

FILED
09-18-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2023AP002362

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

Plaintiffs-Respondents

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

Intervenor-Respondents,

vs.

JOEL URMANSKI, in his official capacity as District
Attorney for Sheboygan County, Wisconsin,

Defendant-Appellant

JOHN T. CHISHOLM, in his official capacity as District
Attorney for Milwaukee County, Wisconsin, and ISMAEL
R. OZANNE, in his official capacity as District Attorney
for Dane County, Wisconsin,

Defendants-Respondents.

**NON-PARTY *AMICI CURIAE* BRIEF OF LOCAL ELECTED
OFFICIALS IN SUPPORT OF RESPONDENTS**

TABLE OF CONTENTS

	Page
I. STATEMENT OF INTEREST	1
II. INTRODUCTION	2
III. ARGUMENT	3
A. Interpreting § 940.04 as an Abortion Ban Would Corrode Public Trust, Undermining Local Governments	3
B. DA Urmanski's Interpretation of § 940.04 Overrides More Recent Legislation and Threatens Access to Essential Medical Care.....	7
C. Local Governments Cannot and Should Not Use Limited Resources to Second-Guess Doctors	11
IV. CONCLUSION.....	13

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Dobbs v. Jackson Women's Health Org.</i> , 597 U.S. 215 (2022)	4, 5, 6, 11, 13
<i>Grant Cnty. Serv. Bureau, Inc. v. Treweek</i> , 19 Wis. 2d 548 (1963)	8
<i>Kaul v. Urmanski</i> , No. 22-cv-1594 (Wis. Cir. Ct., Dane Cnty.) (Dec. 5, 2023), Dkt. No. 183	<i>passim</i>
<i>Okla. Call for Reprod. Just. v. Drummond</i> , 526 P.3d 1123 (Okla. 2023)	10
<i>Planned Parenthood Great Nw. v. Idaho</i> , 522 P.3d 1132 (Idaho 2023)	10
<i>State v. Black</i> , 188 Wis. 2d 639 (1994)	2
<i>State v. Johnson</i> , 407 Wis. 2d 195 (2023)	2
<i>Town of Madison v. City of Madison</i> , 269 Wis. 609 (1955)	8
<i>United States v. Idaho</i> , No. 22-cv-00329 (D. Idaho Aug. 15, 2022), ECF No. 50-1	9

STATUTES

Wis. Stat. § 940.04	<i>passim</i>
Wis. Stat. § 940.15	8

OTHER AUTHORITIES

<i>Abortion Access Despite State Bans</i> , ABC NEWS (July 25, 2022), https://perma.cc/2TZF-56GD	13
--	----

<i>Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother’s Death Was Preventable</i> , PROPUBLICA (Sept. 16, 2024), https://perma.cc/R3YT-KCZK	8
Allison Garfield, <i>Madison and Dane County push back on Wisconsin’s 1849 abortion ban</i> , THE CAP TIMES (July 7, 2022), https://perma.cc/D23Q-5SPC	5, 13
Am. Coll. Of Obstetricians and Gynecologists, <i>Understanding and Navigating Medical Emergency Exceptions in Abortion Bans and Restrictions</i> (Aug. 15, 2022), https://perma.cc/L9SV-UBRH	9
Andre Jacque, Wis. State Senator, Dist. 1, <i>Lawmakers React to Understaffing In District Attorney Offices</i> , FOX 11 NEWS, https://perma.cc/A7LY-RHED	12
Ashley Luthern, <i>‘A Crisis’: Domestic Violence Deaths Rise in Wisconsin, But Funding for Victims Plummets</i> , MILWAUKEE J. SENTINEL (Oct. 16, 2023), https://perma.cc/BJ6W-C73Q	5
Associated Press, <i>Budget Committee Passes Pay Increase Plan for Prosecutors, Public Defenders in Wisconsin</i> , PBS WISCONSIN (May 16, 2023), https://perma.cc/8K94-YFWY	11
Associated Press, <i>Dozens of Idaho Obstetricians Have Stopped Practicing There Since Abortions Were Banned, Study Says</i> , SEATTLE TIMES (Feb. 21, 2024), https://perma.cc/GNB4-T2VV	10, 11
Brendan Pierson, <i>Texas AG Threatens to Prosecute Doctors in Emergency Abortion</i> , REUTERS (Dec. 7, 2023), https://perma.cc/NWK8-FBB9	11
Carter Sherman, <i>A Woman Needed Help After an Abortion. She Had to Wait Because She Wasn’t Dying Yet</i> , VICE NEWS (Sept. 6, 2022), https://perma.cc/63HG-NZUP	7, 8

