IN THE SUPREME COURT OF WISCONSIN

CASE NO: 2024AP000330-OA

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.

RESPONDENT JOEL URMANSKI'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO CERTIFY A CLASS OF RESPONDENTS

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INTRODUCTION

The Petitioners' motion for certification of a class of respondents introduces needless complexity to this matter and, besides, fails to meet the Petitioners' burden of demonstrating that the proposed class of respondents meets the requirements for class certification. The Petitioners' arguments are often conclusory and undeveloped to the point of waiver, and they fail regardless. And, ultimately, the motion is unnecessary insofar as this is an original action before the Wisconsin Supreme Court and any decision issued by this Court will necessarily have statewide effect as precedent. For the reasons set forth below, Respondent Joel Urmanski requests that this Court deny the Petitioners' motion for class certification.

ARGUMENT

Under Wis. Stat. § 803.08(1), this Court must find that all the following prerequisites are present to allow the Petitioners to sue the Respondents as representative parties on behalf of all members of a class:

> (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.

If the Court finds that the above four prerequisites are satisfied, a class action may be maintained only if the Court finds that the case meets the criteria for one of the three types of class actions identified in Wis. Stat. § 803.08(2). Importantly, "'[t]he party seeking class certification bears the burden of showing, by a preponderance

of the evidence, that a proposed class meets the requirements of [the class certification statute].'" *Fotusky v. ProHealth Care, Inc.*, 2023 WI App 19, ¶11, 407 Wis. 2d 554, 991 N.W.2d 502.

I. The Request to Certify a Single Respondent Class Should Be Denied.

First, to the extent Petitioners ask this Court to certify a single respondent class of "All 71 locally elected district attorneys in the State of Wisconsin, acting in their official capacities," with Respondents Urmanski, Ozanne, and Chisholm acting as class representatives, this Court should deny the motion.

A. The proposed class does not satisfy § 803.08(1).

Setting aside the fact that the proposed class—71 easily identifiable district attorneys—is likely not so numerous as to preclude joinder, the Petitioners have failed to satisfy at least two of the § 803.08(1) criteria: typicality and adequacy.

1. The Petitioners have not met their burden of demonstrating typicality.

First, aside from a conclusory assertion that "[i]t seems likely that, as district attorneys, the three named representatives will provide defenses to the Petitioner's [claims] that are typical of their class," (7-16-24 Pet. Br. at 7), the Petitioners do not develop an argument or present evidence that would satisfy their burden of demonstrating the existence of typicality in a single class comprised of all district attorneys. The Petitioners' failure to develop an argument is reason enough to deny Petitioners' request for certification of a single class of Respondents. And, the

Petitioners themselves seem to acknowledge that typicality is lacking when Petitioners quickly pivot to a suggestion that this Court create subclasses.

Indeed, that typicality is lacking with respect to the proposed class should be clear from the fact that typicality is already likely lacking with respect to the three named Respondents (who would each be members of the Petitioners' proposed class). The named Respondents have already taken divergent approaches as to at least one motion to intervene filed in this action.[1] And, as explained in more detail in the adequacy section below, there is no reason to believe that Respondents Chisholm and Ozanne would vigorously defend the position of Respondent Urmanski (or other district attorneys who share Respondent Urmanski's views) as to the merits of Petitioners' claims. At minimum, there is currently no evidence supporting the proposition that Respondents Chisholm, Ozanne, and Urmanski are aligned and that their views reflect the views of all 71 district attorneys in the State. Since it is the Petitioners' burden to demonstrate typicality, the motion should fail.

There are other typicality issues as well. Certifying a class requires that the Court define the class claims, issues, and defenses. Wis. Stat. § 803.08(3)(b). Yet, for Petitioners' claims premised on the alleged constitutional rights of those who may seek abortions, none of the Petitioners have standing and the claims thus are not suited for class certification against any respondent. None of the individual

[1] Respondent Chisholm opposed the petition to intervene by Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin, whereas Respondents Ozanne and Urmanski did not file oppositions to that petition.

women petitioners—none of whom are currently pregnant or are likely to become pregnant in the future—have standing to assert these claims, insofar as they do not present any controversy ripe for judicial determination and are seeking 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.[2] And, as Urmanski has indicated elsewhere, allowing the petitioners who are abortion providers to assert the rights of their future patients would be inconsistent with Wisconsin law.[3] "[C]onstitutional rights are personal and may not be asserted vicariously." *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund,* 2000 WI 98, ¶73, 237 Wis. 2d 99, 613 N.W.2d 849 (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."). Because there is no proper party to assert such claims, they cannot be certified as part of a class.

