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SUPREME COURT

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 THE *KAUL V. URMANSKI* STATE PLAINTIFFS' MOTION TO INTERVENE AS PETITIONERS

Andrew T. Phillips, SBN 1022232
Matthew J. Thome, SBN 1113463
Attolles Law, s.c.
222 E. Erie St., Ste. 210
Milwaukee, WI 53202
Telephone: (414) 285-0825
aphillips@attolles.com
mthome@attolles.com

Counsel for Respondent Joel Urmanski

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INTRODUCTION

"The Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶96, 307 Wis. 2d 1, 745 N.W.2d 1. To be sure, it would be impossible for the Attorney General here to represent Respondent Urmanski and to defend the constitutionality of § 940.04 as applied to abortion, given the positions taken by the Attorney General in the *Kaul v. Urmanski* litigation. But, there is a difference between refusing to appear in this case to defend the constitutionality of § 940.04 and actively seeking to intervene to assert an affirmative claim that § 940.04 is unconstitutional as applied to abortions.[1] The Attorney General asks this Court for the latter: permission to appear as a party (along with the other *Kaul v. Urmanski* State Plaintiffs) to challenge the constitutionality of Wis. Stat. § 940.04 as applied to abortion, but this Court should reject his request.

This is not the type of case that would ordinarily justify allowing the Attorney General and other state agencies and officials to intervene to challenge the constitutionality of a state law. And, the *Kaul* State Plaintiffs' motion is procedurally improper insofar as it would result in the splitting of claims involving the same parties and same facts across multiple actions. The Court should deny the *Kaul* State Plaintiffs' motion to intervene.

[1] There is similarly a difference between the *Kaul* State Plaintiffs' request to argue the unconstitutionality of § 940.04 as an alternative basis on which to affirm the judgment in *Kaul v. Urmanski*, on which Urmanski took no position at the bypass stage and which this Court rejected, and their attempt to intervene in a separate action to assert an affirmative claim that § 940.04 is unconstitutional.

ARGUMENT

I. This Court Should Deny the *Kaul* State Plaintiffs' Request for Intervention as of Right

The *Kaul* State Plaintiffs must satisfy a four-part test to intervene as of right in this action:

> (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 Twp., 112 Wis. 2d 539, 545, 334 N.W.2d 252, 256 (1983); *see also Helgeland*, 2008 WI 9 at ¶37. Here, Urmanski does not dispute that the *Kaul* State Plaintiffs' motion to intervene is timely. Urmanski does dispute, however, whether the *Kaul* State Plaintiffs satisfy the remaining requirements for intervention as of right.

A. The *Kaul* State Plaintiffs do not satisfy the second and third factors for intervention as of right.

1. The *Kaul* State Plaintiffs' motion violates the rule against claim-splitting.

The *Kaul* State Plaintiffs argue they should be allowed intervention because of their interest in this Court's resolution of a separate case, *Kaul v. Urmanski*, in which the *Kaul* State Plaintiffs sued Urmanski and the other district attorney respondents seeking a declaration that § 940.04 could not be applied to abortions as a matter of statutory interpretation and due to alleged "longstanding disuse and public reliance on *Roe*." (07-16-24 State Pls.' Br. at 8.) The *Kaul* State Plaintiffs

argue that the question in this case—whether, if § 940.04 does apply to abortion, the statute is constitutional—is "interconnected" with the questions presented in *Kaul*, and that they should be allowed to intervene because the cases are "directly connected." *Id.* Far from providing an interest justifying their intervention in this case, it is the direct connection between the *Kaul v. Urmanski* case and this one that demonstrates why intervention should be denied. Specifically, allowing the *Kaul* State Plaintiffs to intervene in this action to pursue an affirmative claim that applying § 940.04 to abortion would violate the state constitution—a claim that the *Kaul* State Plaintiffs could have raised in their complaint in the *Kaul v. Urmanski* litigation—would allow the *Kaul* State Plaintiffs to split claims across multiple actions, which is generally not allowed.

