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IN THE SUPREME COURT OF WISCONSIN
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.

JOINT BRIEF OF RESPONDENTS OZANNE AND CHISHOLM IN OPPOSITION TO PETITIONERS' MOTION FOR CERTIFICATION UNDER WIS. STAT. § 803.08 OF A CLASS OF RESPONDENTS

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Introduction

Certification of a class of 71 Respondent Wisconsin district attorneys in this original action would be unprecedented in Wisconsin law and is unnecessary to bind all 71 district attorneys to this Court's ultimate construction of the Wisconsin laws at issue in this case. The legal standards for certifying a class—whether of plaintiffs or defendants—are set forth in Wisconsin Statutes section 803.08, which this Court "repealed and recreated" in December 2017 "'with the stated purpose of aligning the statute with the federal class action Federal Rules of Civil Procedure Rule 23.'" *Fotusky v. ProHealth Care, Inc.*, 2023 WI App 19, ¶11, 407 Wis. 2d 554, 991 N.W.2d 502 (quoting *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶23, 388 Wis. 2d 546, 933 N.W.2d 654). This Court has not yet construed or applied that statute, and the Respondent class[1] that Petitioners ask this Court to certify is a particularly poor candidate for a case of first impression. Not only are defendant classes sparingly used and unusual even in federal courts,[2] but historically they are unknown in Wisconsin law: Petitioners cite no Wisconsin cases in which a court has certified a defendant class, nor has Respondents' research identified any. And for good reason: defendant class actions present troubling federal due process and other concerns not present in plaintiff class actions.

[1] Opinions and treatises addressing class actions seeking to certify classes of defendants typically refer to "defendant" classes. Although the proposed class here would be one comprising "Respondents" rather than "defendants," this brief refers to "defendant" class actions when discussing legal authorities generally, and refers to the proposed class in this original action as one comprising "Respondents."

[2] *See* Manual for Complex Litigation, Fourth, § 21, at p. 244 ("Occasionally, a plaintiff or other party seeks to have a defendant class certified. Such requests are unusual.").

Even setting aside the unprecedented nature of what Petitioners ask this Court to do for the very first time, the Court should deny Petitioners' motion to certify a Respondent class because Petitioners fail to carry their burden of satisfying all four express statutory prerequisites that section 803.08 requires them to demonstrate:

- Petitioners fail to establish that the proposed class—all 71 Wisconsin district attorneys—is so numerous that joinder of all is impracticable. *See* Wis. Stat. § 803.08(1)(a). This is not a sprawling proposed class of members who are difficult to identify and who cannot be located without discovery and the class-certification process. To the contrary, all 71 district attorneys are elected officials who are easily identifiable, currently serve in public office, can easily be located, and are obligated by law to accept service of a complaint.

- Petitioners fail to establish that the defenses of the three Respondent District Attorneys are typical of the defenses of the proposed class that includes the remaining 68 Wisconsin district attorneys. *See* Wis. Stat. § 803.08(1)(c). The arguments, positions, and legal strategy approaches of the three Respondents are not even typical of one another—as has been repeatedly demonstrated in both this and the related *Kaul v. Urmanski* action now pending before this Court on bypass from the court of appeals as Case No. 2023AP2362—much less of the 68 other Wisconsin district attorneys. Nor is Petitioners' undeveloped suggestion of subclasses (which Petitioners fail to meaningfully define) a remedy for this fatal deficiency.

- Petitioners fail to establish that the three Respondent District Attorneys will fairly and adequately protect the interests of the proposed class. *See* Wis. Stat. § 803.08(1)(d). Again, because the three Respondents took different positions on various issues in the related *Kaul v. Urmanski* action when it was before the Dane County Circuit Court and have taken different positions in this original action, they each clearly have different interests from one another, and almost certainly have different interests with respect to the issues involved in this action, than do the remaining 68 Wisconsin district attorneys. Moreover, Petitioners have not identified any proposed class counsel, and neither the Attorney General (who has petitioned to intervene) nor Respondents' counsel (who, by contract, have been retained to

> represent only their respective clients here, and likely would be conflicted out of serving as counsel for other district attorneys) could serve in that role.

