STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP330-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.

***KAUL V. URMANSKI* STATE PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PETITIONERS**

JOSHUA L. KAUL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Josh Kaul,
Wisconsin Department of Safety
& Professional Services, the
Wisconsin Medical Examining
Board, and Clarence P. Chou, MD

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101 HSJ
(608) 267-2238 ADR
(608) 957-5218 CG
(608) 294-2907 (Fax)
jursshs@doj.state.wi.us
russomannoad@doj.state.wi.us
gibsoncj@doj.state.wi.us

TABLE OF CONTENTS

INTRODUCTION

This Court has granted review in two cases that concern one important subject: Is Wis. Stat. § 940.04, at times described as "Wisconsin's 1800s-era abortion ban," enforceable Wisconsin law on abortion, or not?

In *Kaul v. Urmanski*, Attorney General Kaul, the Wisconsin Department of Safety and Professional Services, and the Wisconsin Medical Examining Board and its Chair—the *Kaul* State Plaintiffs—brought suit within days of the Supreme Court's decision overturning *Roe v. Wade*. They argued that Wis. Stat. § 940.04 is *not* enforceable as to abortion. The circuit court held that Wis. Stat. § 940.04 is not enforceable as to abortion. This Court has now granted bypass and will decide that case.

This original action also asks whether Wis. Stat. § 940.04 could be enforceable as to abortion, but for an additional reason: because, even if Wis. Stat. § 940.04 were otherwise enforceable as to abortion, the individual liberties guaranteed by the Wisconsin Constitution would prohibit a near-total abortion ban.

Put simply, *Kaul* asks whether Wisconsin "does" have a near-total abortion ban (the answer is no), and *Planned Parenthood* asks whether Wisconsin "could" have a near-total abortion ban (the answer is no).

This Court should grant the *Kaul* State Plaintiffs' motion to intervene as petitioners here. The significant questions in *Kaul* and this case are so closely connected that how each case is litigated or decided could directly impact the other. They are so closely connected that the *Kaul* State Plaintiffs sought to address the constitutionality of Wis. Stat. § 940.04 if otherwise enforceable as to abortion before this Court in *Kaul*. Moreover, the defendants in *Kaul* and this case are the same and both cases involve, as parties, physicians who provide reproductive healthcare and oppose a near-total

abortion ban. The *Kaul* State Plaintiffs, with their unique interests and roles—including the Attorney General's interest resulting from his statutory right to be heard on any constitutional challenge to state law—should also be parties on this critically important, directly connected, and novel question of Wisconsin constitutional law.

Since *Dobbs v. Jackson Women's Health Organization*, the *Kaul* State Plaintiffs have been working determinedly to provide the Wisconsin public with clarity that Wisconsin does not have an enforceable near-total abortion ban. They will continue to do so before this Court. They further agree with Petitioners here that this Court should provide clarity that Wisconsin could not constitutionally have a near-total abortion ban. And they ask this Court to allow them to intervene to fully argue why the Wisconsin Constitution would prohibit it.

LEGAL STANDARDS FOR INTERVENTION

Wisconsin law provides for intervention either as a matter of right or as permitted by the Court. Wis. Stat. § 803.09.

First, a party shall be allowed to intervene as of right "[u]pon timely motion" if "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." Wis. Stat. § 803.09(1).

In considering whether a party can intervene as of right, courts analyze whether the movant shows four factors: (1) the motion is timely; (2) "the movant claims an interest sufficiently related to the subject of the action"; (3) the "disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest"; and

(4) "the existing parties do not adequately represent the movant's interest." *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 38, 307 Wis. 2d 1, 745 N.W.2d 1. These factors "need not be analyzed in isolation from one another, and a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other[s]." *Id.* ¶ 39. The analysis is "holistic." *Id.* ¶ 40 (citation omitted).

