

FILED
07-16-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

Case No. 2024AP000330

PLANNED PARENTHOOD OF WISCONSIN, on behalf of itself, its employees, and its patients; KATHY KING, M.D. and ALLISON LINTON, M.D., M.P.H., on behalf of themselves and their patients; and 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; JOHN T. CHISHOLM, in his official capacity as District Attorney for Milwaukee County, Wisconsin,

Respondents.

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR CERTIFICATION UNDER WIS. STAT. § 803.08
OF A CLASS OF RESPONDENTS

PINES BACH LLP

Diane M. Welsh, SBN 1030940
Christa O. Westerberg, SBN 1040530
Will Kramer, SBN 1102671
Samantha R. Foran, SBN 1122735

122 West Washington Ave.,
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
dwelsh@pinesbach.com
cwesterberg@pinesbach.com
wkramer@pinesbach.com
sforan@pinesbach.com

*Attorneys for Petitioners Planned
Parenthood of Wisconsin, Dr. Kathy
King, Dr. Allison Linton, Maria L.,
Jennifer S., Leslie K., and Anais L.*

I. Introduction

Petitioners Planned Parenthood of Wisconsin, Dr. Kathy King, Dr. Allison Linton, Maria L., Jennifer S., Leslie K., and Anais L. (“the Petitioners”) are seeking a declaration that: (1) Article I, Section 1 of the Wisconsin Constitution’s guarantee of the inherent rights to life and liberty includes a person’s right to make one’s own decisions about whether or when to have a child and a physician’s right to provide appropriate abortion care; (2) section 940.04 of the Wisconsin Statutes, if interpreted as an abortion ban, violates Article I, Section 1 of the Wisconsin Constitution’s guarantee of the inherent rights to life and liberty as to Women Petitioners and Physicians; (3) the right to equal protection guaranteed by Article I, Section 1 of the Wisconsin Constitution encompasses the right to make one’s own decisions about reproductive health care, including whether or not to carry a pregnancy to term and a physician’s right to provide appropriate abortion care; and (4) section 940.04, if interpreted as an abortion ban, violates the right to equal protection guaranteed by Article I, Section 1 of the Wisconsin Constitution, as to Women Petitioners and Physicians. Additionally, Petitioners request that Respondents be permanently enjoined Defendants from enforcing Section 940.04 against abortions.

Petitioners have moved the Court pursuant to section 803.08 to certify a class of respondents, consisting of “All 71 locally elected district attorneys in the state of Wisconsin, acting in their official capacities.”

The prerequisites for members of a class who may be sued as representative parties on behalf of all members are set forth under section 803.08(1):

- (a) The class is so numerous that joinder of all members is impracticable.
- (b) There are questions of law or fact common to the class.
- (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- (d) The representative parties will fairly and adequately protect the interests of the class.

This memorandum explains why this case meets all four of the prerequisites for class certification, as well as the requirement under section 803.08(2)(a)1. that “prosecuting separate actions by or against individual class members would create a risk of...inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.”

II. Argument

A. The standards for class certification under Wisconsin law follow the federal standards and case law.

The class action procedure in Wisconsin was modeled after Rule 23 of the Federal Rules of Civil Procedure. The intent in doing so was to “craft a Wisconsin class action rule that tracks as closely as possible federal practice so that Wisconsin courts and practitioners can look to the well-developed body of federal case law interpreting Rule 23 for guidance.” Judicial Notes to section 803.08. Consequently, federal case law on class certification is instructive to the Court’s application of Wisconsin’s class certification procedure. See *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 5, 388 Wis. 2d 546, 553, 933 N.W.2d 654, 657 (“we conclude that the trial court correctly considered the relevant facts, applied the legal

standard set forth in the newly revised Wis. Stat. § 803.08 consistent with federal law on class certification.”).