<i>Cross-Cutting Issues: Victims and Witnesses – Criminal Justice Assessment Toolkit</i> , UNITED NATIONS OFF. ON DRUGS & CRIME, https://perma.cc/5CFM-2Z2X (last visited Aug. 13, 2024)	5
<i>Elected Prosecutors Refuse to Prosecute Abortions, Even if Roe v. Wade Is Overturned</i> , FAIR & JUST PROSECUTION (Oct. 14, 2020), https://perma.cc/GC5L-T7DR	13
Elizabeth Cohen et al., <i>In Some States, Doctors Weigh ‘Ruinous’ Litigation Against Proper Care for Women Who Have Miscarriages</i> , CNN (July 20, 2022), https://perma.cc/GX8W-5F4E	11
Erika L. Sabbath et al., <i>US Obstetrician-Gynecologists’ Perceived Impacts of Post-Dobbs v. Jackson State Abortion Bans</i> , 7 J. OF THE AM. MED. ASS’N 1 (2024)	11
Giffords Law Center to Prevent Gun Violence, <i>In Pursuit of Peace</i> (Sept. 9, 2021), https://perma.cc/583V-HW4G	4
Henry Redman, <i>Criminalized abortion will lead to cops investigating miscarriages, advocates say</i> , WIS. EXAMINER (Jul. 5, 2022), https://perma.cc/926X-TRTU	7
<i>Human Rights Crisis: Abortion in the United States After Dobbs</i> , HUMAN RIGHTS WATCH (Apr. 18, 2023), https://perma.cc/GM3X-2K6A	4, 13
<i>Immigration Options for Victims of Crime</i> , U.S. DEP’T OF HOMELAND SEC., https://perma.cc/9VPF-5SA6 (last visited Aug. 13, 2024)	6
<i>Issues / Promoting Community Trust and Police Accountability</i> , FAIR & JUST PROSECUTION, https://perma.cc/P775-67KD	4
<i>Joint Statement from Elected Prosecutors</i> , FAIR & JUST PROSECUTION (June 24, 2022), https://perma.cc/APV3-Q3KN	13
<i>Joint Statement from Elected Prosecutors</i> , FAIR & JUST PROSECUTION (June 2019), https://perma.cc/HD7L-UL4G	13

Karl Racine, <i>My Year-Long Trial Against Hate</i> , MEDIUM (Jan. 27, 2022), https://perma.cc/U4L2-4WE7	12
Kate Zernike, <i>Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say</i> , N.Y. TIMES (Sep. 10, 2022), https://perma.cc/YYN7-5XQ5	11
Kavitha Surana, <i>Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable</i> , PROPUBLICA (Sept. 16, 2024), https://perma.cc/R3YT-KCZK	8
Kyla Guilfoil, <i>City Leaders Push for Abortion Access Despite State Bans</i> , ABC NEWS (July 25, 2022), https://perma.cc/2TZF-56GD	13
Kylie Cooper, MD, <i>The Difficult Decision to Leave</i> , ACOG (Jun. 22, 2023), https://perma.cc/T6KE-YLKK	10, 11
Marcella Alsan & Crystal S. Yang; <i>Fear and the Safety Net: Evidence from Secure Communities</i> , The Review of Economics and Statistics (Sept. 27, 2022), https://doi.org/10.1162/rest_a_01250	4
Mark Carlisle, <i>Phoenix Mayor Decries Abortion Ban, Says City Will Deprioritize Enforcement</i> , DAILY INDEP. (Apr. 10, 2024), https://perma.cc/8ULZ-K9LJ	13
Maureen Chowdhury, <i>Medical Professionals Describe a World of Uncertainty a Year After the Roe v. Wade Reversal</i> , CNN (Jul. 23, 2023), https://perma.cc/8P96- 5DKE	11
Megan Carpenter, <i>'I Cry Every Day': Evictions Are on the Rise in Wisconsin</i> , SPECTRUM NEWS 1 (Nov. 7, 2023), https://perma.cc/KJJ9-9NVB	12
Nathan Denzin, <i>The Legal Impact of Wisconsin's Shortage of Prosecutors and Public Defenders</i> , PBS NEWS (Apr. 1, 2023), https://perma.cc/F9BV-U9KE	12

