No. 23AP2362

# In the Supreme Court of Wisconsin

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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.

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

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**PROPOSED RESPONSE, OR, IN THE ATLERNATIVE, AMICUS BRIEF, IN OPPOSITION TO RESPONDENTS' SUPPLEMENTAL BYPASS PETITION**

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## INTRODUCTION

Attorney General Josh Kaul has made an extraordinary request to this Court. He seeks to expand the scope of his *own* case while it is up on appeal—and to add a constitutional claim no less. Not just any constitutional claim, either. He hopes to transform this case into a vehicle to create a constitutional right to abortion in Wisconsin. Kaul could have included a constitutional claim when he filed this case, but he chose not to. His attempt to do so now is beyond procedurally improper: it is unheard of. Adding a constitutional claim at this late hour would also flout the basic canon of constitutional avoidance. If this Court affirms the Circuit Court on the claims Kaul actually brought, there is no reason to reach the constitutional question, much less disregard the normal litigation process.

There are many other reasons not to take up the question and constitutionalize abortion in Wisconsin. For one, the claim is meritless on its face. Abortion was prohibited in Wisconsin both before and when the Constitution was adopted, as well as by the earliest statutes, and it has been prohibited ever since (but for *Roe v. Wade* and *State v. Black*'s gloss on Wis. Stat. § 940.04). Nothing in the Constitution's text or Wisconsin's history suggests that there is a secret and unwritten right to abortion that Wisconsin law has been violating for 176 years. Constitutionalizing the issue would embroil this Court in the same mess of policy questions that *Roe* spawned—how far the right goes, what sorts of regulations of abortion are permissible, etc.—with collateral consequences on numerous other statutes and regulations of abortion supported by majorities of Wisconsin voters. And, like *Roe* did at the federal level, it will politicize the Court and judicial elections for decades to come.

None of this is necessary now. This Court can resolve the statutory questions and save any constitutional claims for another day, if ever.

Where to draw the line on abortion is a question that belongs in the Legislature—a body that is about to change dramatically due to the new maps. This Court should reject Kaul's attempt to transform this case and constitutionalize abortion in Wisconsin.

## ARGUMENT

### I. Adding a New Constitutional Claim at this Point Is Procedurally Improper.

Kaul's supplemental bypass petition contains an ask as extraordinary as it is improper. Kaul seeks permission to add to his complaint, at the appellate stage and following judgment *in his favor*, an alternate claim that there exists a right to abortion under the Wisconsin Constitution and that Wis. Stat. § 940.04 violates it.[1] Setting aside for a moment the doubtful merits of the constitutional argument (discussed *infra,* Part III), there is no legal support for such a bizarre and fundamentally unfair procedural approach. Indeed, the norms of civil and appellate procedure prohibit it.

This Court has held, repeatedly, that it "generally refuses to consider issues raised for the first time on appeal, *especially a claim that a statute is unconstitutional*." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 555, 576 N.W.2d 245 (1998) (emphasis added); *Sambs v. City of Brookfield*, 66 Wis. 2d 296, 314, 224 N.W.2d 582 (1975) ("This court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reasons for doing so."); *State v. Weidner*, 47 Wis. 2d 321, 323, 177 N.W.2d 69 (1970) ("[A]s a general rule, the constitutionality of a statute cannot be questioned for the first time on appeal."); *Shadow Lawn Sch. Dist. No. 3.*

[1] The Intervenors-Respondents also seek to add the constitutional question in their "response" to the bypass petition. Intervenors-Respondents' Response at 4. That attempt to transform the case is flawed for all of the same reasons explained herein.

*of Walworth Cnty. v. Walworth Cnty. Sch. Comm. of Walworth Cnty.*, 33 Wis. 2d 333, 344, 147 N.W.2d 227 (1967) ("[T]his court … ordinarily will not consider the question of constitutionality which has been raised for the first time on appeal but will deem that any such right which may have existed was waived by failure to raise it early in the proceeding before the trial court." (quoting *Wisconsin Power & Light Co. v. Dean*, 275 Wis. 236, 242, 81 N.W.2d 486 (1957)); *In re Ryan's Est.*, 117 Wis. 480, 94 N.W. 342, 344 (1903) ("[I]t would be an abuse of discretion, at least, to allow an entirely new claim to be first presented to the appellate tribunal.").

