STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP2362

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

Plaintiffs-Respondents,

CHRISTOPHER J. FORD, KRISTIN 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 FINAL ORDERS ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DIANE SCHLIPPER, PRESIDING

PLAINTIFFS-RESPONDENTS' SUPPLEMENTAL PETITION IN SUPPORT OF REQUEST TO BYPASS THE COURT OF APPEALS

JOSHUA L. KAUL
Attorney General of Wisconsin

HANNAH S. JURSS
Assistant Attorney General
State Bar #1081221

Attorneys for Plaintiffs-Respondents

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

INTRODUCTION

This appeal asks a critical question for the people of our State: whether Wis. Stat. § 940.04 can ban abortion except when necessary to preserve the pregnant woman's life. The circuit court agreed with State Plaintiffs-Respondents and Physician Intervenors-Respondents and held that, under the rationale of this Court's decision in *State v. Black*, Wis. Stat. § 940.04 is *not* an abortion statute.

Defendant-Appellant Joel Urmanski, District Attorney of Sheboygan County, has appealed, and all parties to the appeal agree that this Court should grant bypass. Appellant Urmanski has petitioned for bypass, the Physician Intervenors have responded in support of bypass, and State Respondents agree that this Court should grant bypass.

State Respondents present this supplemental petition to offer additional support for bypass. Whether *Black* controls is a question only this Court can definitively answer. And the women of Wisconsin should not have to wait any longer for a final, definitive answer on this critically important question.

Wisconsin women also deserve clarity on their state constitutional rights. That is why, if this Court grants bypass, State Respondents intend to present this Court with an additional basis for affirming that Wis. Stat. § 940.04 cannot be enforceable as to abortion: because such a reading would violate the Wisconsin Constitution. Multiple rights guaranteed by our constitution, including a woman's rights to control over her body, freedom over the direction of her life, and equal protection under the law, all protect against a law that would, if applicable to abortion, prohibit abortion unless necessary to save her life. State Respondents propose a schedule for staggered briefing to ensure full and fair litigation of that constitutional question.

ISSUES PRESENTED

This appeal asks whether Wis. Stat. § 940.04 applies to abortion or instead to feticide only, for three reasons:

1. Pursuant to this Court's rationale in *State v. Black*, whether Wis. Stat. § 940.04 is unenforceable as to abortion;

2. Aside from *Black*, whether Wis. Stat. § 940.04 has been impliedly repealed by Wisconsin's modern abortion laws;

3. Whether Wis. Stat. § 940.04 would be unconstitutional if construed as applicable to abortion. Below, Physician Intervenors argued that the statute would otherwise be unconstitutionally vague, in violation of due process. In this Court, both groups of Respondents plan to argue that the Wisconsin Constitution, including its guarantees of the rights to life, liberty, the pursuit of happiness, and the right to equal protection, prohibit construing section 940.04 as applying to abortion.

Urmanski also asks this Court to review two other issues: (1) whether State Respondents have standing, and (2) to decide a claim made by State Respondents but not litigated in their motion for final judgment: whether Wis. Stat. § 940.04 is not enforceable as to abortion because of prolonged disuse. Should this Court grant bypass, State Respondents are prepared to respond to arguments on these issues.

RELIEF REQUESTED

Plaintiffs-Respondents Attorney General Josh Kaul, The Wisconsin Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and Clarence P. Chou, M.D. ("State Respondents") agree with Defendant-Appellant-Petitioner Urmanski and Physician Intervenors that this Court should take jurisdiction of this appeal, and do so now. If this Court grants bypass, State Respondents ask for briefing and oral argument before this Court.

STATEMENT OF THE CASE

Physician Intervenors' response in support of bypass has detailed the recent history surrounding the interpretation of Wis. Stat. § 940.04 following the U.S. Supreme Court's overturning of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 212 (2022). State Respondents provide only an abbreviated statement of the case here.

I. *Dobbs* triggered immediate confusion over Wisconsin abortion law, and providers stopped services.

Dobbs threw Wisconsin into immediate statewide confusion over whether abortion services remained legal. The debate centered on a statute, originating in the mid-1800's and currently listed in Wis. Stat. § 940.04, which prohibits "[a]ny person, other than the mother," from "intentionally destroy[ing] the life of an unborn child" from the "time of conception" onward, unless "necessary. . . to save the life of the mother." Wis. Stat. §§ 940.04(1), (5), (6). The confusion in the law led abortion providers to halt abortion services across Wisconsin.[1]

---

[1] *See, e.g.,* Sarah Lehr, *The legal challenge of Wisconsin's 1849 abortion ban is awaiting its day in court. Where does the case stand?*, Wisconsin Public Radio (Sept. 30, 2022), https://www.wpr.org/legal-challenge-wisconsins-1849-abortion-ban-awaiting-its-day-court-where-does-case-stand (explaining that providers stopped providing abortions in Wisconsin following *Dobbs*).

