IN THE SUPREME COURT OF WISCONSIN

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,
Intervenors-Respondents,

vs.

JOEL URMANSKI, as District Attorney for Sheboygan County, WI,
Defendant-Appellant,

JOHN T. CHISHOLM, as District Attorney for Milwaukee County, WI, and ISMAEL R. OZANNE, as District Attorney for Dane County, WI,
Defendants-Respondents.

On Appeal from the Circuit Court of Dane County
Case No. 2022CV001594
Honorable Diane Schlipper Presiding

DEFENDANT-APPELLANT JOEL URMANSKI'S OPENING BRIEF

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ISSUES PRESENTED

Issue No. 1: Does § 940.04, and § 940.04(1), (5), and (6) specifically, prohibit performing consensual abortions, subject to the exception in § 940.04(5)?

Circuit Court's Answer: The circuit court held § 940.04 "says nothing about abortion" and "does not prohibit a consensual medical abortion." (R.147:2, App.049; R.147:20, App.067.) The circuit court relied on this Court's decision in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), and concluded "*Black*'s holding that [§ 940.04(2)(a)] 'is not an abortion statute' and 'is a feticide statute only' must apply equally to Subsection (1)." (R.147:14, App.061.) The circuit court ultimately declared "Wis. Stat. § 940.04 does not apply to abortions." (R.183:14, App.093.)

Issue No. 2: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), has that prohibition been impliedly repealed or superseded by subsequent legislation such that it can no longer be applied to consensual abortions?

Circuit Court's Answer: The circuit court did not address this question.

Issue No. 3: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), is that prohibition unenforceable as to abortions under the Due Process Clause because it is unconstitutionally vague on its face or compliance is impossible?

Circuit Court's Answer: The circuit court did not address this question.

Issue No. 4: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), is that prohibition unenforceable because of alleged disuse and reliance on *Roe v. Wade* and its progeny?

Circuit Court's Answer: The circuit court did not address this question.

Issue No. 5: Do the State Plaintiffs have standing to bring their own claims in this action and, if not, can they rely on the standing of an intervenor to remain in the action and benefit from a judgment obtained by an intervenor?

Circuit Court's Answer: The circuit court concluded the State Plaintiffs had standing and presented a justiciable controversy as to Urmanski. After Urmanski moved for reconsideration, the circuit court concluded it did not need to determine whether the State Plaintiffs presented a justiciable claim because Urmanski conceded a justiciable controversy exists between Urmanski and one of the Physician Intervenors.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court has not set oral argument on this case, but the Court's grant of Urmanski's bypass petition indicates this case merits oral argument. This case does not meet the criteria in § 809.22(2)(a) for submittal on briefs only, and oral argument would be valuable to the Court. Further, the Court's opinion should be published because this case meets the criteria for publication in § 809.23(1)(a) and will decide a case of substantial and continuing public interest.

STATEMENT OF THE CASE

I. Nature of the Case

This case presents the question of whether, after the U.S. Supreme Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, Wis. Stat. § 940.04—and § 940.04(1) specifically—prohibits performing consensual abortions in Wisconsin unless the abortion meets the criteria for a therapeutic abortion under § 940.04(5) (*i.e.*, it is necessary to save the life of the mother). Section 940.04, titled "Abortion," provides:

> (1) Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.
>
> (2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:
>
> (a) Intentionally destroys the life of an unborn quick child; or

> (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.
>
> (5) This section does not apply to a therapeutic abortion which:
>
> (a) Is performed by a physician; and
>
> (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and
>
> (c) Unless an emergency prevents, is performed in a licensed maternity hospital.
>
> (6) In this section "unborn child" means a human being from the time of conception until it is born alive.

Defendant-Appellant Joel Urmanski, the district attorney for Sheboygan County, has not taken a position during the litigation of this case on what the law on abortion should be. That is an issue for the Legislature and the Governor. This case is not about to what extent abortion should be regulated as a matter of public policy. Urmanski does have an opinion on what the law currently is, however. Urmanski believes § 940.04—and § 940.04(1) specifically—prohibits performing abortions (including consensual abortions) from conception until birth (subject to § 940.04(5)).

The circuit court disagreed. The circuit court, relying on this Court's decision in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), concluded § 940.04 was not an abortion statute but instead only applied to feticide. Because the circuit court concluded § 940.04 was not an abortion statute, it did not address legal theories on which Plaintiffs-Respondents Josh Kaul, Wisconsin Department of Safety and Professional Services, Wisconsin Medical Examining Board, and Clarence P. Chou, M.D. (the "State Plaintiffs") relied when they brought this lawsuit against Urmanski and two other district attorneys: (1) that subsequent legislative enactments had superseded any application of § 940.04 to abortion, *i.e.*, it had been impliedly repealed and (2) that the doctrine of desuetude applies to prevent applying § 940.04 to consensual abortions. Nor did the circuit court address an additional argument by

the Intervenors-Respondents Christopher J. Ford, Kristin J. Lyerly, and Jennifer J. McIntosh (the "Physician Intervenors"): that enforcing § 940.04 as to abortions would violate the due process clause.