It is well-established that a party must litigate all claims arising out of a single transaction together in the same case. *See, e.g.*, *Juneau Square Corp. v. First Wisconsin Nat. Bank of Milwaukee*, 122 Wis. 2d 673, 682, 364 N.W.2d 164, 169 (Ct. App. 1985). This rule is ordinarily applied in the context of an assertion of claim preclusion or *res judicata*, in which a party seeks to relitigate the same cause of action between the same parties where a prior litigation has resulted in a valid, final judgment on the merits. *Id.* Here, of course, there is no final judgment on the merits in *Kaul v. Urmanski*, because that appeal is pending with this Court, but the rule is still relevant.

First, federal courts apply the rule against claim splitting even when there is no final judgment in the first case, because parties should not be allowed to bring

duplicative lawsuits. *See generally Scholz v. United States*, 18 F.4th 941, 951-52 (7th Cir. 2021). Impermissible claim-splitting occurs when "there is an identity of the parties and of the causes of action between the two lawsuits." *Id.* at 952. There is no reason why Wisconsin should not apply a similar rule, and those criteria are plainly met as between the *Kaul* State Plaintiffs and Urmanski. There is an identity of parties, and the *Kaul* State Plaintiffs are seeking to assert as petitioners in this separate action a claim that arises from the same set of operative facts as their claims in *Kaul v. Urmanski*. This is impermissible claim splitting.

Second, allowing the *Kaul* State Plaintiffs to raise their constitutional arguments in this action could have the effect of allowing them to avoid the claim preclusive effect of a judgment in Urmanski's favor in *Kaul v. Urmanski*. If, as it should, this Court decides the statutory interpretation issues in *Kaul v. Urmanski* before deciding the issues in this case—and if, as this Court should, it decides *Kaul v. Urmanski* in Urmanski's favor and rules that Urmanski's motions to dismiss should have been granted—that would mean that Urmanski has obtained a final decision on the merits of that case that should be entitled to preclusive effect. The *Kaul* State Plaintiffs should not be allowed to use intervention in this action as a way to get around the potential preclusive effect of a ruling in Urmanski's favor in *Kaul v. Urmanski*.

Third, allowing the *Kaul* State Plaintiffs to intervene as petitioners in this action to raise their constitutional arguments would effectively reward the *Kaul* State Plaintiffs for sitting on a claim they could have raised when they first sued

Urmanski in 2022. One could speculate as to why the *Kaul* State Plaintiffs did not challenge the constitutionality of § 940.04 as applied to abortion in their complaint against Urmanski in the *Kaul* case, but they should not be rewarded for trying to assert such a claim as intervenors in a separate action nearly two years later.

Finally, setting aside the procedural impropriety of allowing the *Kaul* State Plaintiffs to assert a new affirmative claim in this action that they could have asserted in *Kaul v. Urmanski*, any connection between this action and *Kaul v. Urmanski* does not provide a legally protectable interest justifying intervention. As discussed in more detail below, neither the Attorney General nor any of the other *Kaul* State Plaintiffs have a legally protectable interest in challenging the constitutionality of § 940.04 as applied to abortion.

2. The Attorney General does not have a legally protectable interest in challenging the constitutionality of § 940.04.

The Attorney General identifies several other alleged interests that he claims justify allowing him to intervene as of right in this action. None of the alleged interests the Attorney General identifies allow him to intervene in this action to assert, in an action against state officers tasked with enforcing § 940.04, that the statute is unconstitutional as applied to abortion.

The Attorney General claims he has an interest in intervening here because Wis. Stat. § 806.04(11) provides him with a statutory right to be heard in any proceeding where a statute is alleged to be unconstitutional. The Attorney General's reliance on § 806.04(11) is misplaced, however, and would turn Wisconsin law on

its head. Specifically, the Attorney General's argument is inconsistent with this Court's precedents. For decades, this Court has held that § 806.04(11) (and its predecessor statute, § 269.56(11)) recognizes "the duty of the attorney general to appear on behalf of the people of this state to show why the statute is constitutional." *Chicago & N.W. Ry. Co. v. La Follette*, 27 Wis. 2d 505, 523, 135 N.W.2d 269, 280 (1965); *see also O'Connell v. Blasius*, 82 Wis. 2d 728, 733, 264 N.W.2d 561, 563 (1978). "The Attorney General of Wisconsin has the duty by statute to defend the constitutionality of state statutes." *Helgeland*, 2008 WI 9 at ¶96. Yet, Attorney General Kaul cites this statute—which places on him a duty of defending the constitutionality of § 940.04—as giving him an interest in challenging its constitutionality in this action. This Court should reject such an argument.