Second, and separately, "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." Wis. Stat. § 803.09(2). When a court exercises its discretion to allow permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

ARGUMENT

Intervention of the *Kaul* State Plaintiffs as Intervenors-Petitioners is warranted here under either Wis. Stat. § 803.09(1) or (2). Most significantly, intervention is proper because this Court has also granted bypass in *Kaul v. Urmanski* and the two cases are directly connected—so much so that the *Kaul* State Plaintiffs asked that the question of the constitutionality of a near-total abortion ban raised here be addressed in *Kaul* itself. The *Kaul* State Plaintiffs also have additional unique interests as state officials, including the Attorney General's interest resulting from his right to be heard in cases challenging the constitutionality of Wisconsin law. Moreover, their intervention will assist this Court in addressing this novel question of Wisconsin constitutional law and will not delay these proceedings. This Court should therefore grant their motion to intervene.

I. This Court should grant the *Kaul v. Urmanski* State Plaintiffs intervention as of right.

This Court should grant intervention to the *Kaul* State Plaintiffs here under Wis. Stat. § 803.09(1) as of right. They satisfy each of the four factors to do so:

A. *First factor:* The motion is timely.

This motion is timely. *Helgeland*, 307 Wis. 2d 1, ¶ 38. This Court has set a deadline of today, July 16, for motions to intervene in this original action.

B. *Second and third factors*: The *Kaul* State Plaintiffs have significant interests related to the subject of this original action which will be affected by this Court's resolution of this original action.

The second and third factors are connected here for the *Kaul* State Plaintiffs, who satisfy both. *Helgeland*, 307 Wis. 2d 1, ¶ 38 (the second factor asks whether the movant "claims an interest sufficiently related to the subject of the action" and the third asks whether the disposition of this action "may as a practical matter impair or impede the movant's ability to protect that interest").

Put simply, the *Kaul* State Plaintiffs have interests in the resolution of this case based on their status as plaintiffs and now Respondents in *Kaul v. Urmanski* and their respective roles as state officers that led them to bring that suit, and the outcome of either case could directly impact the other.

1. The *Kaul* State Plaintiffs have an interest in this Court's resolution of *Kaul v. Urmanski*, which is directly connected to this Court's resolution of this original action.

To explain further, on July 2, this Court entered orders agreeing to hear two cases: (1) *Kaul v. Urmanski*, Appeal No. 2023AP2362, and (2) this case, *Planned Parenthood of Wisconsin v. Urmanski*, Appeal No. 2024AP330-OA. Both cases concern whether Wis. Stat. § 940.04—at times described as "Wisconsin's 1800s-era abortion ban"—is enforceable as to abortion.

In *Kaul*, the circuit court held that under this Court's decision in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), Wis. Stat. § 940.04 does not prohibit abortion and instead prohibits feticide only. The *Kaul* State Plaintiffs argued that, under *Black* and statutory principles of implied repeal, Wis. Stat. § 940.04 had been superseded by more modern abortion laws. They also argued that Wis. Stat. § 940.04 was unenforceable as to abortion because of its longstanding disuse and public reliance on *Roe*. Three Wisconsin physician intervenors also argued that, under *Black* and statutory principles of implied repeal, Wis. Stat. § 940.04 had been superseded, and they additionally argued that Wis. Stat. § 940.04 is unenforceable as to abortion because it relies on arcane language with undefined medical standards. This Court has now granted bypass.

In this case, *Planned Parenthood*, the petitioners asked this Court to grant an original action to address whether Wis. Stat. § 940.04, "if interpreted to prevent a person from obtaining an abortion in all circumstances except 'to save the life of the mother'" violates article I, section 1 of the Wisconsin Constitution in multiple ways. (Pet. 4.) This Court has granted the original action.

The questions of whether Wisconsin "does" or "could" have a near-total abortion ban are so interconnected that the *Kaul* State Plaintiffs asked this Court to address whether Wis. Stat. § 940.04 would violate rights guaranteed by the Wisconsin Constitution if it applied to abortion in *Kaul* itself, as an alternative basis for affirming the circuit court's decision. They sought to argue to this Court that rights guaranteed by the Wisconsin Constitution, including article I, section 1's guarantees of the inherent rights to life, liberty and the pursuit of happiness, as well as to equal freedom and independence, would prohibit a law purporting to ban nearly all abortion. This Court has declined to address that constitutional question in *Kaul*, but it has taken up that very question in this case, *Planned Parenthood*. And it has decided to grant review in both this case and in *Kaul*.