This Court granted bypass. Urmanski now asks this Court to reverse the circuit court and hold that § 940.04, and § 940.04(1) specifically, applies to prohibit abortions (including consensual abortions). *Black* does not foreclose applying § 940.04(1) to a consensual abortion and, even if it did, *Black* should be overruled to the extent it would foreclose such an application.

If this Court agrees the circuit court erred when it concluded § 940.04, including § 940.04(1), is not an abortion statute, this Court should proceed to address the parties' other arguments relating to the applicability of § 940.04 to consensual abortions. First, this Court should hold that § 940.04(1) does not conflict with and has not been impliedly repealed by subsequent legislation, and § 940.04(1) can be enforced as to abortions. Second, this Court should reject the Physician Intervenors' due process arguments and conclude that § 940.04 is not unconstitutionally vague on its face, compliance with § 940.04 is possible, and the Physician Intervenors have not stated a claim that application of § 940.04 to abortions violates due process.[1] Finally, this Court should conclude that Count II of the State Plaintiffs' Amended Complaint fails to state a claim for relief, because the State Plaintiffs lack standing to bring that claim, the doctrine of desuetude does not apply in Wisconsin, and, if it did, this case does not implicate the doctrine. Ultimately, Urmanski asks this Court to reverse the circuit court, order dismissal of the State Plaintiffs' and Physician Intervenors' claims, and conclude § 940.04 can be enforced as to abortions (including consensual abortions).

[1] Consistent with this Court's July 2 order granting bypass, this brief does not address the separate issue of whether the Wisconsin Constitution contains a right to obtain a consensual medical abortion.

II. Legal and Factual Background

A. Wisconsin's Early Abortion Laws

Wisconsin enacted its first prohibition on abortion in 1849. *See* Revised Statutes of Wisconsin, ch. 133, § 11 (1849). It provided: "[e]very person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree." In 1858, the Legislature removed the requirement the unborn child be "quick." Revised Statutes of Wisconsin, ch. 164, § 11 (1858). The Legislature also enacted related provisions with lesser penalties (1) prohibiting persons from attempting to assist a pregnant woman to "procure a miscarriage" and (2) prohibiting a woman from attempting to procure her own miscarriage. *Id.* at ch. 169, §§ 58, 59. Wisconsin's abortion laws remained relatively unchanged, except for modifications to their penalties, until the 1950s when the Legislature revised the criminal code. *See generally Black*, 188 Wis. 2d 639 (Appendix to Dissent); Wis. Stat. §§ 340.095, 351.22, and 351.23 (1947 versions). These statutes were applied to those who performed consensual abortions. *See, e.g.*, *State ex rel. Tingley v. Hanley*, 248 Wis. 578, 22 N.W.2d 510 (1946); *Rodermund v. State*, 167 Wis. 577, 168 N.W. 390 (1918); *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891).

B. The Legislature Enacts § 940.04

When the Legislature revised the criminal code, it enacted Wis. Stat. § 940.04. *See* 1953 Wisconsin Act 623, § 340.08; 1955 Wisconsin Act 696, § 940.04. The Legislative Council's comment to the revised statutory language that became § 940.04(1), (5), and (6) refers to an "operation" and states "[t]his section penalizes the person who performs an abortion on another" and "[t]his section is a substantial restatement of the present law." Wisconsin Legislative Council Judiciary

Committee Report on the Criminal Code at 66-67 (1953) (R.88:12-13.)[2] After its enactment, § 940.04 continued to be applied to those who performed consensual abortions. *See, e.g.*, *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968) (upholding conviction for the crime of committing an abortion in violation of Wis. Stat. § 940.04(1)); *State v. Cohen*, 31 Wis. 2d 97, 142 N.W.2d 161 (1966) (same); *see also State v. Harling*, 44 Wis. 2d 266, 170 N.W.2d 720 (1969) (upholding conviction under Wis. Stat. § 940.04(2) for the crime of performing an abortion). Indeed, § 940.04 was identified by the U.S. Supreme Court in *Roe* as a statute similar to the abortion ban at issue in *Roe.* 410 U.S. at 118 n.2.

C. The Legislature Enacts § 940.15 and Declines to Repeal § 940.04

After *Roe*, Wisconsin officials could not enforce § 940.04(1) against consensual abortions. *See Larkin v. McCann*, 368 F. Supp. 1352 (E.D. Wis. 1974). In 1985, the Legislature enacted Wis. Stat. § 940.15, which states: "[w]hoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class I felony." § 940.15(2). The statute defines viability and provides an exception "if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician." § 940.15(1), (3).