II. Four days after *Dobbs*, State Respondents filed this lawsuit to obtain clarity that Wis. Stat. § 940.04 is unenforceable as to abortion. Three Wisconsin physicians intervened as additional plaintiffs.

Four days after *Dobbs*, State Respondents filed their complaint, which they later amended. (R. 4; 34, Pet.-App. 9–30.)[2] They presented two counts, both seeking a declaration that Wis. Stat. § 940.04 is unenforceable as to abortion.

First, they sought a declaration that Wis. Stat. § 940.04 is unenforceable as to abortion because it was impliedly repealed by Wisconsin's subsequently enacted, modern abortion laws. (R. 4; *see also* R. 34:16–22, Pet.-App. 20–26 (State Respondents' Amended Complaint).)[3]

Second, they sought a declaration that Wis. Stat. § 940.04 is unenforceable as to abortion because of its longstanding disuse and public reliance on *Roe*. (*See* R. 34:22–24, Pet.-App. 26–28.)

Three Wisconsin physicians intervened. (*See* R.75, Pet.-App. 33–47 (Physician Intervenors' Complaint).) They also raised two counts for declaratory relief that Wis. Stat. § 940.04 is unenforceable as to abortion. First, like State Respondents, they argued that Wis. Stat. § 940.04 had been superseded by Wisconsin's modern abortion laws. Second, they argued that Wis. Stat. § 940.04 is unenforceable as to abortion because it relies on arcane language with undefined medical standards. (R. 75, Pet.-App. 33–47.)

---

[2] The amended complaint named the district attorneys of Sheboygan, Milwaukee, and Dane Counties—where abortion services were being provided prior to *Dobbs*—as defendants.

[3] All cites to the Petitioners' Appendix cite to District Attorney Urmanski's Appendix.

District Attorney Urmanski moved to dismiss both complaints for failure to state a claim. (*See* R. 147, Pet.-App. 48–68 (circuit court order).) After briefing and oral argument, the circuit court entered an order denying Urmanski's motion to dismiss. (R. 147, Pet.-App. 48–68.)

The circuit court concluded that, under this Court's decision in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), Wis. Stat. § 940.04 is not an abortion statute. (R. 147:8–21, Pet.-App. 55–68.) The circuit court reasoned that the subsection in Wis. Stat. § 940.04 at issue in *Black*—Wis. Stat. § 940.04(2)(a)—which this Court concluded did not prohibit abortion and instead prohibited feticide only, was "nearly identical" to the subsection at issue here, Wis. Stat. § 940.04(1). (R. 147:9–12, Pet.-App. 56–59.) The circuit court explained that the two subsections proscribe the same conduct, except that Wis. Stat. § 940.04(2)(a) applies later in pregnancy and in turn imposes a higher penalty. (R. 147:9–12, Pet.-App. 56–59.) The circuit court held that every component of this Court's statutory interpretation analysis in *Black* applied with equal force to Wis. Stat. § 940.04(1). (R. 147:9–21, Pet.-App. 56–68.)

III. The circuit court declared that Wis. Stat. § 940.04 is unenforceable as to abortion under *Black*. District Attorney Urmanski appealed and asked this Court to grant bypass.

State Respondents next filed a motion for judgment on the pleadings as to the first count of their complaint. Physician Intervenors sought judgment on the pleadings on both counts in their complaint; the court converted Physician Intervenors' motion into a motion for summary judgment. (R. 160:5–10, Pet.-App. 73–78.)

Following briefing, the circuit court entered a final decision and order reaffirming its previous conclusion that this Court's analysis in *Black* controls and that Wis. Stat.

§ 940.04 prohibits feticide only, not abortion. (R. 183; Pet.-App. 80–93.) It issued a declaration that "Wis. Stat. § 940.04 does not apply to abortions." (R. 183:14, Pet.-App. 93.)[4]

Appellant Urmanski appealed. (R. 186; 187.) He has petitioned this Court for bypass. Physician Intervenors have also agreed that this Court should grant bypass.