Nicole Narea, <i>How Blue Cities in Red States Are Resisting Abortion Bans</i> , VOX (June 29, 2022), https://perma.cc/K24J-452T	13
Poppy Noor, <i>The Doctors Leaving Anti-Abortion States: ‘I Couldn’t Do My Job At All,’</i> THE GUARDIAN (Oct. 26, 2022), https://perma.cc/P952-PJFS	11
Q&A with Philly District Attorney Candidate Larry Krasner, PHILLY THRIVE (May 15, 2017), https://perma.cc/E8D2-WR6Q	12
Randi Kaye, <i>Idaho’s Murky Abortion Law Is Driving Doctors Out of the State</i> , CNN (May 13, 2023), https://perma.cc/V8XU-FRY3	10, 11
Rich Kremer, <i>FBI: Number of Hate Crimes in Wisconsin Increased by 54 Percent in 2021</i> , WIS. PUB. RADIO (Dec. 22, 2022), https://perma.cc/4R2U-K2A6	12
Samuel L. Dickman, MD et al., <i>Rape-Related Pregnancies in the 14 US States with Total Abortion Bans</i> , JAMA INTERN. MED. (Jan 24, 2024), https://perma.cc/2AYU-JANL	6
Sarah Porter & Adam Voskuil, <i>Double Trouble: Wisconsin’s Land & Water Are Inundated with Pollution from Animal Manure and Excess Farm Fertilizer</i> , ENV’T WORKING GRP. (Feb. 2, 2022), https://perma.cc/T43B-D5XY	12
<i>Sexual Violence in Wisconsin</i> , WIS. DEP’T OF HEALTH SERVS., https://perma.cc/ZB22-S9WW (last visited Aug. 13, 2024)	6
Sheryl Stolberg, <i>As Abortion Laws Drive Obstetricians from Red States, Maternity Care Suffers</i> , N.Y. TIMES (Sept. 6, 2023), https://perma.cc/LW77-UVSJ	10, 11
<i>The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy</i> , NAT’L INST. OF JUST. (Dec. 1, 2012), https://perma.cc/G568-K5AZ	7

To Protect Reproductive Justice in the City of Madison, RES-22-00458, Council Office (June 24, 2022)	11, 13
Whitney Arey et al., <i>A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8</i> , 387 N. ENGL. J. MED. 388 (2022)	11
Wis. Dep’t of Just., <i>Treatment Alternatives and Diversion Program</i> , https://perma.cc/KTN3-C3HP (last visited Aug. 13, 2024)	12
Women & Children’s Horizons of Kenosha, <i>Sexual Assault</i> , https://perma.cc/78PU-PXMF	3

I. STATEMENT OF INTEREST

Amici are local elected officials in Wisconsin,¹ representing communities with diverse populations, economic circumstances, and local interests. As the level of government closest to the people, localities share a common commitment to supporting the health and welfare of our constituents, which includes safeguarding access to and trust in reproductive healthcare.

At its core, this case concerns access to healthcare when it is most needed. In no other context are individuals facing significant health risks denied clear and necessary care. Yet, under a misapplication of this statute, pregnant individuals—and only pregnant individuals—could be deprived of life-altering treatment. We are acutely aware of the crucial role abortion access plays in both the health and economic well-being of our communities. In amici's view, allowing prosecutors and law enforcement to retrospectively second-guess precarious emergency healthcare decisions entangles them in matters they are not equipped to manage. This imposition not only misconstrues the role of law enforcement but also undermines community trust and threatens public safety, impairing the ability of all local elected officials to do our jobs. Amici file this brief to advance our shared interest in maintaining public safety, ensuring confidence in law enforcement, and protecting the health and safety of our communities, including preserving access to essential healthcare.

¹ No counsel for a party authored this brief in whole or in part. No person other than amici or amici's counsel made a monetary contribution to the preparation or submission of this brief. A list of all amici is available at Appendix A.

II. INTRODUCTION

The circuit court correctly held that “Wis. Stat. § 940.04 does not prohibit abortions.”² This Court confirmed 30 years ago that § 940.04 “is a feticide statute only” and does not apply to “consensual” abortions. *State v. Black*, 188 Wis. 2d 639, 647 (1994). This Court “require[s] a special justification in order to overturn [its] precedent.” *State v. Johnson*, 407 Wis. 2d 195, 207 (2023). There is no such justification here—the interpretation of § 940.04 is neither “unsound in principle” nor “unworkable in practice.” *Id.* at 208 (citations omitted).

In fact, DA Urmanski’s proposed interpretation is “unworkable in practice,” particularly for the local governments throughout the state that would bear the burden of such an interpretation. Interpreting Wis. Stat. § 940.04 as an abortion ban would result in an unworkable burden on local officials; on institutions struggling to maintain the trust of vulnerable communities; on healthcare providers forced to limit their medical judgment to meet archaic standards; and on law enforcement forced to second-guess those doctors.

As with many other medical procedures, “[v]arious other Wisconsin laws regulate abortion in other ways.” (Ap. Br. at 18). Applying canons of interpretation to read Wis. Stat. § 940.04 to impose a total ban on all abortions would render these other statutes meaningless. The intent of § 940.04 cannot have been to ban all abortions if numerous other regulations, including regulations *within § 940 itself*, prescribe specific limitations on when abortions *may* be performed.³

² Decision and Order at 2, *Kaul v. Urmanski*, No. 22-cv-1594 (Wis. Cir. Ct., Dane Cnty.) (Dec. 5, 2023), Dkt. No. 183 (“Decision”).

³ See Pls. Resp. Br. at 16-19 (discussing the robust statutory framework governing legal abortions in Wisconsin).

