FILED
09-29-2023
CIRCUIT COURT
DANE COUNTY, WI
2022CV001594

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 DANE COUNTY

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.

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.

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

BRIEF OF *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS CHISHOLM AND OZANNE BRIEFS IN RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND INTERVENORS' MOTION FOR SUMMARY JUDGMENT BY PUBLIC RIGHTS PROJECT AND THE ASSOCIATION OF PROSECUTING ATTORNEYS

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INTERESTS OF AMICI CURIAE

Public Rights Project ("PRP") is a not-for-profit legal advocacy organization committed to equitable enforcement of law. Operating at the intersection of community organizing and government enforcement, PRP seeks to catalyze more rights protection by our network of nearly 200 state, local, and tribal government partners. PRP provides technical assistance, training, and legal support to drive enforcement that improves the daily lives of historically underserved groups.

PRP also represents elected officials and local governments closest to the people, and these partners have a distinct obligation to support the health and welfare of their constituents, including reproductive healthcare. We have represented district attorneys in court fighting to expand reproductive health care as well as defending their ability to make enforcement choices that they deem in the best interest of public safety. As a result of these activities, we understand the particular importance that abortion plays in decisions about one's own health and economic welfare.

The Association of Prosecuting Attorneys ("APA") is a national non-profit organization created by prosecutors from across the country to strengthen their efforts in ensuring safer communities and improving their performance in the criminal justice system. The APA provides resources such as training and technical assistance to develop proactive and innovative prosecutorial practices. It acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including by submitting briefs as *amicus curiae* in appropriate cases. The APA's board of directors includes current prosecutors from states throughout the nation. The APA has sixteen attorneys on staff with over 350 years of collective criminal justice experience.

Together, PRP and APA file this brief in support of Defendants Dane County District Attorney Ismael R. Ozanne and Milwaukee County District Attorney John T. Chisholm to (1) affirm their right and responsibility to exercise appropriate prosecutorial discretion in their communities and enforce applicable state and federal law in line with their specific community priorities; (2) explain that prosecutorial discretion simply does not apply when certain conduct is not covered by the statute at issue; and (3) press for a final judgment in this case holding that Wis. Stat. § 940.04 is a feticide statute and does not cover consensual medical abortions.

ARGUMENT

District Attorneys Chisholm and Ozanne are right to underscore the long established and vital legal foundations of prosecutorial discretion and independence. And they express concern that a decision from this Court could undermine those core principles. We write here to provide support for those core principles of prosecutorial discretion and independence, and we explain that this Court's correct reading of Wis. Stat. § 940.04 as a feticide statute simply leaves no room for prosecutor action (and no place for discretion or uneven enforcement).

This Court simply does not need to take up the issues of local prosecutorial discretion and independence, principles that do not apply here where the abortion conduct at issue is simply not covered by § 940.04. But this Court must make its preliminary ruling on the scope and subject matter of § 940.04 final because Defendant Urmanski[1] and other state agents[2] in Wisconsin have posited that § 940.04 can be enforced against Wisconsin physicians providing consensual medical

[1] Urmanski Consolidated Brief in Opposition to the Plaintiffs' and Intervenors' Motions for Judgment on the Pleadings and/or Summary Judgment at 13-26.
[2] Fond du Lac County District Attorney Eric Toney, and a 2022 Republican candidate for Wisconsin Attorney General, said he would enforce Section 940.04 as a ban on all abortions except those necessary to save the life of the mother. Aff. of Dr. Christopher Ford.

abortions, and other prosecutors have expressed their confusion about what the law is.[3] Only this Court can decide there is no place for the prosecutor here, and no discretion to exercise, because the statute does not cover physicians providing consensual medical abortions.

Finally, we press for a broad declaration because all Wisconsin prosecutors, law enforcement, and other state agents have an interest in enforcing the law, and they all need this Court's clear and final guidance as to what law is enforceable against what conduct. This Court should issue a final judgment declaring that Wis. Stat. § 940.04 is a feticide statute and inapplicable in the abortion context. A broad declaration of this nature will apply across the state and require universal compliance.

I. American Law Respects Broad Prosecutorial Discretion Responsive to Community Priorities, But Discretion Does Not Extend to Prosecuting Conduct that is Not In Fact Covered by the Statute.

In any lawsuit, such as this one, in which prosecutors stand as defendants, it is important to consider the essential role of prosecutorial discretion within the American system. However, prosecutorial authority does not extend to the prosecution of conduct that is not in fact criminal under a given statute, and it is insufficient to resolve the question of what activities are truly criminal. For that, judicial action is needed.