Section 940.15 was part of 1985 Wis. Act 56. The initial draft of the bill (1985 Assembly Bill 510) contained language repealing § 940.04. *See* Initial Draft of 1985 Assembly Bill 510, 1985-86 Legislature, LRB-4124/1 at 2 (R.88:40 ("940.04 of the statutes is repealed and recreated to read").) The Legislature removed the language repealing § 940.04, however, during subsequent drafting. *See, e.g.*, Assembly Substitute Amendment to 1985 Assembly Bill 510, 1985-86

[2] What became § 940.04(1), (5), and (6) in the 1955 revision was first proposed as § 340.08 of the revision that was enacted in 1953 but allowed to expire in favor of the 1955 revision. The Legislative Council's comments to § 340.08 of the 1953 revision reflect the legislative history of § 940.04(1), (5), and (6).

Legislature, LRBs0289/2 (R.138:1-28). 1985 Wisconsin Act 56 enacted the new ban as a separate section and did not repeal § 940.04. And, in the years since 1985, numerous bills have been introduced that would have repealed § 940.04, but none have been enacted.[3]

D. Other Wisconsin Abortion Restrictions

Various other Wisconsin laws regulate abortion in various ways. Wis. Stat. § 253.107 bans abortion "if the probable postfertilization age of the unborn child is 20 or more weeks," except in cases of "medical emergency." § 253.107(3)(a). Wis. Stat. § 940.16 bans partial-birth abortions outside of emergency circumstances. And, various Wisconsin laws impose physician admitting privilege requirements, impose informed consent requirements, prohibit using abortion-inducing drugs unless certain criteria are satisfied, prohibit using public funds for abortions subject to certain exceptions, and address parental consent requirements for abortions for minors. *See* Wis. Stat. § 253.095; § 253.10; § 253.105; § 20.927; § 48.257; and § 48.375. None of these statutes contain language expressly legalizing abortions, and several of them contain language expressly disclaiming any such inference. *See, e.g.*, § 253.10(8); § 253.105(6); § 253.107(7) ("Nothing in this section may be construed as … making lawful an abortion that is otherwise unlawful.").

E. *State v. Black* and Subsequent Developments

In 1994, this Court decided *Black*, which held that a man who had allegedly committed feticide by violently assaulting his wife days before her due date, causing the death of the unborn baby, could be charged under § 940.04(2)(a). In doing so, this Court responded to the man's argument the statute was "to apply only in the context of consensual medical abortions." 188 Wis. 2d at 644. This Court concluded that "[i]n order to construe secs. 940.04(2)(a) and 940.15, consistently" it would interpret § 940.04(2)(a) as "not an abortion statute." *Id.* at 646. This Court stated

[3] *See, e.g.* 2023 Assembly Bill 218; 2015 Assembly Bill 880; 2015 Senate Bill 653; 2015 Assembly Bill 916; 2015 Senate Bill 701; 2007 Assembly Bill 749; 2007 Senate Bill 398; 2005 Senate Bill 721; 2005 Assembly Bill 1144.

§ 940.04(2)(a) "makes no mention of an abortive type procedure" and rather "proscribes the intentional criminal act of feticide: the intentional destruction of an unborn quick child presumably without consent of the mother." *Id.* In short, this Court concluded § 940.04(2)(a) "is a feticide statute only" and applied to Black's alleged actions. *Id.* at 647. Two justices (Chief Justice Heffernan and Justice Abrahamson) dissented and concluded that § 940.04 "was intended to apply only to medical abortion." 188 Wis. 2d at 660.

After *Black*, the Legislature passed a separate feticide statute, 1997 Wisconsin Act 295. 1997 Wisconsin Act 295 included language, enacted in Wis. Stat. § 939.75(2)(b)1., which stated the new feticide provisions are inapplicable to "[a]n act committed during an induced abortion," but also that this exception "does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16 to an induced abortion" (thus indicating § 940.04 is an abortion statute).

III. Relevant Factual and Procedural Background

In 2022, the U.S. Supreme Court overruled *Roe* and its progeny in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). After *Dobbs*, the State Plaintiffs initiated this case by suing legislative officers. (R.4:1-25.) The State Plaintiffs then filed an Amended Complaint dropping the legislators and naming Urmanski and the district attorneys of Milwaukee County and Dane County, John Chisholm and Ismael Ozanne. (Doc. 34:1-28, App.005-032.) The Amended Complaint sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions based on arguments that § 940.04 had been superseded by subsequent laws or, alternatively, was unenforceable as to abortions due to disuse.

Thereafter, the Physician Intervenors were allowed to intervene. (R.80:1-3.) They also sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions, as well as a permanent injunction against the application of § 940.04 to abortions. (R.75:1-15, App.033-047.) Like the State Plaintiffs, they claimed § 940.04 had been superseded by subsequent legislation. They also claimed § 940.04

was unenforceable because it is premised on arcane language, belies modern medicine, and contains impossible requirements.

Urmanski moved to dismiss. Urmanski argued dismissal was warranted because (1) § 940.04 (and § 940.04(1), (5), and (6) in particular) applies to and prohibits performing consensual abortions from conception until birth, subject to the exception in § 940.04(5) for abortions to save the life of the mother; (2) this prohibition has not been impliedly repealed or superseded; (3) this prohibition is not unconstitutionally vague on its face and compliance is not impossible; and (4) the State Plaintiffs' allegations of disuse and reliance on *Roe* did not state a claim that would make the prohibition unenforceable. Urmanski also moved to dismiss the State Plaintiffs as lacking standing. (R.91:1-41.)

