STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

JOSH KAUL, in his official capacity as Attorney General, Wisconsin Department of Justice, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD, and SHELDON A. WASSERMAN, M.D., in his official capacity as Chairperson of the Wisconsin Medical Examining Board,

Plaintiffs,

and

CHRISTOPHER J. FORD, KRISTIN LYERLY, and JENNIFER JURY MCINTOSH,

Intervenors,

v.

Case No. 2022-CV-1594
Declaratory Judgment: 30701

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,

Defendants.

PLAINTIFFS' REPLY BRIEF TO DISTRICT ATTORNEY CHISHOLM'S RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT I OF PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

District Attorney Chisholm's response to Plaintiffs' motion for judgment on the pleadings raises a challenge to something this Court already decided: that the Attorney General and other Plaintiffs have standing. (Doc. 167:4–5.)[1] This Court should reject the attempts to go backwards. This is particularly true given that no Defendant disputes that the case should move forward.

ARGUMENT

There is neither support nor reason for this Court reconsidering its ruling that Plaintiffs have standing.

This Court already decided Plaintiffs' standing, and there is no reason to revisit it now. Reconsideration "is not a vehicle for making new arguments or submitting new evidentiary materials [that could have been submitted earlier]." *Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶ 14, 400 Wis. 2d 592, 970 N.W.2d 243 (citation omitted). Rather, a "reconsideration movant must either present 'newly discovered evidence or establish a manifest error of law or fact.'" *Id.* at ¶ 13 (citation omitted). And a "'manifest error' must be more than disappointment or umbrage with the ruling"—a movant has to prove this Court ruled with "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Id.* at ¶ 14 (citation omitted).

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[1] Urmanski also seeks reconsideration of this Court's standing decision and tries to relitigate his arguments on it. (*See* Doc. 169:2–3; 170:6–11). As Plaintiffs argue in their reply to Urmanski's brief and here, this Court should deny Urmanski's motion for reconsideration without further litigation.

Chisholm effectively argues that this Court should reconsider its motion to dismiss ruling that the Attorney General has standing. Chisholm argues that it matters that the Attorney General does not supervise district attorneys. (*See* Doc. 167:4–5.) But this observation raises no misapplication of law or fact to warrant reconsideration of this Court's decision. Chisholm was heard on standing prior to this Court's order denying Urmanski's motion to dismiss. (Doc. 146:26–29.) And this Court's standing ruling was not based on the Attorney General supervising district attorneys. (*See* Doc. 147:7–8.)

To the contrary, this Court's recognition that Plaintiffs, particularly the Attorney General, have standing rested on caselaw that makes clear that in rare cases involving unique issues of statewide importance, government officers—and particularly the Attorney General—have standing to bring declaratory judgment actions to obtain clarity in the law. (Doc. 147:7–8) (citing *In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W.633 (1936), and *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).) This Court's decision also properly recognized that such standing in these unusual, important cases, aligns with Wisconsin's liberal standing doctrine that involves no blackletter standing bar, but to the contrary, is a matter of judicial policy aimed to ensure that legal arguments will be carefully developed. (Doc. 147:8 (citing *McConkey v. Van Hollen*, 2010 WI 57, ¶ 16, 326 Wis. 2d 1, 783 N.W.2d 855)); *see also Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 16, 403 Wis. 2d 607,

976 N.W.2d 519 (standing in Wisconsin "is limited only by prudential considerations").[2]

The attempt to have this Court relitigate Plaintiffs' standing is further misplaced because the case will move forward no matter what. Indeed, neither Chisholm nor any other Defendant is arguing that the case should not move forward for a lack of any standing by either Plaintiffs or Intervenors. (*See* Doc. 167; 168; 170.)

Chisholm does not challenge the standing of other State Plaintiffs, DSPS, MEB, and Dr. Wasserman. (*See* Doc. 120; 146:28–29.) Ozanne does not raise a challenge to Plaintiffs' standing. (*See* Doc. 168; *see also* Doc. 146:29 (Ozanne oral argument).) And Urmanski concedes that at least one Intervenor has standing. (Doc. 170:14.) There is neither a basis in the law nor practical reason why this Court should reconsider Plaintiffs' standing. *See Bauer*, 400 Wis. 2d 592, ¶ 14.

Really, Chisholm's arguments about the Attorney General's standing seem grounded in his repeated assertions that the prosecutorial discretion of district attorneys should not be infringed. (*See* Doc. 167.) This is also something Chisholm

[2] This Court should reject without further consideration Urmanski's attempts to reargue *Lynch* and *State ex rel. LaFollette v. Dammann*, 220 Wis. 2d 17, 264 N.W.2d 627 (1936). (*See* Doc. 170:10–12.) Rearguing cases already argued is of course not grounds for reconsideration. Nor can Urmanski come anywhere close to showing a manifest error in this Court's reasoning by pointing to federal caselaw with different standing requirements or two Wisconsin cases involving questions of who would or would not have standing to challenge a particular regulatory body's decision *not* to prosecute a particular matter. *See Wis. Educ. Ass'n Council v. Wis. State Elections Bd.*, 2000 WI App 89, ¶ 18, 234 Wis. 2d 349, 610 N.W.2d 108 (discussing *Wis. Pharmaceutical Ass'n v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953) and explaining that "the gravamen of both disputes [was] the failure of a regulatory board to prosecute those whom the plaintiffs believed had violated the law.").

argued prior to this Court's decision on Plaintiffs' standing. (*See* Doc. 120 (letter prior to oral argument), Doc. 146:26–29 (oral argument).)

It's also inapposite, as Plaintiffs already explained. (Doc. 146:16.) Chisholm himself acknowledges that "[c]ontradictory statutes cannot be remedied by prosecutorial discretion." (Doc. 167:5).

No one in this case is challenging the ability of Wisconsin prosecutors to prosecute enforceable Wisconsin law. That's not what's at issue in this action. Rather, what is at issue is whether Wis. Stat. § 940.04 is, as a matter of law, enforceable as to abortion. No Wisconsin prosecutor has the authority to enforce something that is *not* enforceable Wisconsin law. A Wisconsin prosecutor does not, for example, have prosecutorial discretion to prosecute someone in Wisconsin for a violation of Florida criminal law. Why not? Because Florida law is not enforceable Wisconsin law. If Wis. Stat. § 940.04, as a matter of law, is not enforceable as to abortion, it is not an exercise of prosecutorial discretion to decide whether or not to prosecute a physician under Wis. Stat. § 940.04 for providing an abortion. This case does not implicate prosecutorial discretion.

CONCLUSION

This Court should grant Plaintiffs' motion for judgment on Count I of Plaintiffs' Amended Complaint. It should declare that Wis. Stat. § 940.04 is unenforceable as to abortion.

Dated this 29th day of September 2023.

Respectfully submitted,

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