ARGUMENT

State Respondents agree with Urmanski and Physician Intervenors that this Court should grant bypass, and do so before briefing in the court of appeals. Here they offer further support as to why this Court should grant bypass, particularly as to the additional constitutional argument State Respondents intend to make before this Court, and propose a staggered briefing schedule to accommodate that argument.

---

[4] The circuit court order is final for purposes of appeal as to all parties. District Attorney Urmanski has named State Respondents and all Physician Intervenors as Respondents to this appeal, and the circuit court closed the case upon issuing its order. *Dane County Case Number 2022CV1594 Josh Kaul v. Chris Kapenga*, Wis. Cir. Ct. Access, https://wcca.wicourts.gov/caseDetail.html?caseNo=2022CV001594&countyNo=13 (last visited Feb. 27, 2024). The circuit court explained that because Urmanski conceded that one Intervenor had standing, the court did not need to address other parties' standing. Having granted the complete declaratory relief that State Respondents and Physician Intervenors sought, the circuit court further explained that it "denies the State Agencies' motion for judgment on the pleadings as moot." (R. 183:2, Pet.-App. 81.) The effect of the final order was to afford State Respondents the full relief they sought: "a declaration that § 940.04 does not apply to consensual abortions." (R. 183:1–2, 14, Pet.-App. 80–81, 93.)

I. Bypass is warranted when a case meets the criteria for review and will ultimately reach this Court.

This Court may take jurisdiction of an appeal pending in the court of appeals if "[i]t grants direct review upon a petition to bypass filed by a party." Wis. Stat. § 808.05(1). A case warranting bypass "is usually one" which (1) "meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1)," and (2) the Court will "ultimately" "choose to consider regardless of how the Court of Appeals might decide the issues." Wisconsin Supreme Court Internal Operating Procedures, § III.B.2. This Court has not adopted a hard-and-fast rule on whether court of appeals briefing is required before it will grant a bypass petition.

II. This appeal meets the criteria for bypass.

Whether Wis. Stat. § 940.04 is enforceable as to abortion has tremendous statewide impact for Wisconsin women and medical professionals. *See* Wis. Stat. § (Rule) 809.62(1r). This appeal meets the criteria for bypass, and prior to court of appeals briefing, for three additional reasons. First, only this Court can decide whether the circuit court properly applied its prior holding in *State v. Black*. Second, interim appellate litigation would prolong the harms from confusion caused by *Dobbs*. And third, this Court should consider Respondents' alternative basis to affirm the circuit court's decision: that the Wisconsin Constitution precludes a reading of Wis. Stat. § 940.04 as enforceable as to abortion.

A. This Court should grant bypass because whether *Black* controls is a question this Court must answer.

This Court should grant bypass now because only it can answer how its prior holding in *Black* applies here.

The confusion following *Dobbs* arose primarily from the conflict between two Wisconsin statutes, both titled "Abortion": Wis. Stat. § 940.04(1) (at issue here) and Wis. Stat. § 940.15, enacted in 1985. 1985 Wis. Act 56, § 35. If both applied to abortion, the former would criminalize abortions specifically recognized as lawful by the latter.

Wisconsin Stat. § 940.15 makes providing an abortion a felony only after the point of "viability," and provides exceptions to that prohibition "if the abortion is necessary to preserve the life or health of the woman." Wis. Stat. § 940.15.

So, if Wis. Stat. §§ 940.04(1) and 940.15 were both enforceable as to abortion, those statutes would conflict as to both: (1) when in terms of stage of pregnancy abortion becomes prohibited (after conception versus after viability); and (2) exceptions to the prohibition for the pregnant woman's health (when necessary to save her life versus when necessary to preserve her life *or* health).

In *Black*, confronted with the conflict that would exist between a related subsection of Wis. Stat. § 940.04 and Wis. Stat. § 940.15 if both were enforceable as to abortion, this Court concluded that both provisions could *not* apply to abortion. It held that the subsection of Wis. Stat. § 940.04 at issue there prohibited the crime of feticide only, not abortion. *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

Black concerned Wis. Stat. § 940.04(2)(a), which prohibits "any person, other than the mother," "[i]ntentionally destroy[ing] the life of an unborn quick child." The only textual differences between that subsection and Wis. Stat. § 940.04(1)—at issue here—are that (1) Wis. Stat. § 940.04(1)

prohibits the intentional destruction of an "unborn child" whereas Wis. Stat. § 940.04(2)(a) prohibits the intentional destruction of an "unborn *quick* child," and (2) Wis. Stat. § 940.04(2)(a) in turn imposes a harsher punishment than Wis. Stat. § 940.04(1).