And while these cases caveat that courts will occasionally consider additional constitutional *issues* where there are compelling reasons to do so, Kaul cites no precedent whatsoever for the proposition that a *plaintiff* who *won* below can entirely change the nature of their lawsuit on appeal and add a new constitutional claim never raised below. As the plaintiff, Kaul was the master of his own complaint; he could have brought a constitutional claim, but he chose not to.

Kaul premises his attempt to drastically expand the scope of the litigation at this late stage on the general rule that an appellate court "may affirm a decision by a circuit court for reasons other than those relied on by that court even if they were not argued by the parties." *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2008 WI App 116, ¶34, 313 Wis. 2d 93, 756 N.W.2d 461, *aff'd*, 2009 WI 73, 319 Wis. 2d 52, 768 N.W.2d 596. But this rule, which allows an appellate court to avoid requiring a second set of proceedings where the circuit court "reache[d] the right result for the wrong reason," *Milton v. Washburn Cnty.*, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924, has no application given that Kaul's new claim would effectively produce *reversal and a different result. See State v. Rogers*, 196 Wis. 2d 817, 827, 539

N.W.2d 897 (Ct. App. 1995) ("We will not … blindside trial courts with reversals based on theories which did not originate in their forum.").

Kaul's argument rests on a mischaracterization of what occurred below. The Circuit Court's decision—that is, the relief provided in the judgment appealed from—consists of a single declaration under Wis. Stat. § 806.04 "that Wis. Stat. § 940.04 does not apply to abortions." R. 183:14. In contrast, the Circuit Court dismissed with prejudice, at an earlier stage in the litigation, all "claims premised on the assertion that Wis. Stat. § 940.04 prohibits abortions." R. 147:21. Thus, Kaul's new, alternate request that this Court declare that the Wisconsin Constitution contains a right to abortion and that § 940.04 violates that right would plainly require *modification* of the final judgment, not mere affirmance.

This is why none of the "right result, wrong reasoning" cases Kaul cites help him. In each case, unlike this one, the alternate grounds cited by the Court of Appeals were aimed at supporting the *same exact ruling* made by the Circuit Court. *See Vilas County v. Bowler*, 2019 WI App 43, ¶30 & n.6, 388 Wis. 2d 395, 933 N.W.2d 120 (alternate grounds supported circuit court's original ruling that structures were "residences" under ordinance and that ordinance could thus be enforced); *Farmers Auto*, 2008 WI App 116, ¶34 (alternate grounds supported circuit court's original ruling that contract clause was not unconscionable and that dismissal of breach-of-contract claim was thus appropriate); *Correa v. Farmers Ins. Exchange*, 2010 WI App 171, ¶4, 330 Wis. 2d 682, 794 N.W.2d 259 (alternate grounds partially supported original circuit court's ruling that there was sufficient evidence to support damages award); *Glendenning's Limestone & Ready-Mix Co. v. Reimer*, 2006 WI App 161, ¶14, 295 Wis. 2d 556, 721 N.W.2d 704 (alternate grounds would support circuit court's original ruling that

insurance policy did not provide coverage). Those circumstances are not present here.

Nor may Kaul shoehorn a forfeited constitutional claim into the appeal via the rule of statutory construction that where there are "competing plausible interpretations of a statutory text," the Court may presume that the Legislature "did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). A principal purpose of that canon is to "allow[ ] courts to *avoid* the decision of constitutional questions," *id.*, as in cases where a particular interpretation creates "obvious constitutional difficulties." *Baird v. La Follette*, 72 Wis. 2d 1, 5, 239 N.W.2d 536 (1976). But Kaul clearly seeks something different. His claim would *require* the decision of a novel (that is, non-obvious) constitutional question: whether the Wisconsin Constitution protects the right to abortion in the first place, and if so to what extent. That is a separate declaratory claim.