Moreover, interpreting § 940.04 to allow the prosecution of doctors for performing any abortions will—as it has in the past—result in dire consequences for the people of Wisconsin. Doctors will likely face unjustified prosecution and feel pressured to leave the state, or the practice, taking medical care away from the people of Wisconsin. Victims may be unwilling to report crimes that result in pregnancy—sexual assault is already the most under-reported violent crime in the state—for fear of prosecution.⁴ And prosecutors will be given the impossible task of trying to discern when an abortion was necessary to save the life of the pregnant person, something on which even trained doctors may not agree. For this reason, many local officials have publicly objected to prosecuting abortion⁵ in any form and recognize the disastrous consequences for their communities if they were forced to do so.

For all these reasons, amici respectfully request that this Court affirm the Decision, which is supported by precedent and policy considerations and hold that Wis. Stat. § 940.04 is a feticide statute only.

III. ARGUMENT

A. Interpreting § 940.04 as an Abortion Ban Would Corrode Public Trust, Undermining Local Governments.

Local governments work only when residents trust that they can engage with community institutions without risking their safety or the safety of those close to them. Policing private health and reproductive decisions, like abortion, erodes that vital community trust, and prevents

⁴ See Women & Children's Horizons of Kenosha, *Sexual Assault*, <https://perma.cc/78PU-PXMF>.

⁵ Even the prosecutorial parties in this action do not agree on the propriety of prosecuting abortion as a crime. The top prosecutor in the state, along with two other local prosecutors, believe the trial court correctly decided this case, while one local prosecutor, Mr. Urmanski, continues to argue it was wrongly decided.

local officials from doing their jobs well.⁶ For example, when federal policies changed and there was a perceived increased threat of deportation, even Hispanic American *citizens*—who were never at risk of removal—engaged less with social safety net programs.⁷

Similarly, women engage less with the healthcare system in states that have criminalized abortion post-*Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).⁸ This includes women who have no intention of getting an abortion. And the effect is more pronounced in populations marginalized on account of their wealth or race. The confusion around criminalization chills people from accessing prenatal care. In short, criminalizing decisions or statuses decreases trust and engagement across-the-board, even among those who do not share the impugned status, nor engage in the proscribed decisions.

A lack of public trust also compromises public safety.⁹ When abortion is criminalized, pregnant victims of serious crimes may hesitate to cooperate with law enforcement and prosecutors. This undermines efforts to combat serious crimes, such as intimate partner violence. Considering that the rate of people dying because of intimate partner

⁶ See, e.g., *Issues / Promoting Community Trust and Police Accountability*, FAIR & JUST PROSECUTION, <https://perma.cc/P775-67KD>.

⁷ Marcella Alsan & Crystal S. Yang; *Fear and the Safety Net: Evidence from Secure Communities*, The Review of Economics and Statistics (Sept. 27, 2022); doi: https://doi.org/10.1162/rest_a_01250.

⁸ *Human Rights Crisis: Abortion in the United States After Dobbs*, HUMAN RIGHTS WATCH, ¶ 25 (Apr. 18, 2023), <https://perma.cc/GM3X-2K6A>.

⁹ See, e.g., Giffords Law Center to Prevent Gun Violence, *In Pursuit of Peace* (Sept. 9, 2021), <https://perma.cc/583V-HW4G> (violent crime rates increase in areas with a lack of public trust in law enforcement).

violence is *rising* in Wisconsin,¹⁰ lack of trust from the citizens prosecutors serve could contribute to serious crimes like these going unreported, undetected, and unpunished.

Many other local officials are impacted by and invested in the interpretation of this statute. For example, in 2022, following the leak of the *Dobbs* decision, the Mayor and City Council of Madison sponsored a Resolution “To Protect Reproductive Justice in the City of Madison” which denounced any applicability of § 940.04 that would criminalize abortion, and encouraged local police to revise the General Orders to reflect that a complaint asserting solely a violation of Wis. Stat. § 940.04, would be referred to the Wisconsin Department of Health Services for investigation if the premises is a licensed medical facility.¹¹ The Dane County Sheriff seeks to focus his resources on violent crimes, stating that it “does not have the resources nor expertise to investigate medical professionals conducting medical procedures in medical facilities.”¹²

“When victims of crime or abuse of power do not have a lot of trust in the authorities and when they cannot expect much help from them, they are less likely to report the crime.”¹³ We have seen this dynamic erode trust in the immigration context, for example, where victims of and witnesses to crime are reluctant to come forward and report to, or

¹⁰ Ashley Luthern, ‘A Crisis’: Domestic Violence Deaths Rise in Wisconsin, But Funding for Victims Plummets, MILWAUKEE J. SENTINEL (Oct. 16, 2023), <https://perma.cc/BJ6W-C73Q>.

¹¹ To Protect Reproductive Justice in the City of Madison, RES-22-00458, Council Office (June 24, 2022).

¹² Allison Garfield, *Madison and Dane County push back on Wisconsin’s 1849 abortion ban*, THE CAP TIMES (July 7, 2022), <https://perma.cc/D23Q-5SPC>.

