OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

July 2, 2024

To:

Diane M. Welsh
Electronic Notice

Samantha R. Foran
Electronic Notice

Christa O. Westerberg
Electronic Notice

Andrew T. Phillips
Electronic Notice

Will Kramer
Electronic Notice

*Distribution list continued on Page 7.

You are hereby notified that the Court has entered the following order:

No. 2024AP330-OA Planned Parenthood of Wisconsin v. Urmanski

On February 22, 2024, petitioners, Planned Parenthood of Wisconsin; Kathy King, M.D.; Allison Linton, M.D., M.P.H.; "Maria L."; "Jennifer S."; "Leslie K."; and "Anais L.,"[1] filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70. Concurrently with this order, the court is issuing a separate order that grants the petition for leave to commence an original action.

On April 25, 2024, a motion to intervene or, in the alternative, a motion to file an amicus brief along with a supporting memorandum, a proposed brief, and supporting affidavits were filed on behalf of Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin (collectively, the "Proposed Intervenors"). The proposed brief opposed the petition for leave to commence an original action. On April 29, 2024, petitioners filed a response opposing the motion to intervene, but stating they had no objection to the Proposed Intervenors filing an amicus brief. On May 6, 2024, District Attorney Chisolm filed a response in opposition to both the motion to intervene and the alternative motion to file an amicus brief.

[1] "Maria L.," "Jennifer S.," "Leslie K.," and "Anais L." are pseudonyms used in the original action petition and supporting affidavits to refer to four individual women petitioners.

The Proposed Intervenors' motion to intervene seeks both intervention as of right under Wis. Stat. § 803.09(1)[2] and permissive intervention under Wis. Stat. § 803.09(2).[3]

To be granted intervention as of right, a proposed intervenor must satisfy four criteria:

> (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 protected by existing parties.

State ex rel. Bilder v. Delavan Township, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983). The movant must satisfy each of these criteria to claim a right to intervene, but the criteria are not to be analyzed in isolation from each other. Helgeland v. Wisconsin Municipalities, 2008 WI 9, ¶39, 307 Wis. 2d 1, 745 N.W.2d 1. A strong showing on one of them "may contribute to the movant's ability to meet the other requirements as well." Id. This analysis is to be "holistic, flexible, and highly fact-specific." Id., ¶40.

We conclude that the Proposed Intervenors have not met their burden to demonstrate that they have a sufficient legal interest relating to the subject of this original action. The Proposed Intervenors indicate that they are primarily lobbying and public education groups, which courts have found to lack legal interests that would support intervention as a matter of right. See, e.g., Keith v. Daley, 764 F.2d 126 (7th Cir. 1985); Northland Family Planning Clinic, Inc. v. Cox, 394 F. Supp. 2d 978 (E.D. Mich. 2005); Rodriguez-Williams v. Johnson, 542 P.2d 632 (Wyo. 2024). The affidavits they submitted in support of their motion are insufficient to show that they possess

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[2] Section 803.09(1), Stats. (2021-22), provides as follows:

> Upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

[3] Section 803.09(2), Stats. (2021-22), provides in relevant part as follows:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

any legally protectable interest in enforcing the challenged statute that differs from the public at large or even from other individuals or organizations that share their views. They fail to demonstrate that they, as independent entities, will suffer any specific, legally recognized injury from a ruling by this court in this matter. Given their inability to satisfy this requirement, we need not address the other criteria for intervention as of right.

We also conclude that the Proposed Intervenors have failed to demonstrate that they should be permitted to intervene despite lacking a right to do so. The statute directs that courts considering motions for permissive intervention consider three factors: (1) timeliness; (2) whether the movant has a "claim or defense" that has a question of law or fact in common with the "main action"; and (3) whether intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). A court, whether a circuit court or an appellate court, is required to exercise its discretion when considering these factors and deciding whether a movant should be permitted to intervene. Helgeland, 307 Wis. 2d 1, ¶120.