Ultimately, resolution of Kaul's request for the addition of this claim at the appellate stage is straightforward. The rule applicable here, and the one not cited by Kaul, is the "general forfeiture rule" pursuant to which "an appellant challenging a circuit court ruling must generally give the circuit court an opportunity to address an issue before it is raised on appeal." *Anderson v. Kayser Ford, Inc.*, 2019 WI App 9, ¶16, 386 Wis. 2d 210, 925 N.W.2d 547 (emphasis removed). For purposes of his new claim, Kaul is functionally a cross-appellant seeking modification of the judgment below, not a respondent seeking its mere affirmance, as shown by Kaul's quiet acknowledgment that appellate proceedings will be "unfair" unless this Court "set[s] briefing in this case in accordance with the general framework … of cross-appeals," Pet. 22—*i.e.*, briefing allowing Kaul to address the constitutional claim first as though he were a cross-appellant! But Kaul did not file a cross-appeal, because the Circuit Court never ruled on his constitutional claim, because he never

included such a claim in his complaint or argued it below. "Review" is prohibited. *See, e.g.*, *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("[T]he appellee may not attack the decree [below] with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.").

In addition to the law prohibiting Kaul's request, it is worth noting the fundamental unfairness of adding a constitutional claim now. Notably, Kaul does not even try to justify his failure to litigate the question below, something easily available to him. Nor does he try to reconcile his conduct with the rules governing when and how a plaintiff may amend his complaint. *See* Wis. Stat. § 802.09. Instead, Kaul mechanically states that "[t]he record in this case will be adequate" to permit review "because the constitutional question will look to publicly available, generally applicable facts." Pet. 21. Put differently, Kaul concedes that the facts on which he wishes to rely for the new claim are not in the record. Kaul forgets that the Wisconsin Statutes, to say nothing of basic considerations of due process, afford opposing parties the right to dispute the admissibility of, test, and rebut these unidentified "facts," activities for which the appellate process is ill-suited. Further, had Kaul raised this constitutional issue below, it would have provided notice to parties like the Intervenors so that they could have exercised their rights to be added to the litigation and fully heard in the first instance. Kaul's ambush circumvents all of these rules.

In sum, this Court should not set precedent permitting litigants to assert whatever claims they wish once a case has reached appeal. That it is Wisconsin's Attorney General making the demand—an experienced litigator with immense power over the affairs of Wisconsinites and sometimes their liberty—means that greater, not lesser fidelity to the checks and balances of the litigation process is required. *See Rogers*, 196

Wis. 2d at 827 (refusing to allow the Attorney General to raise new theories on criminal appeal while noting that "forcing parties to make all of their arguments to the trial court … prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal (or on remand) should their original idea not win favor"). This Court should deny Kaul's unprecedented request to treat the "rules" of civil and appellate procedure as mere "suggestions" of procedure and to permit a wholesale reworking of this case at the Supreme Court stage.

## II. Adding a New Constitutional Claim Would Flout the Doctrine of Constitutional Avoidance.

Even if this Court might be inclined to "relax" the rules of litigation in rare cases to allow for the tardy assertion of claims, this action is a uniquely bad fit for such a request. This Court has repeatedly stated that it "should not decide the constitutionality of a statute unless it is essential to the determination of the case before it." *Kollasch v. Adamany*, 104 Wis. 2d 552, 561, 313 N.W.2d 47 (1981).

It is hard to see how consideration of the constitutionality of Wis. Stat. § 940.04 is necessary here where it was not even litigated below and where the supposed holders of Kaul's claimed right to abortion—women who are or may become pregnant—are not even parties to this suit in that capacity. If this Court agrees with the Circuit Court's interpretation of Wis. Stat. § 940.04, *i.e.*, that it does not prohibit abortions, it can affirm without any need to consider whether the Wisconsin Constitution contains a right to abortion. If, on the other hand, it reverses and concludes that § 940.04 prohibits abortions and remains in full effect, those who might suffer the violation of their constitutional rights via application of that prohibition can sue for relief.

In neither case would it be "essential" for this Court to reach out now and decide the monumental constitutional question Kaul now raises, which would be contrary to this Court's usual hesitance to consider such questions. Indeed, constitutional adjudication would be particularly ill-advised here where all affected parties have not been afforded an opportunity to participate and be heard, *see, e.g.*, Wis. Stat. § 803.03 ("Joinder of persons needed for just and complete adjudication"), and where this Court will lack the benefit of the analysis of the constitutional provisions in question by lower courts.

Kaul is essentially asking this Court to shoot from the hip on one of the most significant and controversial constitutional questions in Wisconsin history. But proper determination of what the Wisconsin Constitution says on the subject of abortion requires more than a single round of briefing with a single, local public official expected to represent the interests of all those who believe the question of abortion is committed to the democratic process. This Court should apply its usual judicial policy of avoiding unnecessary constitutional questions and review only those questions actually aired below. It can and should save the constitutional question for another day and case.