¹³ See *Cross-Cutting Issues: Victims and Witnesses – Criminal Justice Assessment Toolkit*, UNITED NATIONS OFF. ON DRUGS & CRIME, § 2.1, <https://perma.cc/5CFM-2Z2X> (last visited Aug. 13, 2024).

cooperate with, law enforcement if their immigration status or that of their family members will also be questioned as part of the investigation.¹⁴ If law enforcement were asked to enforce § 940.04 to criminalize consensual abortion, it would undermine the investigation and prosecution of serious criminal offenses.

Consider a minor who becomes pregnant after being raped. To effectively identify and prosecute the perpetrator, law enforcement must be able to build a relationship of trust with the victim to ensure cooperation through a difficult process. Urmanski's proposed interpretation of § 940.04 would impair that cooperation and public health goals for any minor who is considering an abortion.

Interfering with healthcare decisions and prosecuting abortion providers also risks further trauma for victims of sexual abuse, rape, incest, trafficking, and domestic violence. Over one million Wisconsin adults have reported experiencing sexual violence of some kind.¹⁵ It is estimated that, since *Dobbs*, nearly 65,000 pregnancies have been caused by rape in the 14 states where abortion is now banned.¹⁶ Wisconsin citizens deal with painful losses caused by miscarriage or abuse, or voluntary terminations that follow an act of rape, or are due to fetal health issues or health risks posed to the pregnant person. Their trauma would only be compounded by having to process these experiences

¹⁴ See *Immigration Options for Victims of Crime*, U.S. DEP'T OF HOMELAND SEC., <https://perma.cc/9VPF-5SA6> (last visited Aug. 13, 2024).

¹⁵ *Sexual Violence in Wisconsin*, WIS. DEP'T OF HEALTH SERVS., <https://perma.cc/ZB22-S9WW> (last visited Aug. 13, 2024).

¹⁶ Samuel L. Dickman, MD et al., *Rape-Related Pregnancies in the 14 US States with Total Abortion Bans*, JAMA INTERN. MED. (Jan 24, 2024), <https://perma.cc/2AYU-JANL>.

through the criminal justice system.¹⁷ The threat of prosecution could also be “weaponized by abusers,” who could suggest to law enforcement that a miscarriage was really an illegal abortion.¹⁸ This kind of invasion into the personal sphere is as inappropriate for local actors to have to enforce as it is harmful.

B. DA Urmanski’s Interpretation of § 940.04 Overrides More Recent Legislation and Threatens Access to Essential Medical Care.

Ambiguity around when a medically necessary abortion is sufficient to qualify as *legally* “necessary” has already threatened lives of women in Wisconsin.¹⁹ Very early in her pregnancy, one woman (referred to in reporting as “A.” to protect her privacy) went to Illinois to get a medication abortion. Days after A. took the medication, she visited a doctor in Wisconsin who informed her that some tissue from her pregnancy was still in her uterus. If left untreated, A. was at risk of potentially fatal sepsis. But uncertainty around § 940.04 made doctors pause. They spent days trying to prove A.’s pregnancy was not viable or that her life was at risk. Only then would they provide A. with necessary medical care. While A. survived the ordeal, Amber Nicole Thurman’s recently reported experience foreshadows the fatal consequences of DA Urmanski’s interpretation. She died, orphaning her six-year-old son,

¹⁷ *The Neurobiology of Sexual Assault: Implications for Law Enforcement, Prosecution, and Victim Advocacy*, NAT’L INST. OF JUST. (Dec. 1, 2012), <https://perma.cc/G568-K5AZ>.

¹⁸ Henry Redman, *Criminalized abortion will lead to cops investigating miscarriages, advocates say*, WIS. EXAMINER (Jul. 5, 2022), <https://perma.cc/926X-TRTU>.

¹⁹ See, e.g., Carter Sherman, *A Woman Needed Help After an Abortion. She Had to Wait Because She Wasn’t Dying Yet*, VICE NEWS (Sept. 6, 2022), <https://perma.cc/63HG-NZUP>.

because Georgia doctors waited 20 hours to remove infected fetal tissue, fearing that state's strict ban.²⁰

Before it was suggested that § 940.04 applied to restrict consensual abortion, doctors would “intervene right [a]way.”²¹ Section 940.15 straightforwardly authorized abortions before viability “to preserve the . . . health of the woman.” This acknowledged contemporary medical knowledge and mores, serving as the core of an extensive regulatory regime for abortion care. Yet DA Urmanski urges the Court to defy basic principles of statutory construction by reading the older, more general statute to supplant the more recent enactment. *Cf. Grant Cnty. Serv. Bureau, Inc. v. Treweek*, 19 Wis. 2d 548, 552 (1963) (“Under the well-recognized standards of statutory construction, the more recent specific statute controls and exists as an exception to the general statute.”); *Town of Madison v. City of Madison*, 269 Wis. 609, 614 (1955) (“The cardinal principle of statutory construction is to save and not to destroy.”).