To his credit, the Attorney General acknowledges that he generally has a duty to defend the constitutionality of state law, but he nevertheless asserts that this is one of those "certain, rare circumstances" where the Attorney General can serve as a plaintiff on behalf of the people of Wisconsin to challenge the constitutionality of a state law. (07-16-24 State Pls.' Br. at 12.) The Attorney General cites *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), but that case simply acknowledges the long-recognized exception that allows the Attorney General or the Governor to challenge the constitutionality of an apportionment plan. This is a narrow exception, however, and results from the fact that, where apportionment is concerned, this Court has concluded "that a claim of denial of equal protection as the result of malapportionment [is] not necessarily a claim of an

individual injury." 22 Wis. 2d at 553. Instead, a claim of denial of equal protection as the result of malapportionment is a wrong suffered by the state as a polity, and therefore "the state, as the representative of the polity, must be permitted to raise the substantive issues surrounding the constitutionality of an apportionment under the provisions of either the state or federal constitutions." *Id.*

This case, of course, does not involve a challenge to the apportionment of legislative districts and the Attorney General fails to explain why this case should fall within the exception recognized in the apportionment cases. The Attorney General makes no argument that § 940.04, if otherwise applicable to abortions, is unconstitutional in a way that would harm the state as a polity or would violate the public trust. *See State v. City of Oak Creek*, 2000 WI 9, ¶43, 232 Wis. 2d 612, 605 N.W.2d 526 (discussing state as polity doctrine). He is not seeking to intervene in the name of the state, but on his own behalf and on behalf of the other *Kaul* State Plaintiffs. *Cf. id.* at 50 ("[T]he position of attorney general and the authority of the state are not synonymous[.]"). Instead, the allegedly harmed interests in this case are private ones—the alleged constitutional rights of women who seek abortions and the doctors who perform them. Such private interests do not provide justification for the Attorney General to challenge the constitutionality of § 940.04.

The Attorney General also asserts that "this Court has specifically recognized that in exceptional scenarios where a declaratory judgment is sought to address an issue of 'vital concern' to the 'entire public' and resolve 'uncertainty and doubt' for the people of Wisconsin, the Attorney General of Wisconsin is proper plaintiff."

(07-16-24 State Pls.' Br. at 13.) To support this assertion, the Attorney General cites *In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W. 633, 635 (1936), but that case is also inapposite. In that case, the Attorney General sought a declaratory judgment as to the constitutionality of an act he was to enforce, against the tavern industry subject to the act, and *defended* the constitutionality of the act. 264 N.W. at 635. That case does not stand for the proposition that, in an already pending action in which private parties challenge the constitutionality of state law, the Attorney General can intervene on the side of the private parties and against a fellow state officer who is defending the constitutionality of state law.

Moreover, to the extent the Attorney General means to invoke the "great public concern doctrine," that doctrine does not support the intervention of the Attorney General (or any of the other *Kaul* State Plaintiffs). The great public concern doctrine allows state agencies to challenge a statute's constitutionality when an issue is a matter of great public interest. *City of Oak Creek*, 2000 WI 9 at ¶38. "The great public concern doctrine is an exception to the general rule that 'state agencies or public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so and the statute is held invalid.'" *Id.* (quoting *Fulton Found. v. Dep't of Taxation*, 13 Wis. 2d 1, 11, 108 N.W.2d 312 (1961)). Importantly, "the great public concern exception does not apply to suits between two creatures of the state." *City of Oak Creek*, 2000 WI 9 at ¶41. Here, the Attorney General and Urmanski are both state officers—"creatures of the state"—and thus the Attorney General cannot rely on the

fact that the constitutionality of the application of § 940.04 to abortion is a matter of great public interest to justify his intervention on the side of the petitioners in this action. *See* Wis. Stat. § 17.19(3s) and (4) (identifying district attorney and attorney general as state offices).