Moreover, though this Court's orders do not definitively explain how it plans to address both cases—it has set briefing in *Kaul* but not yet set briefing here and has not yet set argument in either case—Justices' discussions in the order granting the original action petition here both demonstrate that this Court understands how interconnected the cases are and suggest that the Court may intend to hear and/or decide the cases simultaneously.

In her concurrence to the order granting the original action here, Justice Karofsky explained that the Court is "granting a petition whose resolution may depend on how we rule in another case, Kaul v. Urmanski." (Order at 3, July 2, 2024 (J. Karofsky, concurring).) Justices dissenting from this Court's order granting this original action also recognized the direct connection between the cases. (*Id.* at 5, 10) (J. R. Bradley and J. Hagedorn, dissenting). Justice Karofsky emphasized in her concurrence that it is "not particularly groundbreaking for this court to schedule two cases with interdependent issues at the same time." (*Id.* at 4.)

Justice Karofsky further emphasized that it is also not unusual "for the court to hear statutory and constitutional claims at the same time," given that "[t]he court does not know how it should resolve a particular case until it reviews all of the arguments made by parties." (Order at 4, July 2, 2024 (J. Karofsky, concurring).) "Consequently, it makes good sense to hear all of the relevant legal arguments before rendering a decision, even if ultimately we may not have to resolve some of the issues raised in one or both of these cases." (*Id.*)

That does make good sense, and to that end, the *Kaul* State Plaintiffs should be able to present their full legal arguments on how and why the Wisconsin Constitution would prohibit a near-total abortion ban like Wis. Stat. § 940.04, if it were otherwise enforceable as to abortion.

Intervention is particularly important because of the otherwise present overlap in party interests between *Kaul v. Urmanski* and this case. The defendants in *Kaul* are the same parties as the Respondents here: District Attorneys Urmanski, Ozanne, and Chisholm, in their official capacities. The district attorney defendants in *Kaul* will therefore be parties in both suits. Though different physicians, physicians who provide reproductive healthcare and oppose a near-total abortion ban will also be heard as parties in both suits (the State Plaintiffs did not object to the intervention of the physician intervenors in *Kaul*). Those parties will also be able to advance arguments in this case as parties that could affect how this Court addresses resolution of *Kaul v. Urmanski*. The *Kaul* State Plaintiffs have an interest in being heard as parties in both suits, too.

Critically, there are multiple scenarios in which this Court's consideration of the parties' arguments here could directly impact resolution of *Kaul v. Urmanski*. For example, while the *Kaul* State Plaintiffs are confident that this Court will agree with the circuit court in *Kaul* that Wis. Stat.

§ 940.04 is unenforceable as to abortion, whether the Wisconsin Constitution would prohibit a near-total abortion ban like Wis. Stat. § 940.04 (if it were otherwise enforceable as to abortion) offers an alternative basis for affirming the circuit court's decision in *Kaul*. *Vilas County v. Bowler*, 2019 WI App 43, 30 n.6, 388 Wis. 2d 395, 933 N.W.2d 120; *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 2006 WI App 161, ¶ 14, 295 Wis. 2d 556, 721 N.W.2d 704.

The Court's conclusions here (in *Planned Parenthood*) could also inform its statutory-interpretation conclusions in *Kaul*. One of the tenets of statutory interpretation, for example, is the "constitutional-doubt principle"—that this Court "disfavor[s] statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration." *Wis. Leg. v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900.

This Court could also decide to fully answer the questions posed in both cases. Indeed, if there were ever an occasion where this Court should err in favor of providing definitive clarity on all fronts, this is it. While the judicial practice of constitutional avoidance—of courts not deciding constitutional questions to resolve an issue unless unavoidable—is the ordinary default, this Court has also recognized that there are times "where the constitutional question" is of such "great public importance" "that the principle of constitutional avoidance" should "give[] way." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 52, 376 Wis. 2d 147, 897 N.W.2d 384; *see also, e.g., James v. Heinrich*, 2021 WI 58, ¶¶ 32–48, 397 Wis. 2d 517, 960 N.W.2d 350 (this Court addressing constitutional challenges to a COVID-19 related order in addition to deciding case on statutory grounds, based on the "great public importance" of the constitutional question and the "judiciary's obligation to uphold the constitution").