Section 940.15 permitted abortions in additional circumstances for good reason: laws criminalizing abortion—even with “life” exceptions—not only complicate doctors’ care, but also threaten pregnant people whose lives are in jeopardy. This is why the purported “life” exception in § 940.04(5) cannot salvage DA Urmanski’s urged interpretation. Even at death’s door, Wisconsin citizens and their doctors will avoid necessary medical treatment. This would be even more true for marginalized communities, against whom anti-abortion statutes are more often

²⁰ Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother’s Death Was Preventable*, PROPUBLICA (Sept. 16, 2024), <https://perma.cc/R3YT-KCZK>.

²¹ Sherman, *supra* note 19 (quoting A’s treating physician in Wisconsin).

enforced. In Ohio, a Black woman named Brittney Watts had a spontaneous miscarriage after her water broke prematurely at twenty-one weeks. While the doctors debated the legality of the abortion they recommended, Watts, losing dangerous amounts of blood, miscarried at home, and later had to answer to criminal charges.

Law enforcement is ill-equipped to second-guess the difficult judgments that medical professionals must exercise when a pregnancy creates a life-threatening situation. As the American College of Obstetricians and Gynecologists and nine other medical societies, explained in a recent amicus brief:

Life and health exist on a fragile and shifting continuum and in emergent situations physicians must and do act quickly to preserve it. They cannot be expected, and should not be compelled, to delay stabilizing treatment until a legislatively imagined but medically nonexistent line has been crossed.²²

A condition that is life-threatening for one patient may not be so for another. Or a once-benign condition may escalate into a life-threatening situation if there is an underlying condition that was not immediately discernable to a treating physician.²³ And not all potentially fatal conditions will definitively end a pregnant patient's life.

A.'s story, discussed above, is not the only example of doctors fearing prosecution for providing necessary care. Doctors have left states with anti-abortion laws to avoid being criminally prosecuted for carrying

²² Br. of Am. Coll. of Emergency Physicians of Idaho, *et al.*, as Amici Curiae Supporting Plaintiffs at 16, *United States v. Idaho*, No. 22-cv-00329 (D. Idaho Aug. 15, 2022), ECF No. 50-1.

²³ Am. Coll. Of Obstetricians and Gynecologists, *Understanding and Navigating Medical Emergency Exceptions in Abortion Bans and Restrictions* (Aug. 15, 2022), <https://perma.cc/L9SV-UBRH>.

out their medical duties.²⁴ Those who specialize in high-risk pregnancies fear “[b]eing tried as a felon simply for saving someone’s life” in a state with an absolute ban.²⁵

An exception that purportedly shields doctors from liability when the abortion is “necessary . . . to save the life of the mother” is not enough to allow doctors to practice effectively. Asking courts to determine the “necessity” of an abortion is impractical, dangerous, and may lead doctors to withhold lifesaving treatment. Moreover, the determination of “necessity” blurs the lines for both doctors and those who enforce and interpret the law on what constitutes a *medically* necessary abortion, and whether that differs from what constitutes a *legally* necessary abortion.²⁶ This question first falls on medical providers who, when making serious medical decisions at crucial moments, would think not of the best needs of their patient, but of whether that provider would be able to convince a court of law or a jury that their care was “necessary.” And even when it seems abundantly clear that a patient needs an

²⁴ See, e.g., Randi Kaye, *Idaho’s Murky Abortion Law Is Driving Doctors Out of the State*, CNN (May 13, 2023), <https://perma.cc/V8XU-FRY3>; Sheryl Stolberg, *As Abortion Laws Drive Obstetricians from Red States, Maternity Care Suffers*, N.Y. TIMES (Sept. 6, 2023), <https://perma.cc/LW77-UVSJ>; Associated Press, *Dozens of Idaho Obstetricians Have Stopped Practicing There Since Abortions Were Banned, Study Says*, SEATTLE TIMES (Feb. 21, 2024), <https://perma.cc/GNB4-T2VV>; Kylie Cooper, MD, *The Difficult Decision to Leave*, ACOG (Jun. 22, 2023), <https://perma.cc/T6KE-YLKK>.

²⁵ Kaye, *supra* note 24.

²⁶ See, e.g., *Planned Parenthood Great Nw. v. Idaho*, 522 P.3d 1132, 1204 (Idaho 2023) (referring to a “core of circumstances” [that] includes every situation where, in the physician’s good faith medical judgment, an abortion was ‘necessary’ to prevent the death of the pregnant woman”); *Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1130 (Okla. 2023) (abortion legal where there is a “reasonable degree of medical certainty or probability” that the woman’s life would be “endanger[ed]” without it).

abortion, doctors might still face prosecution.²⁷ So, unsurprisingly, some doctors in states criminalizing abortion err on the side of inaction, in one case forcing a woman to carry lifeless fetal remains for two weeks.²⁸

Doctors in Wisconsin, as exemplified by A.'s case, faced impossible decisions after *Dobbs*.²⁹ The circuit court cleared up their confusion by confirming that § 940.04 is a feticide statute. By affirming the circuit court's decision and removing any confusion around the reach of § 940.04, this Court can give Wisconsin doctors the much-needed peace of mind to continue focusing on the lifesaving care they provide to patients every day, without fear of criminal consequences.