B. The proposed Respondent Class is ripe for certification under Wis. Stat. §§ 803.08(1) and (2)(a)1.

The proposed Respondent Class meets the four requirements under sections 803.08(1) and (2)(a)1. However, to the extent that there are discrepancies within the Class as to the typicality and interests of the Class, the Court may find it appropriate to create subclasses within the Class to protect the interests of all 71 district attorneys across the state. Regardless of whether the Court selects to certify the Class as a singular class or as subclasses, it is necessary that the Respondent Class is certified to ensure consistency across the state.

1. The proposed Respondent Class is “so numerous that joinder of all members is impracticable.”

A class may be certified only if it is “so numerous that joinder of all members is impracticable.” Wis. Stat. § 803.08(1)(a). Although the statute does not specify a minimum on the number at which it becomes impracticable, “a forty-member class is often regarded as sufficient to meet the numerosity requirement.” *Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir. 2017) (citing *Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 n. 9 (7th Cir.1969)).

As there are 71 district attorneys, located in counties across the state, joinder of all 71 district attorneys would be impracticable. Due to the size of the Class, this case meets the numerosity requirement.

2. There are questions of law and fact common to members of the proposed Respondent Class, consistent with section 803.08(1)(b).

Class certification requires “commonality” among the class, meaning “questions of law or fact common to the class.” Wis. Stat. § 803.08(1)(b). Commonality requires “a common contention of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). “What matters... [is] the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.*

Here, members of the Respondent Class are all district attorneys in their official capacity who are, by law, entrusted with the prosecution of crimes consistent with the Wisconsin Constitution and Statutes of the State of Wisconsin. Each of the members of the Respondent Class would have the ability to prosecute individuals for obtaining an abortion or providers who perform abortions, if the law permits it. Each of the members of the Respondent Class would generate “common answers” about their role as prosecutors. The Court should find that commonality is satisfied for class certification.

3. The defenses of the Class Representatives are typical of those of the Class, consistent with section 803.08(1)(c).

A plaintiff class may only be certified if the “defenses of the representative parties are typical of the...defenses of the class.” Wis. Stat. § 803.08(1)(c). “The typicality requirement is said to limit the class [defenses] to those fairly encompassed by the named” Respondents’ defenses. *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). As such, this prerequisite focuses on the characteristics

of the named representatives, here District Attorneys Urmanski, Ozanne, and Chisholm, and whether their defenses are typical of those of the Class. It seems likely that, as district attorneys, the three named representatives will provide defenses to the Petitioner's defenses that are typical of their class.

However, Petitioners recognize that there may be some differences among the named Representatives. Should the Court determine that there is a divide among the named Representatives as to their defenses, it would be appropriate for the Court to establish subclasses as to those defenses. *See Wis. Stat. § 803.08(7); see also Hammetter v. Verisma Sys., Inc.*, 2021 WI App 53, ¶ 20, 399 Wis. 2d 211, 227, 963 N.W.2d 874, 882. Specifically, District Attorney Urmanski, in responding to the Petitioner's Petition, argued that each of the counts of the Petition lacked merit. District Attorneys Ozanne and Chisholm took no position as to the merits of the petition. Dividing the class of 71 district attorneys along such lines may be appropriate to ensure that both positions are represented. "[A]s long as each subclass is homogeneous, in the sense that every member of the subclass wants the same relief, and each subclass otherwise satisfies the requirements for certifying a class, so that each could be the plaintiff class in a separate class action, there is no objection to combining them in a single class action." *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 368 (7th Cir. 2012).