In this case, timeliness is not an issue, as the motion to intervene was brought before we decided to exercise our original jurisdiction. The Proposed Intervenors, however, have not identified any specific "claim or defense" that they possess regarding the constitutionality of Wis. Stat. § 940.04. See Keith, 764 F.2d at 1272 (affirming the district court's denial of permissive intervention where the district court found, inter alia, that the pro-life organization seeking intervention had failed to show that it had a direct claim or right in the issues presented in that case). Merely propounding a general position on a topic of debate in society, lobbying for that position, or wishing to make legal arguments consistent with that position does not give them a legal claim or defense that is sufficient to support permissive intervention. Moreover, if we were to permit intervention by the Proposed Intervenors, there would be no logical distinction that would preclude intervention by all of the many other lobbying and education organizations on both sides of the abortion debate. Permitting intervention to all such parties would create the very real possibility that the case would be unduly delayed or that the ability of the original parties to litigate the issues presented would be prejudiced. Consequently, we exercise our discretion to deny permissive intervention to the Proposed Intervenors.

Denying intervention to become a party does not mean that the Proposed Intervenors are without any ability to submit their arguments to this court. The Proposed Intervenors have also moved, in the alternative, for leave to submit their response opposing the original action petition as a non-party brief. See Wis. Stat. § (Rule) 809.19(7). We conclude that the Proposed Intervenors have shown that they have special knowledge and experience regarding the matter at issue so as to render a response from them of significant value to the court. Wis. S. Ct. I.O.P. III.B.6.c. Accordingly, we grant the Proposed Intervenors' alternative motion for leave to file their response as a non-party brief, and we have considered their response in deciding whether to exercise our original jurisdiction in this matter.

Upon consideration of the foregoing and for the reasons set forth above,

IT IS ORDERED that the motion to intervene as of right and the motion for permissive intervention are denied; and

IT IS FURTHER ORDERED that the alternative motion for leave to file a non-party brief is granted, and the proposed response opposing the petition for leave to commence an original action is accepted as filed.

BRIAN HAGEDORN, J. (*concurring*). I join the court's decision denying the motion to intervene. The proposed intervenors have a sincere interest in the legal issues raised in this case, and they are welcome to weigh in as amici. But in my view, they have not met the requirements to intervene as a party to the case. As the court's order explains, to become a party to the case, the organizations "must have some cognizable interest in its outcome," meaning they "must 'either gain or lose by the direct operation of the judgment.'" Priorities USA v. Wis. Elections Comm'n, No. 2024AP164, unpublished order at 2 (Wis. Apr. 18, 2024) (Hagedorn, J., dissenting) (quoting Helgeland v. Wis. Municipalities, 2008 WI 9, ¶45, 307 Wis. 2d 1, 745 N.W.2d 1). As I recently said in dissenting to the Governor's intervention in a different case, "public policy views do not create the kind of legally protected interest one must have to become a party to litigation." Id.

At least one of the organizations argues that it has a legally protected interest because it provides counseling and care for women who have had abortions. But this does not appear to create an injury cognizable in the law any more than litigation concerning crime or addiction would create an injury for an organization running homeless shelters simply because it may affect its operations. Accepting a standard that lenient would seem to work a significant shift in our doctrine of standing. And as I have said elsewhere, standing is not a mere technicality. See Teigen v. Wis. Elections Comm'n, 2022 WI 64, ¶160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) ("Standing is the foundational principle that those who seek to invoke the court's power to remedy a wrong must face a harm which can be remedied by the exercise of judicial power."). It is an important threshold inquiry that keeps the judiciary within its lane of deciding cases, not just offering abstract interpretations of the law.

It is true that Planned Parenthood, an advocacy organization among other things, is a named plaintiff in this case. It appears, however, that they are bringing this suit at least in part on behalf of their employee physicians, claiming that the physicians have a constitutional right to perform abortions as part of their medical practice. This asserted right raises a different kind of alleged injury than the proposed intervenors. To be sure, the organizations raise important arguments about fairness; voices on all sides should be heard. And they will—just not as parties. Therefore, I respectfully concur in the court's order denying intervention.