The United States is the only nation with locally elected Prosecutors. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 Yale L.J. 1528, 1549 (2012). America's locally-elected prosecutors are accountable to their local communities and are "administrators of justice." American Bar Association, *Criminal Justice Standards for the Prosecution Function*, Standard 3-1.2 (a), (b) Functions and Duties of the Prosecutor, 4th Ed. (2017); *Strickler v. Greene*, 527 U.S.

[3] *Wisconsin DAs and Prosecuting Abortion Cases*, PBS Wisconsin (July 1, 2022) (La Crosse County District Attorney Tim Gruenke stating he would enforce § 940.04 if upheld by the court, but stating it is unclear what criminal abortion laws apply at this time).

263, 281 (1999); *Peters v. State*, 70 Wis. 2d 22, 41, 233 N.W.2d 420 (1975). Their duty "is to seek justice within the bounds of the law, not merely to convict." ABA Standard 3-1.2.

To fulfill the duty to pursue justice, the National District Attorney Association standards direct prosecutors to "screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest." NDAA STANDARD § 4-1.3 (2009). The ABA Standards for the Prosecution Function additionally provide that "the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support." ABA Standard 3-4.4.

These standards guide the prosecutor in serving the public interest with integrity and balanced judgment to increase public safety by pursuing criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. Protecting the rights of all those who interact with the criminal legal system sometimes means dismissals or diversions, negotiated pleas, or trials.

Specifically, these professional standards provide tools for deciding how to fairly and efficiently distribute limited prosecutorial resources. For example, standards ask prosecutors to consider whether there is a history of non-enforcement of an applicable law, whether the accused has already suffered substantial loss in connection with an alleged crime, or whether the extent of the harm caused by an offense is too small to warrant a criminal sanction. *See* ABA Standard § 3-4.4; and NDAA STANDARD § 4-1.3 (2009).

Even with the helpful guidance that these standards provide, the background principle is that a district attorney in Wisconsin is a constitutional officer endowed with great discretion in deciding whether to prosecute in a particular case. *County of Kenosha v. C & S Mgmt.*, 223 Wis. 2d 373, 400, 588 N.W.2d 236 (1999); *State v. Peterson*, 195 Wis. 351, 359, 218 N.W. 367, 369-370

(1928). Wisconsin prosecutors indeed have the "right and obligation to exercise [their] prosecutorial discretion to determine whether to bring charges under any particular set of circumstances." DA Ozanne Response at 5 (citing *State v. Karpinski*, 92 Wis. 2d 599 (1979), for the proposition that deciding whether to prosecute and under which statute "completely falls within the generally accepted bounds of prosecutorial discretion"). Prosecutors "are under no obligation or duty to charge in all cases where there appeals to be a violation of the law." *Id.*

Broad prosecutorial discretion, however, does not extend to charging conduct that is not in fact criminalized by a given statute. While the prosecutor may strike hard blows, prosecuting with earnestness and vigor, "he is not at liberty to strike foul ones." *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 84 L. Ed. 2d 1 (1985). Because while prosecutors exercise near total discretion about what and whom to charge, they can lodge criminal charges only where criminal conduct is involved. Conduct that is not criminal is not chargeable.

This Court has preliminarily ruled that providing consensual medical abortion is not conduct that is covered by Wis. Stat. § 940.04. That statute is a feticide statute, and it simply does not cover physician-provided consensual medical abortion, despite Defendant Urmanski's arguments to the contrary. Because § 940.04 does not encompass consensual medical abortion, it may not be used by prosecutors to charge providers, pregnant people, or others assisting in the provision or receipt of consensual medical abortion. There is simply no discretion to exercise when the conduct at issue is outside the scope of the criminal statute. But because there remains confusion on the part of some state actors about what conduct is in fact criminalized by § 940.04, this Court must issue a clear and final judgment that the statute does not cover consensual medical abortions.

II. This Court Must Issue a Broad Final Judgment Applying State-Wide and Declaring that Section 940.04 is a Feticide Statute.