[2] There is no basis to conclude that any of these individual women 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 women petitioners is in a position to attack the constitutionality of Wis. Stat. § 940.04.

[3] 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 v. Jackson Women's Health Org.*, 597 U.S. 215, 286-87 (2022).

Moreover, to the extent a justiciable controversy exists between Urmanski and the petitioners who are abortion providers to the extent the abortion providers allege that they provide abortions in Sheboygan County and advance claims based on their own alleged rights and not alleged rights of their future patients, there is no indication that any of the Petitioners present a justiciable controversy as to district attorneys in other counties (at least other counties outside of Milwaukee, Dane, and Sheboygan). Specifically, with respect to the abortion providers who are Petitioners, there is no evidence that they provide abortions at any locations outside of Sheboygan, Dane, and Milwaukee Counties. There is thus no justiciable controversy as to other district attorneys in the State, which should result in denial of a request to include such district attorneys in a single defendant class.

2. The Petitioners have not met their burden of demonstrating adequacy.

"[The] adequate representation inquiry consists of two parts: (1) the adequacy of the named [respondents] as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011). With respect to adequacy, the Petitioners again present an undeveloped argument. In conclusory fashion, they assert they "are confident that the named Class Representatives have a sufficient interest in the outcome of this matter, and their appointed counsel will provide vigorous adequacy." (07-16-24 Pet. Br. at 8). Again, the undeveloped nature of the Petitioners' argument is reason

enough to deny their motion. But, the Petitioners fail to identify or grapple with a number of complicating factors that weigh against certification of a single defendant class represented by the named Respondents and their counsel.

First, adequate representation requires that the named representative have "a sufficient interest in the outcome of the case to ensure vigorous advocacy" and "does not have interests antagonistic to those of the class." *Fournigault v. Indep. One Mortg. Corp.*, 234 F.R.D. 641, 646 (N.D. Ill. 2006). Here, again, Petitioner cannot demonstrate these factors as between the named Respondents, let alone between the named Respondents and all members of the proposed class.

In particular, Respondents Ozanne and Chisholm would not be adequate representatives of a class containing Respondent Urmanski or any other Wisconsin district attorney who disputes Petitioners' claims that application of § 940.04 to abortion would violate an alleged state constitutional right to an abortion or any other protection in Article I, Section 1 of the Wisconsin Constitution. There is no indication that Respondents Ozanne or Chisholm will vigorously defend the constitutionality of § 940.04 as applied to abortions and every indication suggests that Respondents Ozanne and Chisholm likely have interests antagonistic to those who believe that § 940.04 can be constitutionally applied to abortions. Both Respondents Ozanne and Chisholm have publicly committed to not enforcing § 940.04. Respondent Chisholm signed a statement referring to "[c]riminalizing and prosecuting individuals who … provide abortion care" as "a mockery of justice." *See* June 24, 2022 Joint Statement from Elected Prosecutors issued by Fair and Just

Prosecution, *available at* https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf. And, the webpage for Respondent Ozanne's office still contains a prominent message from Respondent Ozanne referring to such laws as "archaic" and telling voters "they will need to elect someone else" to prosecute abortion providers. *See* Dane County District Attorney's Response to United States Supreme Court's Decision to Overturn *Roe v. Wade* – June 24, 2022, *available at* https://da.danecounty.gov/. Respondent Urmanski objects to being included in a class that would be represented by Respondents Ozanne or Chisholm, and it is likely that other Wisconsin district attorneys would as well.