REBECCA GRASSL BRADLEY, J. (*dissenting*). Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin ("proposed intervenors") petitioned this court to intervene because these organizations dispute the existence of a state constitutional right to procure an abortion. The majority denies their motion to intervene, permitting the principal advocate for abortion rights to be heard while silencing every leading pro-life organization in the state. The majority's astonishing unwillingness to consider the pro-life position in this matter will only erode what remains of the public's trust in the legitimacy of any decision the majority makes in this case.

Regardless of whether the proposed intervenors have a right to intervene under Wis. Stat. § 803.09(1), this court has absolute discretion to permit their intervention under § 803.09(2). Helgeland v. Wis. Muns., 2008 WI 9, ¶120, 307 Wis. 2d 1, 745 N.W.2d 1; City of Madison v. WERC, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94. Permitting the pro-life organizations, which are all represented by the same counsel, to intervene would not "unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). At this point, no merits briefing has been filed and allowing these organizations to intervene would not create a cascading effect as the majority's order suggests. The decision to exclude Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin from participating as parties speaks volumes as to how the majority will handle this politically and morally sensitive case.

The majority's track record this term on permissive intervention suggests its exercise of discretion tilts only in one direction. For example, the court allowed a land conservation organization, which aligned with the governor's legal position, to intervene in a separation of powers dispute between the governor and the legislature. Evers v. Marklein, No. 2023AP2020-OA, unpublished order (Wis. Feb. 28, 2024). The majority also allowed the governor to intervene in an election administration dispute even though the governor plays no direct role in election administration at either the state or local level. Priorities USA v. Wis. Elections Comm'n, No. 2024AP164, unpublished order at 1 (Wis. Apr. 18, 2024). Because permissive intervention is within the court's discretion, the majority's denial of intervention for the pro-life organizations showcases the majority's different treatment of litigants advocating positions in tension with the majority's "values."

As a prudential consideration, the majority should allow at least one of the three largest pro-life organizations in the state to intervene to at least present an appearance of impartiality in light of the fact that the largest pro-abortion rights organization in the state brought the suit. Putting the leading advocacy organizations on each side of the abortion issue on equal footing in this case would ensure the court gives every argument equivalent attention. The three pro-life organizations seek intervention based on their shared mission of protecting unborn children and promoting alternatives to abortion. While District Attorney Urmanski and his office will presumably present zealous advocacy, the pro-life organizations understandably question whether their collective interests and perspectives on the law could be adequately represented by a local district attorney. After all, Urmanski's primary role as the elected district attorney for Sheboygan County is to "prosecute all criminal actions before any court within his [] prosecutorial unit and have sole responsibility for prosecution of all criminal actions[.]" Wis. Stat. § 978.05(1).

When presented with a monumental question of constitutional law, the court should welcome well-versed advocacy to present arguments covering every nuance of the issue. By relegating pro-life organizations to amicus status while the state's largest pro-choice organization advocates for Wisconsin's version of Roe v. Wade, 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022), the majority fails to live up to its own promises of pluralism, inclusivity, and openness. It reeks of hypocrisy, but tipping the

scales of justice toward its political allies has become the standard operating procedure of this new progressive majority.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

Distribution List Continued:

Matthew J. Thome
Electronic Notice

Aaron D. Birnbaum
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Samuel J. Leib
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Carly Gerads
Electronic Notice

Clementine Uwabera
Electronic Notice

Douglas M. Poland
Electronic Notice

Rick Esenberg
Luke N. Berg
Nathalie E. Burmeister
Wisconsin Institute for Law & Liberty
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202

Andrew Bath
Thomas More Society
309 W. Washington St., Ste. 1250
Chicago, IL 60606