In a July 7, 2023, Decision and Order, the circuit court denied Urmanski's motions to dismiss in part. (R.147:1-21, App.048-068.) The circuit court concluded the State Plaintiffs had standing to bring their claims against Urmanski. (R.147:7-8, App.054-055.) The circuit court further concluded the State Plaintiffs and Physician Intervenors stated a claim for relief because § 940.04 "says nothing about abortion," (R.147:2, App.049), and "does not prohibit a consensual medical abortion," (R.147:20, App.067). The circuit court relied on *Black* and concluded that "Black's holding that [Wis. Stat. § 940.04(2)(a)] 'is not an abortion statute' and 'is a feticide statute only' must apply equally to Subsection (1)." (R.147:14, App.061.)

The State Plaintiffs and Physician Intervenors then moved for judgment on the pleadings and/or summary judgment. Urmanski opposed the motions for judgment on the pleadings and/or summary judgment and filed his own motion for reconsideration of the July 7 Decision and Order's conclusions. (R.169-171.) Chisholm did not oppose the Doctor-Intervenors' request for a declaratory judgment that § 940.04 does not apply to abortions, but argued Attorney General Kaul was not a property party. (R.167:1-6.) As to Ozanne, he did not oppose the State Agencies' or Doctor-Intervenors' motions for a declaratory judgment—he took no position—but did oppose issuance of a permanent injunction. (R.168:1-8.)

On December 5, 2023, the circuit court entered a final decision and order denying Urmanski's motion for reconsideration, granting Intervenor Lyerly's motion for summary judgment, and declaring § 940.04 does not prohibit abortions. (R.183:1-14, App.080-093.) On the standing of the State Plaintiffs, the circuit court concluded it need not consider whether they presented a justiciable claim because Urmanski conceded Intervenor Lyerly presented a justiciable controversy. (R.183:7, App.086.) The circuit court denied the requests for a permanent injunction. (R.183:14, App.093.)

Urmanski appealed; Ozanne and Chisholm did not. Urmanski subsequently petitioned this Court to bypass the Court of Appeals, which this Court granted on July 2, 2024. This Court denied a supplemental petition to bypass filed by the State Plaintiffs, which sought consideration of the issue of whether Wisconsin Constitution contains a right to obtain a consensual medical abortion. This Court has ordered the parties not to brief that issue in this case.

STANDARD OF REVIEW

Urmanski appeals the circuit court's denial of Urmanski's motion to dismiss and subsequent grant of judgment against Urmanski. This appeal presents questions of law that are subject to de novo review. *Doe 56 v. Mayo Clinic Health Sys.—Eau Claire Clinic, Inc.*, 2016 WI 48, ¶ 14, 369 Wis. 2d 351, 880 N.W.2d 681. This Court reviews de novo the denial of a motion to dismiss for failure to state a claim. *WMC v. Evers*, 2022 WI 38, ¶ 7, 977 N.W.2d 374. This Court similarly reviews de novo the grant of a motion for judgment on the pleadings or for summary judgment. *Southport Commons, LLC v. Wis. Department of Transportation*, 2021 WI 52, ¶ 18, 397 Wis. 2d 362, 960 N.W.2d 17. To the extent this appeal involves review of the circuit court's denial of Urmanski's motion for reconsideration, this Court uses the erroneous-exercise-of-discretion standard of review. *Bauer v. Wisconsin Energy Corp.*, 2022 WI 11, ¶ 11, 400 Wis. 2d 592, 970 N.W.2d 243.

ARGUMENT

I. Section 940.04 Prohibits Consensual Abortions

First, § 940.04, specifically § 940.04(1), prohibits consensual abortions and the circuit court erred when it concluded § 940.04 was a feticide statute that "does not apply to abortions." This is a question of statutory interpretation, a question of law this Court reviews de novo. *Waukesha Cty. v. M.A.C.*, 2024 WI 30, ¶ 25, 412 Wis. 2d 462, 8 N.W.3d 365.

Statutory interpretation begins with the language of the statute, which "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. This Court interprets statutory language in context, not in isolation, and "as part of a whole; in relation the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 2004 WI 58 at ¶ 46. Further, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id*. "A review of statutory history is part of a plain meaning analysis." *Banuelos v. Univ. of Wis. Hospitals and Clinics Authority*, 2023 WI 25, ¶ 17, 406 Wis. 2d 439, 988 N.W.2d 627. Ultimately, "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Kalal*, 2004 WI 58 at ¶ 46. Nevertheless, "even where the statutory language bears a plain meaning," this Court "may consult extrinsic sources to confirm or verify a plain-meaning interpretation." *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 20, 379 Wis. 2d 471, 907 N.W.2d 68 (cleaned up). Here, the only reasonable reading of § 940.04(1), and § 940.04 as a whole, is that it would prohibit consensual abortions.