Next, creating a single class presents multiple adequacy of counsel issues. If the Court were to create a single class containing Respondents Urmanski, Ozanne, and Chisholm represented by their current counsel, the Court would arguably be creating a situation in which each of the named Respondents' counsel would also be representing the other named Respondents (because the other named Respondents would also be part of the class). This is a problem because Respondents Ozanne and Chisholm are currently adverse to Respondent Urmanski in *Kaul v. Urmanski* (Case No. 2023AP2362) and a conflict of interest would then exist. Even if this conflict were waivable, there is no guarantee that each of the named Respondents would provide the necessary waivers.

Further, the undersigned (and presumably counsel for Respondents Ozanne and Chisholm as well) is representing Respondent Urmanski pursuant to an

appointment as special counsel by the Governor under Wis. Stat. § 14.11(2). This is relevant for two reasons. First, the scope of the appointment does not expressly contemplate the representation of a class of district attorneys other than Respondent Urmanski. Certification of a class would likely require that the scope of services under the appointment be broadened. And, second, if any conflicts of interest resulting from the creation of a class necessitated the appointment of new counsel at taxpayer expense to represent the class, this Court would effectively be depriving the Governor of his choice of counsel for Respondent Urmanski (raising separation of powers concerns) and Respondent Urmanski of the counsel with whom he has worked from the time when he was named as a defendant in *Kaul v. Urmanski*. These concerns should weigh against certification of the proposed class.

Finally, it must be noted that this is not the typical case in which a plaintiff seeks to certify a class of state officers to challenge the constitutionality of a state statute. In the ordinary case, the Attorney General, who generally has a duty to defend the constitutionality of state statutes, would likely represent the class and defend the statute. *See State v. City of Oak Creek*, 2000 WI 9, ¶35, 232 Wis. 2d 612, 605 N.W.2d 526. The concerns presented above would not be present. Here, the Attorney General is not defending the constitutionality of § 940.04, even if § 940.04 is determined to apply to abortion as a matter of statutory interpretation. This has resulted in the atypical situation this Court confronts: a proposed single class of district attorneys with three different proposed class representatives who are represented by three different law firms. These unique circumstances, for the

reasons discussed above, generate typicality and adequacy problems that might not otherwise exist in the ordinary case seeking certification of a defendant class of state officials.

B. Wis. Stat. § 803.08(2)(a)(1) does not apply.

Next, even if the proposed class meets the § 803.08(1) criteria, the Petitioners still must demonstrate that the case is one of the types of class actions set forth in § 803.08(2). Here, the Petitioners argue only that this action is maintainable under § 803.08(2)(a)1. That provision, which is Wisconsin's analogue to Fed. R. Civ. P. 23(b)(1)(A), provides that a class action may be maintained if the § 803.08(1) criteria are satisfied and the court finds that "[p]rosecuting separate actions by or against individual class members would create a risk of … 1. Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." As explained below, this case does not meet the criteria for that type of class action.

First, because this is an original action in the Wisconsin Supreme Court, there is no risk of "[i]nconsistent or varying adjudications with respect to individual class members." The Petitioners are concerned that if they do not certify a class, and they are successful in obtaining the relief they seek (a determination that Wis. Stat. § 940.04, if applied to abortions, would violate a state constitutional right to an abortion), prosecutors who are not parties to this case "might believe that they are at liberty to prosecute abortions under section 940.04" and that this "could potentially result in varying adjudications across the state, creating a scenario in

which individuals would have a right to an abortion in one county, but not in others." (07-16-24 Pet. Br. at 8-9). These concerns are illusory.

This Court is the Wisconsin Supreme Court, not a circuit court. Any determination by this Court on the issues presented in this case will have statewide effect unless this Court subsequently overrules or modifies its decision. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256. Thus, there is no risk of "inconsistent or varying adjudications" with respect to individual class members because whatever decision the Court reaches in this case will control the question in any prosecution instituted by a Wisconsin district attorney who is not a party to this case. There is zero risk that, if this Court declares that applying § 940.04 to abortions violates a state constitutional right to an abortion, there could nevertheless be a scenario in which that right exists in one county but not another. Such concerns might be relevant if the Petitioners had initiated this case at the circuit court level, but they are not present in this context.