The Attorney General also cites Wis. Stat. § 165.25(1m), which provides that the Attorney General shall, "[i]f requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested." The Attorney General does not explain why this statute is relevant here, however. Presumably, the Attorney General is indicating that he has been requested by the Governor to represent himself and the other *Kaul* State Plaintiffs in challenging the constitutionality of § 940.04 in this action. Assuming the Attorney General has received the necessary request from the Governor, that would only solve the issue of whether the Attorney General is acting legally by seeking to intervene in this action, but it does not mean that the Attorney General or any of the other *Kaul* State Plaintiffs have legally protectable interests in this action that warrant their intervention. In other words, although § 165.25(1m) might provide the Attorney General with authorization to petition to intervene in this action, this Court is under no obligation to grant such a petition.

Finally, even if the Attorney General were correct that the Attorney

General's right to be heard under § 806.04(11) gives him an interest in challenging the constitutionality of § 940.04 as applied to abortion, the right to be heard under § 806.04(11) is separate and distinct from a right to be a party in an action. *See Richards v. Young*, 150 Wis. 2d 549, 556, 441 N.W.2d 742,745 (1989). Indeed, the Attorney General concedes that his interest in being heard in cases challenging the constitutionality of state law is generally satisfied by the filing of an amicus brief, but nevertheless argues that such an approach is not appropriate here. To justify this argument, the Attorney General relies only on the fact that he "brought suit in a directly connected case" and that this Court's decision in this case will have effect beyond the question of the constitutionality of § 940.04. Neither of these interests suffice to depart from the usual practice of allowing the Attorney General to be heard via filing of an amicus brief.

As already discussed, that the Attorney General "brought suit in a directly connected case" is a reason to deny the Attorney General's request to intervene here, because the Attorney General is attempting to affirmatively assert in this separate action a legal theory that the Attorney General could have alleged from the beginning in *Kaul*. And, to the extent the Attorney General relies on a concern for the precedential effect of this Court's decision in this case and its potential impact on other areas of the law, such concerns do not justify intervention here. Indeed, the Attorney General does not identify any specific impact that this Court's decision in this action will have on his own powers or authority, but instead simply asserts a generalized interest in being heard on what he describes as uncharted constitutional

terrain. Such general interests do not suffice to justify intervention as of right. *See Helgeland*, 2008 WI 9 at ¶73. Regardless, the Attorney General's interests in any potential precedential effect of this Court's decision on other areas of the law can be protected via submission of an *amicus* brief.

3. The other *Kaul* State Plaintiffs do not have a legally protectable interest in challenging the constitutionality of § 940.04.

Finally, the other *Kaul* State Plaintiffs—DSPS and the MEB and its chair—argue that they "have an interest in obtaining clarity as to whether Wisconsin physicians could face criminal prosecution under a near-total abortion ban" and that "[w]hether or how this Court provides such clarity affects their ability to perform their responsibilities." (07-16-24 State Pls.' Br. at 14-15.) This Court should reject these arguments.

First, the DSPS, the MEB, and its chair do not assert legally protectable interests. For the same reasons discussed above, if this Court determines in *Kaul* that § 940.04 does apply to abortions as a matter of statutory interpretation, the DSPS, the MEB and its chair lack the authority to question the constitutionality of that application. DSPS, the MEB, and its chair do not argue that it is their official duty to challenge the constitutionality of § 940.04 as applied to abortions, nor is there any argument they will be personally affected by a failure to do so. Indeed, none of the *Kaul* State Plaintiffs perform abortions and could be subject to a prosecution under § 940.04. Nor do they seek to enforce the statute against Urmanski. Nor, for the reasons discussed above, does the great public concern

doctrine provide an exception that would allow them to challenge the constitutionality of § 940.04, because Urmanski is also a state officer.

At bottom, the other *Kaul* State Plaintiffs simply argue that they have various licensing, investigatory, and enforcement responsibilities that involve the application of Wisconsin's criminal laws and that "clarity" is needed regarding the applicability of § 940.04 to abortion. But, a simple desire for "clarity"—essentially, a request for an advisory opinion—is not a legally protectable interest and does not create a justiciable controversy between the State Plaintiffs and Urmanski that would require that they be allowed to intervene here.

