

In the Supreme Court of Wisconsin

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND
PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD
and CLARENCE P. CHOU, MD, PLAINTIFFS-RESPONDENTS,

CHRISTOPHER J. FORD, KRISTIN J. LYERLY and JENNIFER J.
MCINTOSH, INTERVENORS-RESPONDENTS,

v.

JOEL URMANSKI, as DA for Sheboygan County, WI,
DEFENDANT-APPELLANT,

ISMAEL R. OZANNE, as DA for Dane County, WI and JOHN T.
CHISHOLM, as DA for Milwaukee County, WI, DEFENDANTS.

On Appeal from the Dane County Circuit Court,
The Honorable Diane Schlipper, Presiding,
Case No. 22CV1594

**CONDITIONAL PETITION TO INTERVENE, OR, IN THE
ALTERNATIVE, TO FILE AN AMICUS BRIEF, ON BEHALF
OF WISCONSIN RIGHT TO LIFE, WISCONSIN FAMILY
ACTION, AND PRO-LIFE WISCONSIN**

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Until two weeks ago, this case involved only questions of statutory interpretation. Attorney General Josh Kaul, who filed this case and crafted the claims, raised various arguments for why Wis. Stat. § 940.04 no longer applies to prohibit abortion. He did not raise any constitutional challenge to the statute. Likewise, the Intervenor-Respondents, in their proposed complaint, did not raise any claim based on a constitutional right to abortion.¹ The Circuit Court held, based on *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), that § 940.04 no longer applies to abortions.

Now, for the first time, in their supplemental bypass petitions, Attorney General Kaul and the Intervenor-Respondents seek to transform this case and use it as a vehicle to create a constitutional right to abortion in Wisconsin. As explained in more detail in the brief that accompanies this motion, this request is procedurally improper, unnecessary, and wrong on the merits.

The Proposed Intervenors, Wisconsin Right to Life, Wisconsin Family Action, and Pro-Life Wisconsin, by their undersigned attorneys at the Wisconsin Institute for Law & Liberty and the Thomas More Society, pursuant to Wis. Stat. § 809.13, hereby move to intervene to oppose this late attempt to transform this case, or, if the Court nevertheless allows adding a constitutional claim while the case is on appeal, to oppose that claim on the merits. If this Court agrees with Proposed Intervenors and declines to allow the addition of a constitutional claim on appeal, Proposed Intervenors do not seek to intervene, and the Court can deny this motion.

In the alternative, pursuant to Wis. Stat. § 809.19(7)(b), Proposed Intervenors move to file their proposed response as an amicus brief in

¹ They did raise a vagueness claim, a different kind of constitutional claim. R. 75:13–14.

opposition to adding the constitutional question to this case. Proposed Intervenor's brief in support of intervention also explains the interest of the Proposed Intervenor and why a brief by them is desirable. *See* Wis. Stat. § 809.19(7)(a).

This motion is timely, both with respect to intervention, given that this case has never included an assertion of a constitutional right to abortion until recently, and with respect to the deadline for filing an amicus brief in opposition to a petition to bypass. Wis. Stat. § 809.19(7)(b).

This motion is supported by the affidavits and brief in support of intervention submitted simultaneously with this motion, and is accompanied a proposed response (or in the alternative, amicus brief) in opposition to that portion of Attorney General Kaul's supplemental bypass petition that seeks to add a constitutional claim to this case on appeal.

CONCLUSION

This Court should reject Attorney General Kaul's and the Intervenor-Respondents' attempt to add a claim on appeal that they did not raise when they filed this case, and that was never before the Circuit Court when it decided this case. If this Court allows that request, it should grant the Proposed Intervenor's motion to intervene to oppose this claim on its merits.

Dated: March 12, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
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Electronically signed by Luke N. Berg

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