Given the nearly identical text at issue in *Black* and here, the circuit court held that it was bound by *Black*'s rationale. (R. 147:8–21, Pet.-App. 55–68, 87–88.)

Bypass is warranted because this Court must be the one to answer whether *Black*'s rationale controls or should be revisited. Just as in the circuit court, the court of appeals has no power to overrule a supreme court decision. *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 56, 403 Wis. 2d 1, 976 N.W.2d 263. That is true even if the court of appeals were to disagree with this Court's rationale in *Black*. *Id.* The court of appeals would also have no authority to dismiss anything in *Black* by "concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682.

This Court should thus grant bypass before briefing because this Court would not gain anything from waiting to grant bypass until after briefing in the court of appeals. Urmanski has preserved arguments for this Court alone as to why he thinks this Court should revisit its *Black* rationale.

And because the court of appeals—like the circuit court—would be bound by this Court's decision in *Black*, the court of appeals—like the circuit court—would not have reason to address the second issue presented in this appeal: whether, if it were otherwise enforceable as to abortion, Wis. Stat. § 940.04 has been impliedly repealed by Wisconsin's modern abortion laws. Given *Black*, the court of appeals likely would not have reason to confront the massive conflict in Wisconsin statutes that would exist if *Black*'s rationale did not control. Indeed, if both Wis. Stat. §§ 940.04 and 940.15

applied to abortion, the former would irreconcilably conflict with the latter. And Wisconsin's other modern abortion laws create a comprehensive regime for regulation of lawful abortion that is fundamentally incompatible with a near-total ban. In both circumstances, this Court recognizes that later enactments impliedly repealed the earlier law. *See, e.g., State v. Dairyland Power Co-Op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971); *Wisth v. Mitchell*, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971).

In sum, "regardless of how the court of appeals might decide the issue," this Court will "ultimately" be the one to answer these questions. Wisconsin Supreme Court Internal Operating Procedures, § III.B.2.

B. This Court should grant bypass now because the delay of interim appellate litigation would cause harm to Wisconsin women and medical professionals.

This Court should also grant bypass because interim appellate litigation would unnecessarily prolong harm caused by the confusion in Wisconsin law that existed following *Dobbs*.

Wisconsin women and medical professionals have experienced the ramifications caused by confusion over whether Wisconsin has a law that may be enforced to prohibit any abortion unless necessary to save a pregnant woman's life. Following the issuance of *Dobbs* on June 24, 2022, providers across Wisconsin immediately stopped providing abortions.[5] Though Planned Parenthood resumed providing services in Madison and Milwaukee in mid-September of

---

[5] *See, e.g.,* Sarah Lehr, *The legal challenge of Wisconsin's 1849 abortion ban is awaiting its day in court. Where does the case stand?*, *supra* n.1 (explaining that providers stopped providing abortions in Wisconsin following *Dobbs*).

2023, and in Sheboygan in December, other groups have called for the prosecution of medical professionals who have provided women with abortion care since that point.[6] Further, the possibility that the court of appeals might see the issues differently than this Court would lead to added risks of confusion. Indeed, absent a declaratory judgment against him, Appellant Urmanski has made clear that he would prosecute under Wis. Stat. § 940.04. (*See* R. 34:14, Pet.-App. 18.) The bottom line is that Wisconsin women and medical professionals will continue to face harm until there is a final, definitive ruling from this Court that Wis. Stat. § 940.04 is unenforceable as to abortion.

C. This Court should grant bypass now to consider whether Wis. Stat. § 940.04 would be unconstitutional if it applied to abortion.

As an alternative basis to affirm the circuit court's decision, State Respondents ask this Court to further consider whether the Wisconsin Constitution precludes a reading of Wis. Stat. § 940.04 as applying to abortion. Bypass will allow this Court to address this constitutional question and provide important clarity to the Wisconsin public.

1. Multiple rights guaranteed to women by the Wisconsin Constitution prohibit a law that would ban all abortion after conception, with the only exception being to save the woman's life.