## III. Respondents' Assertion of a Constitutional Right to Abortion is Meritless on Its Face.

The idea that Wisconsin's Constitution contains a secret, unwritten, and heretofore undiscovered "right" to abortion is also meritless on its face. Abortion has been illegal under Wisconsin law for its entire 176 years of statehood (setting aside *Roe v. Wade* and *State v. Black*'s reinterpretation of Wis. Stat. § 940.04 in light of *Roe*). It was even illegal in the territory *before* statehood, and when the Constitution was adopted. If the drafters had intended to create a "right" to abortion—one that would have been immediately violated as soon as they adopted it—

they surely would have spelled that out in the text. They did not, for the obvious reason that there is no such right.

This court's "solemn duty in constitutional interpretation is to faithfully discern and apply the constitution as it is written." *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶28, 407 Wis. 2d 87, 990 N.W.2d 122. To do so, the Court looks to "'the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law [ ] following adoption.'" *Id.* ¶22 (quoting *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996)).

While the text of Article I, Section I, and the debates during its ratification make no reference to abortion, Wisconsin's early statutes do. And, as is well-established, early statutes are a primary source of constitutional interpretation. *Id.* ¶21–23 (citing cases); *id* ¶117 (Dallet, J., concurring); *see also Becker v. Dane County,* 2022 WI 63, ¶42, 403 Wis. 2d 424, 977 N.W.2d 390; *id*. ¶48–50 (Hagedorn, J., concurring).

Wisconsin's early statutes irrefutably prohibited abortion. In 1849, shortly after statehood, Wisconsin's first Legislature passed the following statutes:

> Sec. 10. The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.
>
> Sec. 11. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ such an instrument or other means, with intent thereby to destroy such child, unless the same

> shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Wis. Stat. c. 133, §§ 10, 11 (1849).[2]

The text of these laws appears to have been copied directly from Michigan laws, which applied in Wisconsin even before the Constitution was adopted, while Wisconsin was still a territory. *See* Organic Act of 1836, Section 12 ("the existing laws of the territory of Michigan shall be extended over said territory [Wisconsin])"; Michigan Rev. Stats. of 1846, ch. 153, §§ 32, 33 (containing nearly identical language); Legislative Reference Bureau, *A Brief History of Abortion Laws in Wisconsin* (Aug. 25, 2022). In other words, if there is a secret right to abortion in Wisconsin's Constitution, it was *immediately* violated the moment the drafters adopted it. If that's what the drafters intended, they surely would have said so.

Even more, abortion has never *not* been illegal under Wisconsin law (again, setting aside *Roe* and *Black*). Although there have been various statutory changes, Wisconsin has consistently prohibited abortion throughout its history. *See e.g.*, Wis. Stat. § 340.16 (1925); Wis. Stat. § 940.04 (1955); *see generally*, LRB, *A Brief History of Abortion Laws in Wisconsin*, *supra.*

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[2] There is debate among legal scholars about the historical meaning of the phrase "a quick child," with some arguing that it "meant simply a 'live' child, and under the era's outdated knowledge of embryology, a fetus was thought to become 'quick' at around the sixth week of pregnancy." *Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 242 n.24 (2022). Regardless, the Wisconsin Legislature removed the word "quick" early in Wisconsin's history, in 1858. Wis. Stat. ch. 164, §§ 10, 11 (1858).

Nothing Kaul points to contradicts these historical facts, and the arguments he makes in support of a constitutional right to abortion are meritless. Like the Respondents in *Dobbs*, Kaul contends that the right to abortion is rooted in a broader right to liberty, but nothing he cites shows that the "right" to abortion "ha[s] a sound basis in precedent," history, or anything else for that matter. *See Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 256 (2022) (citing examples of cases that do not involve or provide a right to abortion); *see also* Pet. 19–20 (similarly citing cases that do not involve or provide a right to abortion, but rather pertain to issues such as sterilization, parental rights, and procedural rights before commitment to a mental institution).