And even if that were not enough to defeat certification of the Respondent class sought in this original action, there is yet another insurmountable barrier to granting Petitioners' motion. In addition to all of the mandatory statutory prerequisites (which cannot be satisfied anyway), Petitioners have not and cannot demonstrate that the Respondent class they propose may be maintained under section 803.08(2)(a)(1), which requires the Court to find that "[p]rosecuting separate actions by or 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." That risk is wholly absent here because this Court's adjudication of the issues raised in the Petition ***will be*** the law in Wisconsin that will bind all 71 district attorneys—including the three who are parties to this original action, as well as the 68 others who are not—and with which they must comply. Petitioners essentially admit as much. (*See* Pet'rs' Mem. of Law in Support of Mot. for Certification under Wis. Stat. § 803.08 of a Class of Respondents ("Pet'rs' Br.") at 9.)

Consequently, unlike in some federal district court actions that have found a defendant class appropriate because a ruling by a single federal district court otherwise would not bind ***all*** government actors in a state, this Court is the highest court in Wisconsin, and its ruling in this action ***will be the final and unassailable*** statement of law in Wisconsin on the state law issues it adjudicates. Its ruling will

bind all 71 district attorneys regardless of the presence of only three district attorneys as parties to this action, and a Respondent class in this original action is therefore unnecessary. The Court should deny Petitioners' motion and should instead expressly note in its final ruling in this action that, as Petitioners suggest, its ruling binds all 71 district attorneys in Wisconsin. (*See* Pet'rs' Br. at 9-10.)

Legal Standards

Wisconsin Statutes section 803.08(1) requires a plaintiff (or here, the Petitioners) seeking to certify a class "to first establish three facts about the proposed class and the representative—referred to as numerosity, commonality, and typicality—and one fact about the plaintiff's ability to represent the class." *Harwood*, 2019 WI App 53 ¶23. To establish these mandatory prerequisites, a plaintiff must demonstrate that all of the following are satisfied:

> (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.

Wis. Stat. § 803.08(1)(a)-(d); *Fotusky*, 2023 WI App 19, ¶11; *Harwood*, 2019 WI App 53, ¶23.

"If a circuit court concludes a plaintiff has established all four prerequisites, the court must then look to WIS. STAT. § 803.08(2) to determine the type of class action." *Fotusky*, 2023 WI App 19, ¶12. Here, Petitioners seek to certify a Respondent class pursuant to section 803.02(2)(a)(1), which requires a showing

that: "Prosecuting separate actions by or 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."

A plaintiff seeking to certify a class bears the burden of demonstrating that every element of the statutory requirements is met, and in ruling on a motion to certify a class, courts must conduct a "rigorous analysis" of whether the plaintiff has carried that burden. *Howard v. Cook County Sheriff's Office*, 989 F.3d 587, 597-98 (7th Cir. 2021) ("The plaintiffs bear the burden of proving by a preponderance of the evidence that their proposed class satisfies the requirements of Rule 23. … A district court must "rigorously analyze" the requirements of Rule 23.").

The Court must issue an order granting or denying Petitioners' motion "[a]t an early practicable time after a person sues or is sued as a class representative." Wis. Stat. § 803.08(3)(a).

If the Court certifies the proposed class, its order doing so "must define the class and the class claims, issues, or defenses, and must appoint class counsel under sub. (12)." *Id.*, § 803.08(3)(b). The procedures for appointing class counsel are set forth in section 803.08(12), which provides as follows:

> (12) Class counsel.
>
> (a) Appointing class counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.
>
> (b)
>
> 1. In appointing class counsel, the court must consider all of the following:

> a. The work counsel has done in identifying or investigating potential claims in the action.
>
> b. Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action.
>
> c. Counsel's knowledge of the applicable law.
>
> d. The resources that counsel will commit to representing the class.
>
> 2. In appointing class counsel, the court may do any of the following:
>
> a. Consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.
>
> b. Order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs.
>
> c. Include in the appointing order provisions about the award of attorney fees or nontaxable costs under sub. (13).
>
> d. Make further orders in connection with the appointment.
>
> (c) Standard for appointing class counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under sub. (12) (a) and (d). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
>
> (d) Interim counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
>
> (e) Duty of class counsel. Class counsel must fairly and adequately represent the interests of the class.

Argument

Petitioners' motion fails for many reasons. But even before delving into the statutorily mandated formal requirements that Petitioners must (but cannot) meet, consideration of several general principles of class actions should cause this Court to approach Petitioners' motion with a high degree of skepticism.