This Court has preliminarily ruled that Wis. Stat. § 940.04 is a feticide statute, and that Wis. Stat. § 940.15, by contrast, regulates consensual medical abortion. That determination is grounded in the text of § 940.04 and Wisconsin Supreme Court precedent analyzing the nearly identical language of the same main statute.[4] *See State v. Black*, 188 Wis. 2d 639, 642, 526 N.W.2d 132 (1994) ("The statute plainly proscribes feticide…"). There is further evidence that § 940.04 is a feticide statute, such as: the Wisconsin Legislature's failure to amend § 940.04 post-*Black* to encompass consensual medical abortions (despite making many other amendments); § 940.04 is located among other homicide statutes in the criminal code; and § 940.15 and several other statutes separately regulate consensual pre- and post-viability medical abortions.[5] In addition, if § 940.04 criminalizes consensual medical abortion, it would improperly conflict with several *later*-enacted statutes that permit consensual medical abortions under specific circumstances. This Court's preliminary determination that § 940.04 is a feticide statute and does not criminalize consensual medical abortions is thus correct. But a final judgment declaring that correct determination is needed.

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[4] "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 124 (2004).

[5] Those other statutes include, for example, that: abortion must be performed by a physician, Wis. Stat. § 940.15(5); the physician must have admitting privileges in a hospital within 30 miles of where the abortion is performed, Wis. Stat. § 253.095(2); regulations on post-viability abortions, Wis. Stat. §§ 940.15(2), 253.107; ban after 20 weeks gestation absent a medical emergency, Wis. Stat. § 940.16; requirements on how medication abortions may be provided, Wis. Stat. § 253.105; requirements for consent, Wis. Stat. § 253.10; requirements for parental consent for a minor to be provided with an abortion and judicial bypass, Wis. Stat. §§ 48.257, 48.375, 809.105, 895.037; reporting requirements, Wis. Stat. § 69.186; and governmental funding prohibitions, Wis. Stat. § 20.927.

Wisconsin's Uniform Declaratory Judgments Act grants Wisconsin courts the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Wis. Stat. § 806.04. This Court should take care to craft a broad declaration that applies to all state prosecutors for two reasons. One, all Wisconsin prosecutors and their successors in interest would have authority to charge under § 940.04 in accordance with what this Court finally determines its scope to be. Two, consensual medical abortions have historically been provided all over the state of Wisconsin, and not merely in the three counties represented by the named defendant-prosecutors.

In fact, all three defendant-prosecutors in this case implore this Court to provide final clarity on what is in fact chargeable under § 940.04. *See, e.g.*, Chisholm Brief In Response to Plaintiffs' Motion for Judgment on the Pleadings and Intervenors' Motion for Summary Judgment at 2 ("In order to effectively administer justice, District Attorney Chisholm agrees that the citizens of Wisconsin deserve a clear understanding of what fundamental rights are protected under state statutes."). And all three defendant-prosecutors will obey this Court's declaration. *See* Chisholm Brief at 2 ("Defendant Chisholm will accept and abide by any decision of this Court."); Ozanne Combined Response Plaintiffs' Motion for Judgment on the Pleadings and Intervenors' Motion for Summary Judgment at 3 ("DA Ozanne intends to await the Court's declaration of Wisconsin law, and to abide by the law as the Court declares it to be . . . DA Ozanne has made an express statement that he will abide by the Court's ruling . . . and will not charge for consensual abortions under that statute, just as he would refrain from charging under any other statute that did not apply to the conduct at issue."); Urmanski Decl. at 2 ("A declaratory judgment would be binding on me as a party to the lawsuit.").

But absent a judgment that is clearly binding on all the *other* local prosecutors across Wisconsin, questions will remain regarding whether a prosecutor in Washington County or Jefferson County or Monroe County or in any of the other sixty-six Wisconsin counties not named in this case could charge physicians for providing consensual medical abortions under § 940.04.

This Court must thus issue a clear and final judgment articulating what the law is. And because this Court has undertaken a careful and correct analysis of legal precedent, statutory text, legislative intent and inaction, and the relation of § 940.04 to homicide statutes as well as abortion statutes, we urge this Court to hold clearly, and on a statewide basis, that § 940.04 is a feticide statute and unenforceable in the consensual medical abortion context. Defendant-prosecutors Chisolm and Ozanne agree. *See, e.g.,* Chisholm Brief at 5 ("Defendant Chisholm further agrees that based on the Court's interpretation of *State v. Black*, 188 Wis. 2d 639, 526 N.W. 2d 132 (1994). "[T]here is no basis to prosecute medical consensual abortion under Wis. Stat. § 940.04." *Id.*

CONCLUSION

For the reasons above, this Court should issue a final judgment declaring that § 940.04 is a feticide statute.

RESPECTFULLY SUBMITTED September 29, 2023.

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