Kaul's equal-protection theory doesn't work either. Pet. 20. Again, Wisconsin's history cuts against this claim. Kaul offers a single citation to an unrelated case involving disparate working age requirements for minor males and females in "'street trade' occupations"—which obviously has nothing to do with abortion or anything remotely like it. *Id*. (citing *Warshafsky v. Journal Co*., 63 Wis. 23 130, 138, 216 N.W.2d 197 (1974)). The U.S. Supreme Court has also "squarely foreclosed" any equal-protection-based theory to support a right to abortion, *Dobbs*, 597 U.S. at 236, and this Court has long interpreted Article I, Section 1 "as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶35, 383 Wis. 2d 1, 914 N.W.2d 678.

Put simply, "[a] state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning." *State v. Roberson*, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813. Nothing in the text of Wisconsin's Constitution or history provides a right to abortion, and Kaul's claims to

the contrary fail on the merits. Abortion has been illegal in Wisconsin since 1846 and it is not (nor has it ever been) a constitutional right.

## IV. Constitutionalizing Abortion Would Raise a Host of Questions This Court Would Have to Answer, With No Legal Foundation to Guide the Answers.

While Kaul frames his newly-added constitutional claim as no more than an "alternative basis for affirming the circuit court's decision," Pet. 17–21, the implications go far beyond this case and the one statute at issue here (Wis. Stat. § 940.04). If this Court were to create a constitutional right to abortion in Wisconsin, it would call into question numerous abortion-related statutes and ultimately force this Court to decide whether any of these also violate this newfound right.

For example, would the prohibitions on abortions after viability, Wis. Stat. § 940.15, or after the unborn child can experience pain (defined in the statute as 20 weeks), Wis. Stat. § 253.107, also be unconstitutional? How about partial-birth abortions, an especially gruesome procedure that a majority of Americans consistently oppose[3]? *Id*. § 940.16. None of those prohibitions are challenged or at issue in this case, but if this Court constitutionalizes abortion, it will have to answer these questions sooner or later.

And if the Court's answer is that any of these are ok, where does it draw the line and how does it justify that line? Does it reimpose *Roe*'s now-jettisoned "viability" line, which "has not found much support among philosophers and ethicists," which "other countries almost uniformly eschew," and which raises a host of other questions, such as what "probability of survival" counts as "viable"? *Dobbs*, 597 U.S. at 274–78. Or does this Court impose some other arbitrary line, and if so, what

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[3] *See*, *e.g.*, Abortion, Gallup (last checked Mar. 6, 2024), https://news.gallup.com/poll/1576/abortion.aspx.

line? A fetal heartbeat (weeks 5–6)? Brain activity (weeks 6–7)? Movement in the womb (8 weeks)? Organ function (week 10)? Facial expressions (weeks 10–12)? The ability to experience pain[4]? First trimester? Second trimester? *See generally*, *Dobbs*, 597 U.S. at 233. This Court will have no legal foundation upon which to answer any of these questions, because, again, nothing in Wisconsin's Constitution or history provides a right to abortion. *Supra,* Part III. As in *Roe,* the answers will depend entirely on judicial fiat, with all that that entails.

Or what of the many ancillary regulations of abortion in Wisconsin? Various Wisconsin laws contain, among other things: an ultrasound requirement, Wis. Stat. § 253.10(3g); a 24-hour waiting period, *id.* § 253.10(3)(c)1; information that must be provided to women seeking abortions, *id.* § 253.10(3)(c)1–2, (d); parental consent requirements for minors seeking an abortion, *id.* § 48.375; an admitting-privileges requirement, *id.* § 253.095; limiting abortion procedures to physicians, Wis. Stat. 940.15(5); and a requirement that abortions after 12 weeks must be performed in hospitals, Wis. Admin Code MED § 11.05. Wisconsin law also prohibits government funding of abortion and certain abortion-related activities. *E.g.*, Wis. Stat. §§ 20.927, 20.9275, 66.0601(b)–(c).

Would any of these violate whatever right this Court would create? And what test would this Court apply to decide whether these violate that right? Would this Court resurrect, from its recent death, *Casey*'s undue-burden "test," which, to put it mildly, has "scored poorly on the workability scale," *Dobbs*, 597 U.S. at 280–86, generating decades of

[4] When unborn children can experience pain is still unknown and debated among researchers. Wis. Stat. § 253.107 sets 20-weeks as the threshold, but some believe unborn children can experience pain much earlier, at 12-weeks, or even possibly at 7–8 weeks. *See, e.g.*, Bridget Thill, *Fetal Pain in the First Trimester*, 89(1) Linacre Q 73–100 (Feb. 2022), https://doi.org/10.1177%2F00243639211059245.

contentious litigation and circuit splits over all sorts of abortion regulations, *id*. at 284–85 (listing examples)? Or would it make up something new, *ex nihilo*, just like the right itself?