First, this Court has not yet addressed the class action requirements under the reformulated version of section 803.08, which has been in effect only since

July 1, 2018. Indeed, the court of appeals has issued just a handful of opinions addressing class certification since then, with only a few having been published. Most significantly, none of those cases have considered certification of a defendant class, or certification of an 803.08(2)(a) class, the type of class sought here. Petitioners have not identified a ***single*** Wisconsin case in which a court has certified a defendant class under section 803.08 either after or before its reformulation in 2017, nor has Respondents' research identified any. That makes Petitioners' motion in this case a particularly poor candidate for the Court to interpret and apply the new version of section 803.08 for the very first time.

Second, federal courts take a cautious approach to certifying defendant classes. As the Seventh Circuit has stated, "there is a potential problem with virtually all defendant classes that proceed under anything but Rule 23(b)(3)." *Ameritech Benefit Plan Comm. v. Communication Workers of America*, 220 F.3d 814, 820 (7th Cir.), *reh'g and reh'g en banc denied* (2000). Writing for the *Ameritech Benefit Plan* court, Judge Wood explained that "[d]efendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)'s safeguards. It also means that they are less likely to satisfy the requirements of Rule 23(a)." *Id.* The Wisconsin equivalent of a Rule 23(b)(3) class would be a class certified under Wisconsin Statutes section 803.08(2)(c), which is ***not*** the type of Respondent class Petitioners seek to certify here. Consequently, the

federal due process concerns that Judge Wood noted are very much present here (as well as due process concerns under the Wisconsin Constitution).

Third, as is explained in more detail below, the primary reason that this case is ill-suited for proceeding as a Respondent class action is that, unlike every other class action case Petitioners cite, this one is proceeding as an original action ***before the state's highest court***. It is one thing to certify a defendant class of district attorneys in an action proceeding before a single federal district court judge, whose authority to interpret and apply state law does not exist independently outside of an order that expressly binds all actors in a specific state, for example, all district attorneys in Wisconsin. But the power to definitively declare Wisconsin law in an authoritative and binding way that a federal district court lacks is ***precisely*** the power this Court wields under the Wisconsin Constitution: its declarations of Wisconsin law ***are*** the law in this state and bind all 71 district attorneys regardless of whether they are parties to this action. *Cook v. Cook*, 208 Wis. 2d 166, 181, 560 N.W.2d 246 (1997) ("[T]he supreme court's primary function is that of law defining and law development. The supreme court … has been designated by the constitution and the legislature as a law-declaring court.' … The purpose of the supreme court is 'to oversee and implement the statewide development of the law.'" (citations omitted)). Consequently, certifying the Respondent class that Petitioners seek is wholly unnecessary, would be unprecedented, and is not supported by any of the authorities Petitioners cite.

Mindful of these general points, Respondents now turn to the specific statutory requirements that Petitioners must demonstrate are met to obtain certification of a Respondent class of district attorneys and show why the motion fails and should be denied.

I. Petitioners' motion should be denied because they have not and cannot satisfy all four mandatory prerequisites required by Wis. Stat. § 803.08(1).

There are four mandatory statutory prerequisites that Petitioners carry the burden of demonstrating are satisfied for their motion to succeed: 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy. *See* Wis. Stat. § 803.08(1)(a)-(d). Respondents do not challenge whether Petitioners' motion satisfies the commonality requirement because their motion fails on their inability to demonstrate that the other three mandatory prerequisites are met. Consequently, Respondents address the numerosity, typicality, and adequacy requirements below and explain why those requirements are not and cannot be met here.

A. Petitioners fail to demonstrate *numerosity*: that the proposed Respondent class is so numerous that joinder of all members—*i.e.*, the other 68 Wisconsin district attorneys—is impracticable.

Citing a single Seventh Circuit case, Petitioners assert in conclusory fashion that the numerosity requirement of section 803.08(1)(a) is met here because the proposed class of 71 Wisconsin district attorneys is larger than the number of potential plaintiff class members—40—that federal courts often find is necessary for certification of a plaintiff class. (*See* Pet'rs' Br. at 5 (citing *Mulvania v. Sheriff of Rock Island Cnty.*, 850 F.3d 849, 859 (7th Cir.), *reh'g denied*, 2017 WL 2726577

(7th Cir.), *cert. denied*, 583 U.S. 933 (2017)).) But there are at least two fatal problems with Petitioners' conclusory and undeveloped argument.