And if this Court decides to fully answer both questions, arguments it hears from the other party interests in *Kaul v. Urmanski* here could impact how it understands the issues in *Kaul v. Urmanski*. The *Kaul* State Plaintiffs' interest as plaintiffs and now Respondents in that directly connected litigation gives them a significant interest in this Court's resolution of this case.

2. The *Kaul* State Plaintiffs have additional interests as state officials that will be affected by the resolution of this original action.

The *Kaul* State Plaintiffs also have significant additional interests as state officials that further support their ability to intervene as of right into this original action.

To start, the Attorney General has an interest in intervening here resulting from his statutory right to be heard in constitutional challenges. In accordance with his role as a "high constitutional executive officer," *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶ 60, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted), Wis. Const. art. VI, § 1, Wisconsin law provides Attorney General Kaul with an express right to be heard in any proceeding where a "statute. . . is alleged to be unconstitutional." Wis. Stat. § 806.04(11).

This is just such a proceeding, and a significant one at that. The Attorney General's statutory right to be heard, of course, most commonly functions to help effectuate the Attorney General's responsibility to defend enforceable state law. *See, e.g., O'Connell v. Board of Educ., Jt. Dist. #10*, 82 Wis. 2d 728, 733, 264 N.W.2d 561 (1978). But there are also certain, rare circumstances—like this one—where the Attorney General has a critical role in functioning as a plaintiff or petitioner on behalf of the people of Wisconsin, particularly where important questions of state constitutional

rights are involved. *See, e.g.,* Wis. Stat. § 165.25(1m); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964) ("This court has consistently held that the state, acting either through the Governor or the Attorney General, may challenge the constitutionality of a state reapportionment plan as a violation of *state* constitutional rights of the citizens.").

Indeed, 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 a proper plaintiff. *See, e.g., In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W. 633, 635 (1936) (citation omitted). *Dobbs* represented "the first time in history" where the United States Supreme Court "[r]escind[ed] an individual right in its entirety" and conferred the question "on the State." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2347 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting). The path this Court charts forward following such a decision will also necessarily be novel. The Attorney General should be heard as a party.

In other contexts, our appellate courts have suggested (though not directly held) that the Attorney General's right to be heard under Wis. Stat. § 806.04(11) may be satisfied by filing an amicus brief. *See, e.g., Town of Walworth v. Vill. of Fontana-on-Geneva Lake*, 85 Wis. 2d 432, 436, 270 N.W.2d 442 (Ct. App. 1978) (holding that 60-day statutory service requirement does not apply to service on the Attorney General as the Attorney General can perform his function under Wis. Stat. § 806.04(11) "without being made a party"); *Richards v. Young*, 150 Wis. 2d 549, 556, 441 N.W.2d 742 (1989) (considering arguments regarding service on JCRAR and distinguishing JCRAR's "statutory right to be a party" from the Attorney General's "opportunity to state [his] position").

While in many other constitutional-challenge contexts that may be an adequate interpretation and approach, here it is not. The Attorney General brought suit in a directly connected case and this Court's analytical approach to the state-law-only constitutional question here will have effect beyond the already important subject of whether Wisconsin constitutionally could have a near-total abortion ban.

The *Kaul* State Plaintiffs are unaware of any previous decision from this Court directly addressing fundamental liberty interests—traditionally afforded heightened scrutiny—under article I, section 1 alone (instead of in conjunction with a Fourteenth Amendment argument). How this Court charts this terrain will thus likely impact constitutional litigation in other contexts, too. The significance of the constitutional undertaking this Court will undergo to decide the question renders the Attorney General's statutorily protected interest in being heard in cases that implicate the constitutionality of state law particularly acute here, which further supports the Attorney General's intervention. *See* Wis. Stat. § 806.04(11).

Additionally, the Wisconsin Department of Safety and Professional Services, and the Wisconsin Medical Examining Board and its Chair, have responsibilities that include licensing of physicians, investigation of issues related to licensing, and discipline where appropriate. Wis. Stat. §§ 448.02(3), (8), 440.03(3m); Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i). If it were enforceable as to abortion, Wis. Stat. § 940.04(1) would constitute a Class H felony, which could not be used to prosecute the pregnant woman for obtaining an abortion, *see* Wis. Stat. § 940.13, but rather could be used to criminally prosecute Wisconsin physicians. Thus, as in *Kaul*, here too, these State Plaintiffs have an interest in obtaining clarity as to whether Wisconsin physicians could face criminal prosecution under a near-total abortion ban.