4. The Class Representatives will fairly and adequately protect the interests of the class.

A class may be certified only if the representative parties will fairly and adequately protect the interests of the class. Wis. Stat. § 803.08(1)(d). Courts look to whether the named plaintiffs have "a sufficient interest in

the outcome to ensure vigorous advocacy,” as well as any “antagonistic or conflicting claims with other members of the class.” *Stawski v. Secured Funding Corp.*, No. 06-CV-0918, 2008 WL 647024, at *2 (E.D. Wis. Mar. 6, 2008) (internal quotation marks and citations omitted); see *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

Petitioners are confident that the named Class Representatives have a sufficient interest in the outcome of this matter, and their appointed counsel will provide vigorous advocacy. To the extent that there may be “antagonistic” defenses with other members of the class, it may be appropriate for the Court to establish subclasses, as discussed *supra*. Wis. Stat. § 803.08(7).

5. This action is maintainable under section 803.08(2)(a)1.

A case may proceed if prosecuting separate actions against individual class members would create a risk of “[i]nconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.” Wis. Stat. § 803.08(2)(a)1.

If the class is not certified, petitioners “may litigate against local officials one by one; if they win some of those cases and lose others, they will be in the peculiar position of traveling through the state with their actions being legal in some places and barred in others.” 2 Newberg and Rubenstein on Class Actions § 5:20 (6th ed.); see also *Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214*, 540 F. Supp. 2d 985, 993 (N.D. Ill. 2008) (certifying a defendant class to ensure that the court’s ultimate ruling would be “effectuated statewide.”) Similarly, prosecutors in counties not involved in this matter might believe that they are at liberty to prosecute

abortions under section 940.04. Prosecuting this action against a single district attorney could potentially result in varying adjudications across the state, creating a scenario in which individuals would have a right to abortion in one county, but not in others.

Through certifying this class, the Court would avoid such inconsistency and uncertainty.

C. In the alternative, Petitioners request recognition that a ruling on the issues presented would have statewide impact.

Petitioners maintain that the Respondent Class should be certified. Petitioners also recognize that any declaration by this Court on the constitutional issues presented here would apply to prosecutions and prosecutors statewide. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 44, n. 9, 309 Wis. 2d 365, 749 N.W.2d 211 (explaining that a declaratory judgment declaring a statute to be facially unconstitutional means the State “may not enforce the statute, unless an appropriate court narrows its application.”) The Court could make clear that its ultimate decision here is applicable to all potential prosecutions of section 940.04 around the state, which may negate the need for class certification. If the Court denies class certification, Petitioners request the Court explicitly state that the Court’s decision will have statewide application in order to avoid inconsistency and uncertainty following a decision from this Court.

III. Conclusion

For the reasons above, the Court should certify a respondent class as follows: “All 71 locally elected district attorneys in the state of Wisconsin, acting in their official capacities.”

Furthermore, the Court should name Respondent District Attorneys Urmanski, Ozanne, and Chisholm, acting in their official capacities, as the representative class respondents. If appropriate, the Court should divide the Class into subclasses under Wis. Stat. § 803.08(7), dividing consistent with the arguments presented by District Attorney Urmanski and District Attorneys Ozanne and Chisholm in their responses to the Petition.

In the alternative, if the Court denies the certification of the class, Petitioners respectfully request a clear statement indicating that any ruling on the issues presented in this action will apply to any potential prosecution statewide.

Respectfully submitted this 16th day of July, 2024.

PINES BACH LLP

Electronically signed by Diane M. Welsh

Diane M. Welsh, SBN 1030940
Christa O. Westerberg, SBN 1040530
Will Kramer, SBN 1102671
Samantha R. Foran, SBN 1122735
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
dwelsh@pinesbach.com
cwesterberg@pinesbach.com
wkramer@pinesbach.com
sforan@pinesbach.com

*Attorneys for Petitioners Planned
Parenthood of Wisconsin, Dr. Kathy
King, Dr. Allison Linton, Maria L.,
Jennifer S., Leslie K., and Anais L.*

CERTIFICATION

I hereby certify that this document conforms to the requirements set forth under Wis. Stat. § 809.81.

Dated this 16th day of July, 2024.

PINES BACH LLP

Electronically signed by Diane M. Welsh

Diane M. Welsh, SBN 1030940