First, Petitioners omit from their quotation of *Mulvania* a key phrase that leads off the same sentence containing the phrase they do quote: "***While there is no magic number that applies to every case*** … ." 850 F.3d at 859 (emphasis added). In other words, the same Seventh Circuit opinion on which Petitioners rely recognizes up front that the numerosity requirement is not a bright-line test that simply asks how many potential members a class might include. That comports with how the United States Supreme Court has addressed the issue, explaining that the "numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the NW., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Rather than simply demanding that the class be of a specific number of members, the numerosity requirement has a practical function: it tests whether the class is so numerous that "joinder of all members is impracticable." That was a key question the Seventh Circuit considered in *Mulvania*, which leads to a second problem with Petitioners' reliance on that case.

Second, in *Mulvania*, the Seventh Circuit found that the plaintiff had failed to satisfy its burden of demonstrating numerosity because it failed to show that joinder of the proposed class members would be "impracticable." 850 F.3d at 859. As the Seventh Circuit stated in another case, "[w]hile 'impracticable' does not mean 'impossible,' a class representative must show 'that it is extremely difficult or inconvenient to join all the members of the class. … Mere allegations that a class

action would make litigation easier for a plaintiff are not enough to satisfy Rule 23(a)(1).'" *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773, 777 (7th Cir. 2021) (quoting 7A C. Wright & A. Miller, Federal Practice & Procedure § 1762 (3d ed.)). The Seventh Circuit further explained in *Anderson* why a conclusory assertion that a proposed class will include more than 40 members is insufficient to sustain a finding of numerosity:

> Even if Anderson's proposed class encompassed potential or actual 2019 hires and therefore would have included a few more than 40 employees, a putative class over 40 is not inevitably endowed with numerosity status. The obligation imposed by Rule 23(a) remains: a plaintiff seeking to certify a class must show that joinder would be impracticable. Anderson failed to make this showing. He never demonstrated that naming as plaintiffs each of the predominantly local, current, and former employees of a northeast Wisconsin roofing company would be impracticable. … Our holding imposes no immovable benchmarks for meeting Rule 23(a)'s numerosity requirement. Though we have recognized that 40 class members will often be enough to satisfy numerosity, in no way is that number etched in stone. The controlling inquiry remains the practicability of joinder. Some classes may involve such large numbers of potential members that volume alone will make joinder impracticable. In other circumstances, it may be that smaller classes than the one proposed here will face such high barriers to joinder that the impracticability required by Rule 23(a)(1) will exist. The inquiry is fact and circumstance dependent.

986 F.3d at 778.

The Seventh Circuit's holdings and rationale in both *Mulvania* and *Anderson* apply with equal force here. Whether joinder of all potential members of the proposed Respondent class of 71 district attorneys is "impracticable" without the class mechanism turns on practical considerations of joining and serving the 68 Wisconsin district attorneys not already parties to this case. Such considerations might include, for example, whether the class members are difficult to identify, are difficult to locate, and whether joining them as parties might present other procedural problems. No such practical problems present any challenges here that

would make a Respondent class more efficient or more practical than proceeding without a certified Respondent class. The 68 absent Wisconsin district attorneys are all easily identifiable: they were elected to and hold public office. They all serve at fixed locations that are a matter of public record. And they all are officers of the court, bound by the ethical and other requirements of this Court's rules in chapter 20 of the Wisconsin Statutes. Even so, it is not Respondents' burden on this motion to disprove the numerosity requirement, including that joinder of the remaining 68 district attorneys would be impracticable; rather, it is Petitioners' burden to show that the numerosity requirement is satisfied. *Howard*, 989 F.3d at 597-98. And that Petitioners utterly fail to do. Consequently, the numerosity requirement is not met, and the Court need proceed no further in its analysis. It can, and should, deny Petitioners' motion for class certification on that basis alone.

B. Petitioners fail to demonstrate *typicality*: that the defenses of the three Respondents are typical of the defenses that might be raised by the 68 Wisconsin district attorneys who are not parties to this original action.

Petitioners also bear the burden of proving that the "defenses of the representative parties are typical of the claims or defenses of the class." Wis. Stat. § 803.08(1)(c). Recognizing that the three Respondent District Attorneys took different positions and raised different arguments in responding to the Petition, Petitioners suggest that the antidote to the three Respondents' clearly different views of and approaches to this action would be to create subclasses "along [the] lines" of the different positions that Respondent Urmanski took on the one hand in arguing

against granting the Petition and that Respondents Ozanne and Chisholm took on the other hand in taking no position on the Petition. (*See* Pet'rs' Br. at 7.) Again, there are at least two fatal problems with Petitioners' suggestion.