Finally, even if the *Kaul* State Plaintiffs' desire for "clarity" is a legally protectable interest, disposition of this action will not impair or impede their ability to protect that interest. To the contrary, disposition of this action will fulfill their interest in clarity, regardless of whether they are allowed to intervene. Indeed, contrary to their claims, it is not "clarity" that the *Kaul* State Plaintiffs seek, but the ability to appear in this action as state agencies and officers and challenge the constitutionality of a state law enacted by the Legislature. As already discussed, the *Kaul* State Plaintiffs have no legally protectable interest in doing so.

B. The *Kaul* State Plaintiffs have not shown that the existing parties do not adequately represent their interest.

Finally, the *Kaul* State Plaintiffs have not shown that the existing parties do not adequately represent their interests. To the extent the *Kaul* State Plaintiffs even have a legally protectable interest in disputing the constitutionality of § 940.04

(which they do not), they fail to explain how their position diverges from the position taken by the Petitioners in this action. To the contrary, the Attorney General simply asserts that he "agrees with the petitioners here that the liberties protected by article I, section 1 of the Wisconsin Constitution would prohibit a near-total abortion ban." (07-16-24 State Pls.' Br. at 15.) Of course, mere agreement with an already-existing party's position does not justify intervention and can be conveyed via filing of an *amicus* brief. Similarly, to the extent the Attorney General cites his "responsibility to consider how this Court's analytical framework will apply beyond the context of abortion," such considerations can be addressed via filing of an *amicus* brief and, as discussed above, do not justify intervention.

II. This Court Should Deny the *Kaul* State Plaintiffs' Request for Permissive Intervention

Finally, this Court should exercise its discretion to deny the *Kaul* State Plaintiffs' request for permissive intervention. As an initial matter, the *Kaul* State Plaintiffs are not proper parties to raise a challenge to the constitutionality of § 940.04 as applied to abortions, for the reasons already discussed above. *See City of Madison v. WERC*, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94 (permissive intervention requires a person to be a proper party). Setting aside the question of whether it is even appropriate for the *Kaul* State Plaintiffs to pursue an affirmative claim that § 940.04 is unconstitutional as applied to abortion, allowing them to intervene in this action would likely prejudice Urmanski by allowing challengers to the constitutionality of § 940.04 to present two full merits briefs to

which Urmanski would be required to respond. Nor do the *Kaul* State Plaintiffs provide any indication that they have anything unique to say, other than to express agreement with the Petitioners' position, thus raising the prospect that the *Kaul* State Plaintiffs' briefing would be largely duplicative of the Petitioners' briefing in this case. Finally, as discussed above, it would be appropriate for this Court to exercise its discretion to deny permissive intervention in order to not reward the *Kaul* State Plaintiffs for their delay in bringing a challenge to the constitutionality of § 940.04.

CONCLUSION

For the foregoing reasons, this Court should deny the *Kaul* State Plaintiffs' Motion to Intervene as Petitioners.

Dated this 5th day of August, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:
222 E. Erie Street
Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com

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 3795 words.

Dated this 5th day of August, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:
222 E. Erie Street
Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com

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 August 5, 2024, to:

Luke N. Berg
Wisconsin Institute for Law & Liberty, Inc.
330 East Kilbourn Avenue, Ste. 725
Milwaukee, WI 53202

Anthony LoCoco
Wisconsin Appellate Litigation Services, LLC
13435 Watertown Plank Rd., Ste. 5
Elm Grove, WI 53122

Hannah S. Jurss
Charlotte Gibson
Anthony Russomanno
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

Dated this 5th day of August, 2024.

ATTOLLES LAW, S.C.

Attorneys for Respondent Joel Urmanski

By: Electronically signed by Matthew J. Thome

Andrew T. Phillips
State Bar No. 1022232
Matthew J. Thome
State Bar No. 1113463

P.O. ADDRESS:
222 E. Erie Street

Suite 210
Milwaukee, WI 53202
414-279-0962 (Phillips phone)
414-285-0825 (Thome phone)
Email: aphillips@attolles.com
mthome@attolles.com