C. Local Governments Cannot and Should Not Use Limited Resources to Second-Guess Doctors.

Wisconsin prosecutors, local officials, and members of law enforcement have limited resources and are stretched thin.³⁰ Local

²⁷ See, e.g., Brendan Pierson, *Texas AG Threatens to Prosecute Doctors in Emergency Abortion*, REUTERS (Dec. 7, 2023), <https://perma.cc/NWK8-FBB9>.

²⁸ Elizabeth Cohen et al., *In Some States, Doctors Weigh 'Ruinous' Litigation Against Proper Care for Women Who Have Miscarriages*, CNN (July 20, 2022), <https://perma.cc/GX8W-5F4E>; Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 N. ENGL. J. MED. 388, 389 (2022); Randi Kaye, *supra* note 24; Sheryl Stolberg, *supra* note 24; ASSOCIATED PRESS, *supra* note 24; Kylie Cooper, MD, *supra* note 24.

²⁹ See, e.g., Erika L. Sabbath et al., *US Obstetrician-Gynecologists' Perceived Impacts of Post-Dobbs v. Jackson State Abortion Bans*, 7 J. OF THE AM. MED. ASS'N 1 (2024) (finding a range of perceived impacts, including distress at delaying essential care, fears of legal ramifications, mental health effects, and planned or actual attrition); Maureen Chowdhury, *Medical Professionals Describe a World of Uncertainty a Year After the Roe v. Wade Reversal*, CNN (Jul. 23, 2023), <https://perma.cc/8P96-5DKE>; Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say*, N.Y. TIMES (Sep. 10, 2022), <https://perma.cc/YYN7-5XQ5>; Poppy Noor, *The Doctors Leaving Anti-Abortion States: 'I Couldn't Do My Job At All,'* THE GUARDIAN (Oct. 26, 2022), <https://perma.cc/P952-PJFS>.

³⁰ See Associated Press, *Budget Committee Passes Pay Increase Plan for Prosecutors, Public Defenders in Wisconsin*, PBS WISCONSIN (May 16, 2023), <https://perma.cc/8K94-YFWY> (the underfunding and understaffing of prosecutors and public defenders as a "crisis situation" bordering on a constitutional concern); Andre

officials are—and should be—prioritizing the avoidance, investigation, and prosecution of violent crimes that pose significant safety concerns in their specific communities. They are doing their best combating violent, financial, and environmental crimes, bringing affirmative civil and economic rights enforcement actions, and working on diversion programs and incarceration alternatives to serve their communities.³¹ Evictions and hate crimes are increasing while our land and water continue to suffer from pollution.³² Communities demand that local leaders prioritize such matters with attention, staffing, and other resources.³³

Adding an unnecessary, new area of criminal enforcement—complex and controversial abortion cases—to local officials’ already-full plate is not in the best interest of Wisconsin officials, the communities they serve, or the state at large. For this reason, nominal Defendants Chisholm and Ozanne have joined other local officials around the

Jacque, Wis. State Senator, Dist. 1, *Lawmakers React to Understaffing In District Attorney Offices*, FOX 11 NEWS, <https://perma.cc/A7LY-RHED> (Brown County District Attorney’s office noting a two-to-three-thousand case backlog and concerns regarding understaffing); Nathan Denzin, *The Legal Impact of Wisconsin’s Shortage of Prosecutors and Public Defenders*, PBS NEWS (Apr. 1, 2023), <https://perma.cc/F9BV-U9KE> (“it isn’t unusual for a prosecutor to juggle 200 to 300 cases at a time”).

³¹ Wis. Dep’t of Just., *Treatment Alternatives and Diversion Program*, <https://perma.cc/KTN3-C3HP> (last visited Aug. 13, 2024).

³² Megan Carpenter, *‘I Cry Every Day’: Evictions Are on the Rise in Wisconsin*, SPECTRUM NEWS 1 (Nov. 7, 2023), <https://perma.cc/KJJ9-9NVB>; Rich Kremer, *FBI: Number of Hate Crimes in Wisconsin Increased by 54 Percent in 2021*, WIS. PUB. RADIO (Dec. 22, 2022), <https://perma.cc/4R2U-K2A6>; Sarah Porter & Adam Voskuil, *Double Trouble: Wisconsin’s Land & Water Are Inundated with Pollution from Animal Manure and Excess Farm Fertilizer*, ENV’T WORKING GRP. (Feb. 2, 2022), <https://perma.cc/T43B-D5XY>.