First, the three Respondents' respective approaches to the filing of the Petition do not, standing alone, exhaust the differences in how they have approached, or are likely to approach, the issues in this action, including any defenses and arguments they might raise. For example, Respondent Chisholm opposed the Petition of Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin to intervene in this action, whereas Respondents Urmanski and Ozanne did not. In addition, Jerome E. Listecki, Archbishop of Milwaukee Roman Catholic Diocese, has petitioned to intervene in this action. Responses to that Petition have not yet been filed, but it is certainly conceivable that the different Respondents might take different positions on Archbishop Listecki's petition to intervene. Similarly, in the *Kaul v. Urmanski* action this Court has taken on bypass from the court of appeals and that also involves issues relating to the regulation of abortions under Wisconsin law, the three Respondents took different positions on both procedural and substantive issues. In short, the three Respondent District Attorneys often have different views even among themselves; it is unimaginable that their views—not even typical of one another—will somehow be "typical" of the views of 68 different district attorneys from across our great state, each of whom is elected by their own local constituency.

Petitioners fail to suggest how or why a district attorney from Milwaukee or Dane Counties—counties with large urban populations and significant universities—might hold views that are "typical" of the view of district attorneys from, for example, more rural counties with primarily agricultural-based economies. Or why a district attorney from Sheboygan County—with a population that most strongly adheres to the Catholic and Evangelical Protestant Christian faiths[3]—would raise defenses that are "typical" of a district attorney from a more religiously diverse county, such as Racine County[4].

Second, although Petitioners suggest the creation of subclasses "along [the] lines" of Respondents' responses to the Petition in this action, Petitioners fail to suggest any kind of meaningful definition of proposed subclasses. A proponent of a class (or subclass) cannot merely suggest a possible approach to a class definition; they must propose a workable definition based on objective criteria. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015) ("Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria. … [C]lasses that are defined by subjective criteria, such as by a person's state of mind, fail the objectivity requirement." (citations omitted)). Certifying two or more subclasses "along [the] lines" of arguments that Respondents raised in responding to the Petition would fail to meet the requirements of subclass definitions, which is Petitioners' burden to bear.

[3] *See* https://www.thearda.com/us-religion/census/congregational-membership?t=0&c=55117.
[4] *See* https://www.thearda.com/us-religion/census/congregational-membership?t=0&c=55101.

Howard, 989 F.3d at 597-98. Petitioners have failed to meet that burden or even to develop that argument.

C. Petitioners fail to demonstrate *adequacy*: that the Respondent District Attorneys will fairly and adequately protect the interests of the class of 68 other district attorneys, and the related requirement that class counsel be appointed who will fairly and adequately represent the interests of the Respondent class.

The third mandatory prerequisite that Petitioners must show is that of "adequacy": that "[t]he representative parties will fairly and adequately protect the interests of the class." Wis. Stat. § 803.08(1)(d). Similarly, for this action to proceed as a Respondent class action, the Court must appoint class counsel who will "fairly and adequately represent the interests of the class." *Id.*, § 803.08(12)(e).

While acknowledging the likelihood of "antagonistic" defenses among Respondents themselves as well as other members of the proposed class (*see* Pet'rs' Br. at 8), Petitioners again suggest in conclusory fashion that this barrier to certification could be solved by subclasses. For all of the same reasons as identified in Part I.B. that subclasses cannot remedy the conflicts among district attorneys fatal to the typicality requirement of section 803.08(1)(c), subclasses similarly are no panacea for the difficulties in meeting the adequacy prerequisite of subsection (1)(d). And adequacy is likely an even more insurmountable hurdle, given that the claim Petitioners have presented for the Court's resolution involves such a strongly held interest—whether it is phrased as a "woman's right to choose" or a "right to life." Saddling these three specific Respondent District Attorneys with the obligation to represent the interests of 68 other Wisconsin district attorneys, each of

whom is an elected representative of their own respective county constituency that has its own particular religious and ethical affiliations, traditions, and beliefs, would be futile. *See* Manual for Complex Litigation, Fourth, § 21, at pp. 244-45 ("[C]onflicts of interest between an unwilling class and the class warrant special attention when a defendant class certification motion is made."). Moreover, it is not Respondents' obligation to show that they would not be adequate representatives; rather, it is Petitioners' burden to demonstrate that they would. This Petitioners have not done.