Second, even if there were a risk that prosecutors in counties not currently named as defendants could apply § 940.04 to abortions even if this Court rules in favor of Petitioners in this action, that does not mean that the criteria of § 803.08(2)(a)(1) have been satisfied. Section 803.08(2)(a)1. requires that the inconsistent or varying adjudications "establish incompatible standards of conduct *for the party opposing the class*." (emphasis added). This statute exists to address scenarios in which there might be multiple litigations that could establish incompatible standards of conduct for the class opponent—here the named

Respondents. Here, under the scenario envisioned by the Petitioners, prosecutors who are not parties to this action could still try to prosecute abortions under § 940.04 even if this Court declares such prosecutions unconstitutional, but even if that were the case the named Respondents in this case would remain bound by this Court's decision and there is no risk that the named Respondents in this case would be subject to inconsistent judgments absent class certification. *See generally Fund Texas Choice v. Deski*, No. 1:22-CV-859-RP, 2024 WL 3223686 at *5 (W.D. Tex. June 26, 2024).

II. The Request to Certify Subclasses Should Be Denied.

Next, to the extent Petitioners suggest this Court could certify subclasses to address any issues that might exist with their request to certify a single class of respondents, this Court should deny Petitioners' request. "[I]t is the [Petitioners'] burden to define a proper class, including showing how an action may be subclassed to avoid certification problems." *Albelo v. Epic Landscape Productions, L.C.*, No. 4:17-cv-0454-DGK, 2021 WL 2651809 at *4 n.3 (W.D. Mo. June 28, 2021); *see also Heaven v. Trust Co. Bank*, 118 F.3d 735, 738 (11th Cir. 1997). Here, as explained below, the Petitioners have not met this burden.

First, defining the subclasses in the manner proposed by Petitioners—based on the positions asserted in the Respondents' respective responses to the petition for an original action—likely would not address all the typicality concerns that exist with respect to Petitioners' proposed class. The standing and justiciability concerns discussed above would still remain. Further, Petitioners have made no attempt to

meet their burden of demonstrating that the Respondents' respective positions on the substantive merits of the Petitioners' claims represent the full spectrum of positions that Wisconsin district attorneys may have on the issues raised in this case. *Cf. Reich v. ABC/York-Estes Corp.*, No. 91 C 6265, 1997 WL 321699, at *7 (N.D. Ill. June 6, 1997) (no typicality where evidence was lacking that absent class members subscribed to same legal theories).

The Petitioners' proposal for subclasses also does not resolve the adequacy concerns discussed above. Even representations of subclasses of district attorneys would arguably expand the scope of counsel's representation beyond the scope set forth in their appointments by the Governor and could require modification of those appointments. These logistical concerns should also weigh against certification.

Finally, Petitioners' proposed subclasses would still fail to meet the criteria for a § 803.08(2)(a)(1) class action, for the same reasons discussed above. There is no risk of inconsistent judgments that would establish incompatible standards of conduct for any of the Respondents.

III. Petitioners' Concerns Regarding Statewide Application Are Illusory

Finally, setting aside the Petitioners' failure to satisfy the necessary prerequisites to certify a class in this matter, their motion is entirely unnecessary. The Petitioners' motion seems to be driven, at least in part, by a concern for ensuring that whatever decision this Court issues in this case "will have statewide impact in order to avoid inconsistency and uncertainty following a decision from this Court." Such concerns are entirely illusory. This Court's decision in this matter will have

the effect of declaring the law statewide and bind all lower courts in the State, unless this Court subsequently overrules or modifies whatever decision it issues in this case. *Cook*, 208 Wis. 2d at 189.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioners' Motion for Certification Under Wis. Stat. § 803.08 of a Class of Respondents.

Dated this 31st day of July, 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this document conforms to the requirements set forth under Wis. Stat. § 809.81. The length of this response is 3245 words.

Dated this 31st day of July, 2024.

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CERTIFICATION OF ELECTRONIC FILING AND SERVICE

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

I further certify that a copy of the above document was mailed on July 31, 2024, to:

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Dated this 31st day of July, 2024.

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