A. The plain meaning of § 940.04(1) prohibits consensual abortion.

Section 940.04(1) provides: "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." In *Mac Gresens*, this Court explained that § 940.04(1) has three elements: "a living

unborn child, a destruction and the intent to destroy." 40 Wis. 2d at 181. A consensual abortion performed by a doctor plainly involves the intentional destruction of an unborn child (as defined in § 940.04(6)), and *Mac Gresens* upheld the conviction of a doctor for performing a consensual abortion. *See also Cohen*, 31 Wis. 2d at 98.

First, a doctor who performs an abortion is a person other than the mother of an unborn child. Second, "unborn child" is defined in § 940.04(6) as "a human being from the time of conception until it is born alive," thus making clear the concept of a living unborn child covered by the statute includes embryonic life from the moment of conception and applies both before and after the quickening of the fetus. This is also clear from the existence of the separate statutory provision, § 940.04(2)(a), that can be applied when an unborn child has quickened. Finally, a consensual abortion involves the intentional destruction of the life of the unborn child. That is the point of an abortion: to artificially induce termination of a pregnancy to destroy the embryo or fetus. *See* Black's Law Dictionary (12th ed. 2024), abortion (defining "abortion" as "[a]n artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus"). There really should be no dispute that a consensual abortion falls within the scope of the prohibition of § 940.04(1).

B. Statutory context and the canon against surplusage support the applicability of § 940.04 to consensual abortions.

The context of § 940.04(1), its relationship to surrounding or closely-related statutes, and the need to avoid surplusage, further support reading § 940.04(1) as prohibiting consensual abortions.

First, the context provided by § 940.04(5) shows § 940.04 (and § 940.04(1)) applies to consensual abortions. If § 940.04, and § 940.04(1) specifically, did not prohibit consensual abortions, there would be no need for the statute to include the exception for therapeutic abortions in § 940.04(5). Subsection (5) would be surplusage. To give effect to the exception in § 940.04(5), § 940.04(1) must be

construed as applying to consensual abortions. *See Kalal*, 2004 WI 58 at ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). Further, "[u]nder the doctrine of *expressio unius est exclusion alterius*, the express mention of one matter excludes other similar matters that are not mentioned." *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287 (cleaned up). That subsection (5) provides an exception only for a certain type of abortions—those necessary to save the life of the mother—is an indication that other types of abortions are included in, and not excepted from, § 940.04(1)'s prohibition.

Second, when it was enacted § 940.04 included § 940.04(3) and (4). 1955 Wisconsin Act 696, § 940.04. Wis. Stat. §§ 940.04(3) and (4) prohibited a woman from consenting to the destruction of the life of her unborn child, thus providing further context that § 940.04(1) includes performing consensual abortions within its prohibition.

Third, statutes are closely related when they reference one another. *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. Here, Wis. Stat. § 939.75(2)(b)1. references § 940.04 and categorizes it with other statutes that apply to abortions. Section 939.75(2)(b)1.'s reference to the "applicability of [§] 940.04 … to an induced abortion," and its inclusion of § 940.04 in a list of other statutes that apply to and/or prohibit certain types of abortions, provides additional context demonstrating that § 940.04, including § 940.04(1), applies to abortions. *See State v. Quintana*, 2008 WI 33, ¶ 27, 308 Wis. 2d 615, 748 N.W.2d 447 ("[W]ords are known from their associates.").

C. Statutory history supports the applicability of § 940.04 to consensual abortions.

The statutory history of § 940.04 is also relevant when conducting a plain meaning analysis under *Kalal*. *State ex rel. Nudo Holdings, LLC v. Bd. of Review for City of Kenosha*, 2022 WI 17, ¶ 23 n.16, 401 Wis. 2d 27, 972 N.W.2d 544. The statutory history of § 940.04(1) shows that the language of § 940.04(1), with its

reference to the intentional destruction of the life of an unborn child, is derived from predecessor statutes that criminalized acts taken "with intent … to destroy such child." These predecessor statutes were applied in the context of consensual abortions. *See, e.g.*, *Hanley*, 248 Wis. 578; *Hatchard*, 79 Wis. 357. When the Legislature used similar language in § 940.04(1)—referring to one "who intentionally destroys the life of an unborn child"—it should be presumed that the legislature is acting "with full knowledge of existing laws and prior judicial interpretations of them" such that the same interpretation should apply. *See In re John Doe Petition*, 2010 WI App 142, ¶ 11, 329 Wis.2d 724, 793 N.W.2d 209.