Nor have Petitioners addressed, much less demonstrated, the requirement that there exists class counsel that could adequately represent a class of Wisconsin District Attorneys. *See* Wis. Stat. § 803.08(12). The Attorney General cannot serve in that role; he is adverse to the Respondents in *Kaul v. Urmanski* and has petitioned to intervene adversely to them in this action. Nor can the undersigned private counsel representing Respondents Ozanne and Chisholm in this action serve in that role. The scope of services in each of their contracts to represent their respective clients in this action extends solely to the Respondent that each undersigned firm now represents. They do not wish to serve in the role of class counsel, and although neither firm has conducted a conflict search to determine whether they would have a conflict of interest that would prohibit them from representing any of the remaining 68 Wisconsin district attorneys, given the general nature of each firm's overall practice and the clients they currently and typically represent, they likely would have an actual or potential conflict. Moreover, the searching statutory

requirements to which this Court must adhere in appointing class counsel would place a substantial burden on the parties and the Court that, in the overall context of this original action, is simply unwarranted.

Finally, the financial burden of appointing a ***fourth*** private practice law firm to represent a Respondent class of 68 Wisconsin district attorneys would work a hardship on Wisconsin taxpayers. Given the Attorney General's participation in this and the *Kaul v. Urmanski* actions as a party, the Governor already has had to appoint three private practice law firms to represent the three Respondents. Wisconsin taxpayers already are shouldering a heavy burden to represent Respondents' interests in this action. To appoint yet another private practice law firm to represent a class of Respondents would be both unnecessary and unfair to Wisconsin taxpayers.

II. Petitioners' motion also must fail because Petitioners have not and cannot demonstrate that the proposed Respondent class meets the requirements for certification under Wis. Stat. § 803.08(2)(a).

Petitioners have not and cannot demonstrate that the Respondent class they propose may be maintained under section 803.08(2)(a)(1), which requires the Court to find that "[p]rosecuting separate actions by or 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." Petitioners cite a treatise and a single federal district court case for the proposition that if the proposed Respondent class is not certified here, 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.'" (Pet'rs' Br. at 8 (citing 2 Newberg and Rubenstein on Class Actions § 5.20 (6th ed.) and *Sherman ex rel. Sherman v. Twp. High Sch. Dist.* 214, 540 F. Supp. 2d 985, 993 (N.D. Ill. 2008))) But that risk is wholly absent here, and those authorities do not apply.

Unlike the situation addressed in the Newberg treatise and in *Sherman*, this Court's adjudication of the issues raised in the Petition will be the law in Wisconsin that will bind all 71 district attorneys—including the three who are parties to this original action, as well as the 68 others who are not—and with which they must comply. Wisconsin's district attorneys must take an oath of office prescribed in the Wisconsin Constitution. *See* Wis. Const. art. IV, § 28 ("Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability."); *see also* Wis. Stat. § 19.01. Petitioners essentially admit as much. (*See* Pet'rs' Br. at 9.) Consequently, unlike in other federal district court defendant actions where a defendant class might be appropriate because a ruling by the federal court otherwise would not bind all

government actors in a state,[5] this Court is the highest court in Wisconsin, and its ruling in this action will be the final and unassailable statement of law in Wisconsin on the issues it adjudicates, and its ruling will bind all 71 district attorneys.

A Respondent class in this original action is unnecessary, and certifying it as a Respondent class action would be wasteful and pointless. The Court should therefore deny Petitioners' motion and should instead expressly note in its final ruling in this action that, as Petitioners suggest, its ruling is binding on all 71 district attorneys in Wisconsin. (*See* Pet'rs' Br. at 9-10.)

Conclusion

For the foregoing reasons, the Court should deny Petitioner's Motion for Certification under Wis. Stat. § 803.08 of a Class of Respondents.

[5] *See, e.g., Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 398238, at *2 & n.6 (W.D. Wis. Aug. 2, 2013) (certifying defendant class of 71 Wisconsin district attorneys, with Attorney General J.B. Van Hollen appointed as class counsel, and Dane County District Attorney Ismael Ozanne appointed as class representative). As noted above, the defendant class certified in that action could not be certified here in any event, given that the Attorney General cannot serve as class counsel, and District Attorneys Ozanne and Chisholm cannot (and do not wish to) serve as class representatives.

Respectfully submitted this 31st day of July, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in section 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 5,289 words.

Respectfully submitted this 31st day of July, 2024.

Electronically signed by Douglas M. Poland
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