Whether or how this Court provides such clarity affects their ability to perform their responsibilities.

Ultimately, the *Kaul* State Plaintiffs' interest in how this Court resolves their directly connected case alone more than demonstrates an "interest sufficiently related to the subject" of this original action. *Helgeland*, 307 Wis. 2d 1, ¶ 38. Their interests as state officials in obtaining clarity on this significant constitutional question provides even further support for their intervention as of right here.

C. *Fourth factor*: The *Kaul* State Plaintiffs' interests are unique.

Lastly, the *Kaul* State Plaintiffs have interests that are unique from the parties already present in this original action. *Helgeland*, 307 Wis. 2d 1, ¶ 38.

Most significantly, as noted, all other identical or comparable party interests in the *Kaul v. Urmanski* litigation that this Court will also hear are already represented here—except, currently, the State Plaintiffs. And those parties will be able to make arguments here that could directly impact not just this case but also this Court's resolution of *Kaul v. Urmanski*.

Moreover, as the head of the Department of Justice and the constitutional executive officer with a right to be heard on constitutional challenges, the Attorney General also has unique interests in how this Court analyzes article I, section 1 on its own in the context of fundamental liberties. Attorney General Kaul 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. He also has a responsibility to consider how this Court's analytical framework will apply beyond the context of abortion.

* * *

As they satisfy all four factors, this Court should grant the *Kaul* State Plaintiffs' motion to intervene as of right.

II. This Court should grant the *Kaul v. Urmanski* State Plaintiffs permissive intervention.

If this Court nevertheless concludes that the *Kaul* State Plaintiffs should not be allowed to intervene as of right, it should grant permissive intervention under Wis. Stat. § 803.09(2).

As argued above, the *Kaul* State Plaintiffs have a significant claim that is directly connected to legal questions presented in this original action: they are the plaintiffs and now Respondents before this Court in the directly connected case of *Kaul v. Urmanski*. *See* Wis. Stat. § 803.09(2). How this Court resolves this case could directly affect how it resolves their suit, which this Court may decide simultaneously. And allowing their intervention here will not prejudice the adjudication of the rights of the existing parties here—to the contrary, if not permitted to intervene, the *Kaul* State Plaintiffs would be the only identical or comparable party interest in that case *not* involved as a party in this linked litigation. *See id.* Notably, the *Kaul* State Plaintiffs did not object to the intervention of the physician intervenors in that case and brought suit against the same three defendants present as Respondents here.

Additionally, allowing the *Kaul* State Plaintiffs to intervene here will not delay this original action. *See* Wis. Stat. § 803.09(2). This Court has not yet set any briefing in this original action and set today, July 16, as the deadline for motions to intervene. Moreover, the *Kaul* State Plaintiffs are fully prepared to address the constitutional question on whatever briefing schedule the Court may deem appropriate.

CONCLUSION

This Court should grant the motion of Attorney General Kaul, the Wisconsin Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and Clarence P. Chou, MD, Chair of the Medical Examining Board, to intervene as petitioners in this original action.

Dated this 16th day of July 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

Attorneys for Josh Kaul,
Wisconsin Department of Safety
& Professional Services, the
Wisconsin Medical Examining
Board, and Clarence P. Chou, MD

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101 HSJ
(608) 267-2238 ADR
gibsoncj@doj.state.wi.us
(608) 294-2907 (Fax)
jursshs@doj.state.wi.us
russomannoad@doj.state.wi.us
gibsoncj@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.81 for a brief produced with a proportional serif font. The length of this brief is 3792 words.

CERTIFICATE OF EFILE/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 16, 2024, to:

LUKE BERG
330 EAST KILBOURNE AVENUE, SUITE 725
MILWAUKEE, WI 53202

ANTHONY LOCOCO
13435 WATERTOWN PLANK ROAD, SUITE 5
ELM GROVE, WI 53122

Dated this 16th day of July 2024.

Electronically signed by:

Hannah S. Jurss
HANNAH S. JURSS