³³ See, e.g., *Q&A with Philly District Attorney Candidate Larry Krasner*, PHILLY THRIVE (May 15, 2017), <https://perma.cc/E8D2-WR6Q> (discussing community’s efforts to force prosecution of a local polluter); Karl Racine, *My Year-Long Trial Against Hate*, MEDIUM (Jan. 27, 2022), <https://perma.cc/U4L2-4WE7> (discussing Attorney General Racine’s listening session with the community concerning hate crimes).

country³⁴ to publicly pledge to exercise their discretion to refrain from enforcing state laws criminalizing abortion.³⁵ “Enforcing abortion bans runs counter to the obligations and interests prosecutors are sworn to uphold” and will not only “erode trust in the legal system,” as prosecutors would need to use their limited resources to question and criminalize personal medical choices, but also prevent doctors from “do[ing] [their] jobs . . . for fear that their private medical decisions will be criminalized.”³⁶ Broadly, tasking local government officials with conducting post-hoc medical analyses (and forcing doctors to urgently determine ambiguous and vague legal questions) makes no sense.³⁷

IV. CONCLUSION

The circuit court correctly interpreted Wis. Stat. § 940.04 as a feticide statute. Interpreting it as an abortion ban would be inconsistent with Wisconsin’s pre-*Dobbs* abortion laws. DA Urmanski’s interpretation would corrode community trust in essential local service,

³⁴ See, e.g., Mark Carlisle, *Phoenix Mayor Decries Abortion Ban, Says City Will Deprioritize Enforcement*, DAILY INDEP. (Apr. 10, 2024), <https://perma.cc/8ULZ-K9LJ> (Phoenix’s mayor worked with local police to discourage enforcement of state ban); Kyla Guilfoil, *City Leaders Push for Abortion Access Despite State Bans*, ABC NEWS (July 25, 2022), <https://perma.cc/2TZF-56GD> (city politicians sought to protect abortion access amid bans in Texas, Louisiana, Missouri); Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022), <https://perma.cc/K24J-452T> (same).

³⁵ *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 2019), <https://perma.cc/HD7L-UL4G>; *Elected Prosecutors Refuse to Prosecute Abortions, Even if Roe v. Wade Is Overturned*, FAIR & JUST PROSECUTION (Oct. 14, 2020), <https://perma.cc/GC5L-T7DR>; *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), <https://perma.cc/APV3-Q3KN>; HUMAN RIGHTS WATCH, *supra* note 8.

³⁶ *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), *supra* note 35.

³⁷ Wisconsin officials recognize this. See City of Madison Council Office, *supra* note 11; Garfield, *supra* note 12.

leading patients to avoid health care and serious crimes to go unreported. It would chill doctors who merely wish to do their jobs. It would divert law enforcement from protecting public safety. To avoid these perverse results and uphold its precedent, this Court should hold that Wis. Stat. § 940.04 is a feticide statute—not an abortion ban—and affirm the decision.

Dated: September 18, 2024.

Respectfully submitted,

*Electronically Signed by Sarah A.
Zylstra*

Sarah A. Zylstra
BOARDMAN & CLARK LLP
1 South Pinckney St. Ste 410
PO Box 927
Madison, WI 53701-0927
(608) 283-1709
szylstra@boardmanclark.com
State Bar # 1033159

Joshua Rosenthal*
Aadika Singh*
PUBLIC RIGHTS PROJECT
490 43rd St. #115
Oakland, CA 94609
(907) 331-7481
josh@publicrightsproject.org
aadika@publicrightsproject.org

Margaret A. Dale*
Jana R. Ruthberg*
Michael Clifford Beckwith*
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3226

mdale@proskauer.com
jruthberg@proskauer.com
mbeckwith@proskauer.com

Kelly Landers Hawthorne*
Elizabeth C. Shrieves*
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue NW, Suite
600
Washington, DC 20004
(202) 416-6800
klandershawthorne@proskauer.com
eshrieves@proskauer.com
** Pro Hac Vice Applications Pending*

*Attorneys for Amici Curiae Local
Elected Officials in Support of
Respondents*

APPENDIX A – NAMES OF *AMICI CURIAE*

Cassi Benedict
Council Member
District 4, Sun Prairie, Wisconsin

Aaron Brewster
City Councilor
Eau Claire, Wisconsin

Mitchel Craig
Mayor
City of Portage, Wisconsin

Luke Diaz
Mayor
City of Verona, Wisconsin

Larry Mboga
City Councilor
Eau Claire, Wisconsin

Satya Rhodes-Conway
Mayor
Madison, Wisconsin

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c), for a brief produced with a proportional serif font. The brief is set in 13-point Century Schoolbook. The length of this brief is 3,912 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.

Electronically Signed by Sarah A.
Zylstra
SARAH A. ZYLSTRA