D. Section 990.001(7) supports the applicability of § 940.04 to consensual abortions.

Wis. Stat § 990.001(7) provides that "if [a] revision bill contains a note which says that the meaning of the statute to which the note relates is not changed by the revision, the note is indicative of the legislative intent." This court has previously relied on § 990.001(7) to consider comments accompanying the revised criminal code in 1955. *State v. Jennings*, 2003 WI 10, ¶ 18, 259 Wis. 2d 523, 657 N.W.2d 393. Here, the comment to the statutory section that became § 940.04 stated: "[t]his section penalizes the person who performs an abortion on another" and that "[t]his section is a substantial restatement of the present law."[4] Wisconsin Legislative Council Judiciary Committee Report on the Criminal Code at 66-67 (1953) (R.88:12-13.) Criminal law at the time of the revision of the criminal code plainly prohibited consensual abortions and had done so for a century. The note accompanying the new statutory language that became § 940.04(1)—which under § 990.001(7) can be considered as indicative of legislative intent—further states that

[4] The only identified differences between the revised law and prior abortion laws were changes (1) to require that a therapeutic abortion be performed in a licensed maternity hospital unless an emergency prevents and (2) to extend the exception for therapeutic abortions to cover abortions where the unborn child had not quickened. As the note stated, "[u]nder the old section, a physician who performed a therapeutic abortion on a woman whose child had not quickened was guilty." (R.88:12-13.)

language was substantially the same as prior prohibitions on producing miscarriages, (Doc.88:13), thus further evidencing that Wis. Stats. § 940.04 applies to consensual abortions. And, even if § 990.001(7) does not apply to allow consideration of this note, it should be considered as legislative history that confirms the plain meaning of § 940.04 as a statute that does apply to consensual abortions. *Westmas*, 2018 WI 12 at ¶ 20.

E. Contemporaneous applications of § 940.04 to consensual abortions indicate the statute prohibits abortions.

Next, contemporaneous applications of § 940.04 in the time after its enactment also indicate an understanding that § 940.04, like its predecessor statutes, continued to prohibit abortions both before and after the quickening of a fetus. *See Becker v. Dane Cty.*, 2022 WI 63, ¶ 19, 403 Wis. 2d 424, 439-40, 977 N.W.2d 390. Prior to Roe, this Court upheld convictions of abortion providers under § 940.04(1), providing further confirmation it applies to consensual abortions. *See, e.g.*, *Mac Gresens*, 40 Wis. 2d 179 (upholding conviction for the crime of committing an abortion in violation of § 940.04(1)); *Cohen*, 31 Wis. 2d 97 (same).

F. The title of § 940.04 confirms its applicability to consensual medical abortions.

Titles are not part of statutes, and they cannot be used "to create ambiguity or rewrite the plain text of the statute." *In re: P.M.*, 2024 WI 26, ¶ 15, 412 Wis. 2d 285, 8 N.W.3d 349. Nevertheless, it is appropriate to consult statutory titles as context and to confirm the plain meaning of a statute. *See State v. Matasek*, 2014 WI 27, ¶ 37, 353 Wis. 2d 601, 846 N.W.2d 811. Section 940.04's title, "Abortion," further confirms what the above analysis amply demonstrates—the plain meaning of § 940.04, including § 940.04(1), would prohibit consensual abortions.

G. The harmonious-reading canon does not support reading § 940.04(1) as only applying to feticide.

The harmonious-reading canon "instructs that '[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory.'" *In re T.L.E.-C*, 2021 WI 56, ¶ 30, 397 Wis. 2d 462, 960 N.W.2d 391 (quoting Antonin

Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012)). This canon seems to have been a driver of the *Black* court's determination that § 940.04(2)(a) is not an abortion statute, *Black*, 188 Wis. 2d at 645-46, as that decision sought to avoid a perceived conflict between § 940.04(2)(a) and § 940.15. Application of this canon to preclude the enforcement of § 940.04, and § 940.04(1) specifically, to consensual abortions is not appropriate, for multiple reasons.

First, application of this canon requires the alternative interpretation to be a reasonable construction of the statute. But, "if context and other considerations (including the application of other canons) make it impossible to apply the harmonious-reading canon, the principles governing conflicting provisions … must be applied." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012). As already discussed, it is not a reasonable interpretation of § 940.04(1) to conclude it is a feticide statute only. It applies to consensual abortions.

Moreover, and most importantly, interpreting § 940.04, and § 940.04(1) specifically, to apply to consensual abortions does not create a conflict with § 940.15 or other statutes. This is explained in more detail *infra* in Part II of this argument. There is no conflict because physicians can comply with both § 940.04 and § 940.15, for example. It is not impossible to comply with both. Thus, there is no need to adopt an alternative interpretation to avoid a conflict.

H. The general/specific canon does not support reading § 940.04(1) as only applying to feticide.

The State Plaintiffs or Physician Intervenors might also invoke the canon of statutory construction that "where two conflicting statutes apply to the same subject, the more specific controls." (Dkt. 34 at ¶51.) This rule is inapplicable here. The rule "requires more than the mere existence of one general and one specific statute." *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45, 53, 187 N.W.2d 878 (1971). Rather, "[it] is also necessary that there be an irreconcilable conflict between the two." *Id.* Again as will be explained in Part II of this argument, there is no

irreconcilable conflict between § 940.04(1) and any of the statutes cited by the State Plaintiffs and Physician Intervenors, so the rule does not apply.