If this Court grants bypass, State Respondents intend to argue that though the U.S. Supreme Court has now held

---

[6] Todd Richmond, *Anti-abortion groups demand liberal Wisconsin prosecutors charge abortion providers despite ruling*, AP News (Sept. 26, 2023, 3:56 p.m.), https://apnews.com/article/wisconsin-abortion-lawsuit-1849-ban-prosecutors-c3b513eba2c498e9639a9c5eaef5d31b.

that the federal constitution does not guarantee it, the Wisconsin Constitution protects against a law that would, if applicable to abortion, purport to ban it except when necessary to save the woman's life.

As this Court has recognized, the Wisconsin Constitution may and, in certain circumstances, does provide greater protections than the federal constitution. "Certainly, it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court." *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

State Respondents will argue that multiple provisions of the Wisconsin Constitution protect against a law that would prohibit any abortion after conception without exception other than when necessary to save the pregnant woman's life. These state constitutional rights include:

First, unlike the federal constitution, the Wisconsin Constitution expressly articulates inherent rights of the people. The Wisconsin Constitution begins with the guarantee that "[a]ll people are born equally free and independent, and have *certain inherent rights*; among these are *life, liberty, and the pursuit of happiness*." Wis. Const. art. I, § 1 (emphasis added). "Too much dignity cannot well be given to that declaration." *State v. Redmon*, 134 Wis. 89, 138, 114 N.W. 137 (1907). Not only does the Wisconsin Constitution expressly articulate these inherent rights to life, liberty, and the pursuit of happiness, it explains that governments are created to "secure" such rights. Wis. Const. art. I, § 1.

Until 1982, the Wisconsin Constitution read that "[a]ll *men* are born equally free and independent" with the enumerated inherent rights. Wis. Const. art. I, § 1 (1979) (emphasis added). The people of Wisconsin, however, then

voted to amend our constitution to make clear that "[a]ll *people* are born equally free and independent" with those inherent rights. Wis. Const. art. I, § 1 (emphasis added); 1979 J.R. 36, 1981 J.R. 29, *vote* Nov. 1982.

Bodily autonomy—the right of control over one's body without government intrusion and freedom from governmental restraint over one's own body—is *the* "core" liberty right protected by substantive due process. *Winnebago County v. Christopher S.*, 2016 WI 1, ¶ 37, 366 Wis. 2d 1, 878 N.W.2d 109 (citation omitted). Substantive due process rights have also "been traditionally afforded" to "fundamental liberty interests" including "marriage, family, [and] procreation." *In re Zachary B.*, 2004 WI 48, ¶ 19, 271 Wis. 2d 51, 678 N.W.2d 831.

This Court has recognized that if such rights are to "mean[] anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eberhardy v. Circuit Court for Wood County*, 102 Wis. 2d 539, 562, 307 N.W.2d 881 (1981) (citation omitted); *see also State v. Oakley*, 2001 WI 103, ¶ 45, 245 Wis. 2d 447, 629 N.W.2d 200 (A.W. Bradley, J., dissenting).

Put simply, a woman loses her most fundamental, inherent liberty rights over her life—her control over her body and the ability to direct her own life—if the State of Wisconsin can *force* her to remain pregnant against her will instead of obtaining an abortion. But that is exactly what a statute like Wis. Stat. § 940.04 would purport to do if construed as applicable to abortion: take the choice of "whether to bear or beget a child" away from the woman herself and give it to the State.

As bodily autonomy is *the* "core" protected liberty interest, *Christopher S.*, 366 Wis. 2d 1, ¶ 37 (citation omitted), and because a law like Wis. Stat. § 940.04, if applicable to abortion, would purport to remove a woman's control over her bodily autonomy, heightened scrutiny would apply. *Id.* ¶ 36. But ultimately, whether reviewed under heightened scrutiny or not, a prohibition of any abortion after conception except when necessary to save her life would fail no matter what. The State of Wisconsin has no "legitimate governmental interest" that could justify such a broad prohibition, with the only exception being when an abortion is necessary to save a pregnant woman from dying.[7]

Second, article I, section 1's guarantee of equal protection under the law protects against a law that would force women—against their will—to remain pregnant from conception onward with the only exception being when the pregnancy will otherwise kill them. This Court has emphasized that it must carefully examine laws that would "shackle women with . . . subservience," "lest outdated social stereotypes result in invidious laws or practices." *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 138, 216 N.W.2d 197 (1974) (citation omitted). A law like Wis. Stat. § 940.04, if applicable as to abortion, would violate equal protection by requiring only women to endure forced pregnancy and labor and by

