immense personal and practical significance to many Wisconsinites." Order of July 2, 2024 at 4. Part of the reason that this issue "arouse[s] passionate disagreement" amongst the public, *id.* is because of the directly conflicting nature of the claimed rights. Some, like the Archbishop, maintain that the unborn are human persons deserving of legal rights; others, like the Petitioners, claim that the unborn do not acquire legal rights until birth (or some point between conception and birth) and that a pregnant woman must have full autonomy to decide whether to allow that birth to take place.

Even setting aside the ultimate result in this case, it is unthinkable that a legal decision of such import could be made without full participation by both sides (or all sides) to this dispute. No party to this litigation is asserting the fundamental humanity, inviolability, and

legal personhood of the unborn. Allowing intervention by the Archbishop will ensure that these issues are fully and zealously briefed and that this Court has all of the information it needs to reach the correct decision.[5]

### B. The Archbishop's petition is timely.

The Archbishop addressed this factor above in Section I.A. His petition is timely.

### C. The Archbishop's defense and the main action have a question of law in common.

Permissive intervention requires a showing that the "movant's claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). Each of the Archbishop's constitutional defenses involves the predicate legal defense that the Wisconsin Constitution does not protect a right to abortion, the central legal question in this case. Certain of the Archbishop's defenses also require this Court to assess the nature of any recognized constitutional right to practice one's chosen profession or to bodily integrity, autonomy, and self-determination, legal questions raised by the Petitioners.

The Archbishop's defenses are therefore wholly intertwined with the main action. His position, simply stated, is that this Court cannot

[5] The need to ensure that someone is present to "advocate for the best interests of a minor child" as to particular interests is of course commonly recognized in our legal tradition. Wis. Stat. § 767.407(4) (guardian ad litem for minor children). The Archbishop can fill that role here.

properly resolve the principal issues raised in the Petitioner's petition without considering the additional constitutional interests he asserts. They are inseparable.

### D. Intervention by the Archbishop will not unduly delay or prejudice the adjudication of the rights of the original parties.

The Archbishop largely addressed the final factor for permissive intervention, whether "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," Wis. Stat. § 803.09(2), in Section I.A. above, and demonstrated that his addition to this suit will not delay the case or prejudice anyone. He adds to that discussion only that the Archbishop's intervention will not present the concern this Court cited in its July 2 Order addressing a different motion to intervene, namely that it may then need to allow other parties to intervene. If the Archbishop is added to this suit, the perspective and interests of the unborn will be represented and considerations of adequate representation, timeliness, or both will justify this Court in moving forward with the case.

## CONCLUSION

For the foregoing reasons, Proposed Intervenor-Respondent Jerome E. Listecki, as Roman Catholic Archbishop of Milwaukee, on behalf of himself and the unborn of the Archdiocese of Milwaukee,

respectfully petitions this Court to permit him to intervene in this original action, either as of right or permissively, as an Intervenor-Respondent.

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WISCONSIN APPELLATE
LITIGATION SERVICES LLC

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