I. The constitutional-doubt canon does not support reading § 940.04(1) as only applying to feticide.

The State Plaintiffs or Physician Intervenors might also invoke the constitutional doubt canon to argue § 940.04 does not apply to consensual abortions. "[I]t is a cardinal rule that courts should avoid interpreting a statute in a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *State v. Hamdan*, 2003 WI 113, ¶ 27 n.9, 264 Wis. 2d 433, 665 N.W.2d 785. This canon is not relevant here.

First, as Urmanski will explain elsewhere, § 940.04's application to induced abortions is constitutional. Second, "the constitutional-doubt canon does not trump a plain meaning." It "has no application in the absence of statutory ambiguity." *Hamdan*, 2003 WI 113 at ¶ 27 n.9. "[T]he prerequisite of this rule is that the second possible interpretation is reasonable." *Id.*; *see also State v. Hager*, 2018 WI 40, ¶ 31, 381 Wis. 2d 74, 911 N.W.2d 17. As explained above, it is not reasonable to read § 940.04(1) as only a prohibition on feticide. The only reasonable reading of the statute is that it encompasses a prohibition on consensual abortions, even if it also applies to feticide.

J. The rule of lenity does not support reading § 940.04(1) as only applying to feticide.

The State Plaintiffs below cited the rule of lenity to argue § 940.04(1) does not apply to abortions. (R.34:21, App.025.) That rule "provides that when doubt exists as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis. 2d 857, 867 N.W.2d 400 (internal quotation marks omitted). This rule applies when "a 'grievous ambiguity' remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *Id.* at ¶ 27.

Here, there is no grievous ambiguity or uncertainty that would require application of this principle. Section 940.04(1) has a clear and unambiguous application to consensual abortions and the rule of lenity should not be applied. *Id.*

Finally, to the extent the State Plaintiffs rely on *State v. Christensen*, 110 Wis. 2d 538, 329 N.W.2d 382 (1983), that case involved a situation where a later statute had repealed part of the older statute's definition of the offense. In *Christensen*, the charged offense was defined as elder abuse in "residential care institutions under section 146.32(2)," but a later statute had repealed § 146.32(2). The court applied the rule of lenity in concluding that the repeal of § 146.32(2) had effectively repealed the charged offense. Here, as discussed in Part II, there has been no subsequent repeal and there is no doubt of the meaning of § 940.04.

K. *State v. Black* does not preclude application of § 940.04(1) to abortions and, if it does, it should be overruled.

Finally, this Court "must consider stare decisis." *M.A.C.*, 2024 WI 30 at ¶ 26. Here, precedent supports applying § 940.04(1) to consensual abortions. *See Mac Gresens*, 40 Wis. 2d 179; *Cohen*, 31 Wis. 2d 97. Nevertheless, the circuit court determined that adherence to *Black* compelled the conclusion that Wis. Stat. § 940.04, and § 940.04(1) specifically, is not an abortion statute and only applies to prohibit feticide. *Black* is not binding precedent on the question of whether § 940.04, and § 940.04(1) specifically, applies to consensual abortions. And, even if it were, this Court should overrule it.

1. *Black* did not decide the applicability of § 940.04(1) to consensual abortions.

Black is not binding precedent on the meaning of § 940.04(1), because *Black* says it is not. *Black* was clear: "We address only sec. 940.04(2)(a) and make no attempt to construe any other sections of sec. 940.04." 188 Wis. 2d at 647 n.2. *Black* cannot be read as a binding interpretation of § 940.04(1).

2. *Black*'s discussion of the applicability of § 940.04(2)(a) to consensual abortion should be treated as *dicta* or overruled if necessary.

Urmanski does not dispute that § 940.04(1) uses language similar to § 940.04(2)(a). Urmanski also does not dispute that words and phrases are "presumed to bear the same meaning throughout a text." Scalia & Garner at 170. This presumption is not absolute, however. Courts may adopt an interpretation which ascribes different meanings to the same word or phrase as it variously appears in a statute when "the context clearly requires such an approach." *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, ¶ 12, 367 Wis. 2d 712, 877 N.W.2d 604 (quoting *General Castings Corp. v. Winstead*, 156 Wis. 2d 752, 759, 457 N.W.2d 557 (Ct. App. 1990)). Here, § 940.04(1), when interpreted in context and consistent with *Kalal*, must be read as having application to consensual abortions. Regardless, this Court should not rely on *Black*'s statements regarding the applicability of § 940.04(2)(a) to consensual abortions.

Black did not involve consensual abortions. This Court's statements on the applicability of § 940.04(2)(a) to consensual abortion were not essential to the court's holding, as the court only needed to hold that § 940.04(2)(a) was broad enough to apply to the actions of the defendant in that case. Indeed, neither of the parties in *Black* questioned the applicability of § 940.04(2)(a) to abortions. Rather, the defendant argued he could not be charged under the statute because it "only applies to medical abortion," and the State argued the defendant could be charge because the "the language is sufficiently broad to encompass both medical abortion and fetal death by assault to the pregnant mother." 188 Wis. 2d at 652 (Heffernan, C.J., dissenting). Under these circumstances, it would be appropriate for this Court to treat the statements in *Black* addressing the applicability of § 940.04(2)(a) to consensual abortion as dicta. *See, e.g.*, *State v. Sartin*, 200 Wis. 2d 47, 60, 546 N.W.2d 449, 454 (1996).