Further, the Supreme Court's ill-fated foray into a purported right to abortion under the federal Constitution was never constrained to mere abortion rights. As the Supreme Court recognized, its own abortion cases "led to the distortion of many important but unrelated legal doctrines." *Id.* at 286. If this Court identified a right to abortion under the Wisconsin constitution, would it too be forced to relitigate precedent on facial constitutional challenges, standing, *res judicata*, severability, constitutional avoidance, and the First Amendment? *Id.* at 286–87.

As explained above, wading into this morass will be completely unnecessary if this Court ultimately affirms the Circuit Court's statutory holding below. *Supra,* Part II. Thus, there is no reason to take the extraordinary and procedurally unprecedented step of adding a new claim to a case after it has been taken up on appeal. *Supra,* Part I.

## V. Constitutionalizing Abortion in Wisconsin Would Politicize the Court and Judicial Elections for Years to Come.

*Roe v. Wade* politicized the United States Supreme Court more than any other decision of that Court, and it generated an intense backlash that lasted for decades. This has been documented by numerous writers and Court-observers on both sides of the political aisle. *See*, *e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 385–86 (1985) ("Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."); Dahlia Lithwick, *Foreword: Roe v. Wade at Forty*, 74 Ohio St. L.J. 5, 8 (2013) ("The notion that *Roe* created an almost irreversible political 'backlash' that led to the creation

of the powerful modern conservative legal movement is almost an article of faith among legal academics.").

To give just two examples, it is well-recognized that *Roe v. Wade* has dominated the judicial nomination process for the last 40 years. *Dobbs*, 597 U.S. at 269 ("Roe fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since.") (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 995–96 (Scalia, J., concurring in part)). As one writer summarized, "perhaps no modern decision has generated as much controversy or nominee questioning as *Roe v. Wade*. Clarence Thomas faced more than seventy questions regarding Roe in his hearings, and many believe that Robert Bork's nomination was derailed in part based upon his strident criticism of a constitutional right to privacy. … Moreover, so many of the questions asked of Alito and Roberts during their recent hearings were aimed at eliciting their views on abortion that it is difficult to underestimate the issue's importance to senators and the public." David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 Tex. L. Rev. 1033, 1070 (2008); Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* at 95 (2006) ("*Roe v. Wade* … has formed a big part of the heart and soul of every nomination hearing since Bork's.").

Second, *Roe* redirected all of the energy and attention that could and should have been focused on the political process to the Court instead. "Day after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion." *Lithwick*, 74 Ohio St. L.J. at 11. If this Court constitutionalizes the abortion issue—even though Wisconsin's Constitution says nothing at all

about abortion—it will bring that same level of acrimony and divisiveness to this Court and to judicial elections for years to come.

* * * * *

*Dobbs* rightfully put the abortion issue back where it should have been all along—in the halls of state legislatures. Addressing the issue will take hard work and may require some difficult compromises for both sides of the issue. But in Wisconsin, as elsewhere, that work is only just beginning. This Court should not prematurely cut off that process—especially now, when the Legislature is about to dramatically change due to the new maps recently adopted by the Legislature and the Governor in the wake of this Court's decision in *Clarke v. WEC*, 2023 WI 79, 410 Wis. 2d 1, 998 N.W.2d 370. Scott Bauer, *Wisconsin's Democratic governor signs his new legislative maps into law after Republicans pass them*, Associated Press (Feb. 20, 2024), https://apnews.com/article/wisconsin-redistricting-republican-democrat-9c2677a09e48152df323fbf5c55611ef.

## CONCLUSION

This Court should reject Attorney General Kaul's attempt to add a claim on appeal that he did not raise when he filed this case, and that was never before the Circuit Court when it decided this case.

Dated: March 12, 2024.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.81 for a brief produced with a proportional serif font. The length of this brief is 4,963 words.

Dated: March 12, 2024.

*Electronically Signed by Luke N. Berg*

LUKE N. BERG