---

[7] Rights connected to deeply personal decisions about one's life, body, and interpersonal and intimate relationships—particularly when individual rights of due process, equal protection, and protections against unreasonable search have been considered together—have also at times been described as a right of "privacy." *See In re Kading*, 70 Wis. 2d 508, 525, 235 N.W.2d 409 (1975); *see also* Wis. Const. art. I, §§ 1, 11. However viewed, these rights prohibit the State from imposing a near-total abortion ban—from *forcing* a woman to remain pregnant against her will without exception unless medical professionals determine she will die if she does not have an abortion.

singling out abortion from other critical healthcare for government prohibition.

This Court—as the Court with final authority to interpret the Wisconsin Constitution—should grant bypass and, in so doing, also consider this critically important question.

2. The rights guaranteed to women by the Wisconsin Constitution provide an additional alternative basis for affirming the circuit court's decision.

"As a general rule," appellate courts may affirm a lower court's ruling on different grounds than those relied upon by the lower court. *Vilas County v. Bowler*, 2019 WI App 43, ¶ 30 n.6, 388 Wis. 2d 395, 933 N.W.2d 120. Importantly, this principle extends to arguments "even if. . . not argued by the parties" below. *Farmers Auto Ins. Ass'n v. Union Pacific R. Co.*, 2008 WI App 116, ¶ 34, 313 Wis. 2d 93, 756 N.W.2d 461; *Correa v. Farmers Ins. Exchange*, 2010 WI App 171, ¶ 4, 330 Wis. 2d 682, 794 N.W.2d 259.

This principle may be applied "as long as the record is adequate and the parties have the opportunity to brief the issue on appeal." *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 2006 WI App 161, ¶ 14, 295 Wis. 2d 556, 721 N.W.2d 704.

State Respondents intend to raise a constitutional question of law about the construction of Wis. Stat. § 940.04. The record in this case will be adequate because the constitutional question will look to publicly available, generally applicable facts. *Glendenning's*, 295 Wis. 2d 556, ¶ 14. And State Respondents propose staggered briefing before this Court to ensure the opportunity to brief this constitutional argument. *Id.*

III. If this Court grants bypass, State Respondents request staggered briefing to ensure full and fair litigation of the constitutional question.

District Attorney Urmanski is the appellant in this appeal. The parties did not litigate this constitutional question in the circuit court. It would therefore be unfair to expect District Attorney Urmanski to respond to constitutional arguments in his Initial Brief that State Respondents and Physician Intervenors have, thus far, not yet advanced.

To ensure that District Attorney Urmanski has a full "opportunity to brief the issue on appeal," *Glendenning's Limestone*, 295 Wis. 2d 556, ¶ 14, should this Court grant this supplemental bypass petition, State Respondents ask this Court to set briefing in this case in accordance with the general framework and page limitations of cross-appeals, modified to this Court's timeframes for cases it grants. *See* Wis. Stat. § (Rule) 809.19(6).

State Respondents would propose the briefing as follows: (1) District Attorney Urmanski files his initial brief on the issues litigated below; (2) State Respondents file a combined response/initial brief, responding to District Attorney Urmanski's arguments and raising the alternative constitutional arguments; (3) District Attorney Urmanski files a combined reply/response brief; and (4) State Respondents file a reply brief.

State Respondents would also suggest that both sets of Respondents' briefing deadlines occur on the same dates so that Appellant Urmanski may respond to those arguments together, if he should see fit to do so.

****

The U.S. Supreme Court has returned the question of abortion to the states. This case offers an opportunity for this Court to answer that question for Wisconsin. It should grant bypass and hold that Wis. Stat. § 940.04 is not enforceable as to abortion.

CONCLUSION

This Court should grant bypass and assume jurisdiction of this appeal.

Dated this 27th day of February 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

ANTHONY D. RUSSOMANNO
Assistant Attorney General
State Bar #1076050

S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

Attorneys for Plaintiffs-Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8101 (HSJ)
(608) 267-2238 (ADR)
(608) 266-5457 (SMM)
(608) 294-2907 (Fax)
jursshs@doj.state.wi.us
russomannoad@doj.state.wi.us
murphysm@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a response produced with a proportional serif font. The length of this brief is 4411 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.

Dated this 27th day of February 2024.

Electronically signed by Hannah S. Jurss
HANNAH S. JURSS
Assistant Attorney General