Even if *Black*'s discussion of the applicability of § 940.04(2)(a) to consensual abortions was not dicta, it should be overruled to the extent it forecloses an application of § 940.04, and § 940.04(1) specifically, to consensual abortion. This Court "require[s] a 'special justification' to overrule a prior decision." *M.A.C.*, 2024 WI 30 at ¶ 26. Here, a special justification exists because the law has changed in ways that undermine *Black*'s rationale. *Black* is inconsistent with this Court's subsequent decisions in *Kalal* and *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. And, to the extent *Black* relied on *Roe* to inform its reasoning, *Roe* has been overruled. Further, a special justification exists because *Black* is simply unsound in principle to the extent it held that § 940.04(2)(a) (or any part of § 940.04) cannot be applied to a consensual abortion.

First, *Black* was decided before *Kalal* and does not use the interpretive methodology adopted in that case. *Black* improperly interpreted § 940.04(2)(a) in isolation, without reference to the language of surrounding or closely-related statutes. The context provided by § 940.04(5) and the then-existing § 940.04(3) and (4) show § 940.04 (and § 940.04(1)) would apply to consensual abortions. Wis. Stat. § 939.75(2)(b)1. also references § 940.04 and categorizes it with statutes that apply to abortions. Nor did *Black* sufficiently consider the statutory history of § 940.04, which as discussed above demonstrates the statute prohibited consensual abortions. *See also Black*, 188 Wis. 2d at 650-661 (Heffernan, C.J., dissenting).

Second, *Black* improperly assumed separate statutes must be construed as governing distinct types of conduct, 188 Wis. 2d at 646, but this is inconsistent with the reality that the same conduct can be governed by multiple statutes. *See Grandberry*, 2018 WI 29 at ¶ 35. In addition to § 940.04, Wisconsin law contains multiple partially overlapping prohibitions that may or may not apply to a particular abortion depending on the circumstances. *See* § 940.16 (partial-birth), § 940.15 (post-viability), and § 253.107 (twenty-week ban). Overlapping criminal statutes are common and permitted in the law. *See generally United States v. Batchelder*, 442 U.S. 114, 123 (1979); *State v. Villamil*, 2017 WI 74, ¶¶ 42-49, 377 Wis. 2d 1,

898 N.W.2d 482. Regardless, to the extent *Black* construed § 940.04(2)(a) as having a distinct role of proscribing feticide, *Black*'s reasoning is undermined by the passage of subsequent feticide statutes that contain language indicating § 940.04 applies to induced abortions. *See* 1997 Wisconsin Act 295.

Third, to the extent *Black* relied on the harmonious reading canon and the existence of a perceived inconsistency between § 940.04(2)(a) and § 940.15, 188 Wis. 2d at 646, the analysis was cursory, objectively wrong, and inconsistent with this Court's caselaw addressing incompatibility of statutes. As explained *infra* at Part II, there is no inconsistency between § 940.04(2)(a) (or § 940.04(1)) and § 940.15 because it is not impossible to comply with both statutes. *Grandberry*, 2018 WI 29 at ¶ 21 ("In order for two statutes to be in conflict, it must be impossible to comply with both.").

Finally, to the extent *Black* relied on *Roe* to inform its reasoning, 188 Wis. 2d at 646, *Roe* has been overturned.

In short, this Court should reassess *Black* to the extent *Black* would preclude applying § 940.04(2)(a), § 940.04(1), or any other part of § 940.04 to abortions (including consensual abortions). If *Black* precludes Urmanski's interpretation of § 940.04(1), *Black* should be overturned to the extent it addresses the applicability of § 940.04 to consensual abortions.

L. The doctrine of legislative acquiescence does not apply or require adherence to *Black*.

Finally, the circuit court applied the doctrine of legislative acquiescence in holding that § 940.04 does not apply to abortions. There are several reasons, however, why the doctrine of legislative acquiescence does not require this Court adhere to its decision in *Black* or conclude that § 940.04(1) is a feticide statute only.

First, the basis of the doctrine "is the presumption that the legislature knows that a particular statutory interpretation is binding and, thus, recognizes that its inaction will leave that interpretation intact." *Amazon Logistics, Inc. v. LIRC*, 2023 WI App 26, ¶ 130, 407 Wis. 2d 807, 885, 992 N.W.2d 168, 205. *Black* did not

provide a binding interpretation of Wis. Stat. § 940.04(1) or any part of § 940.04 other than § 940.04(2)(a). It is not correct to say the Legislature acquiesced in an interpretation of § 940.04(1) as a feticide statute only. Given the pre-*Black* decisions that apply § 940.04(1) in the context of consensual abortions, legislators would have felt no need to correct any error in the supreme court's interpretation of § 940.04(2)(a) to ensure § 940.04(1) remained applicable to consensual abortions. *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 36, 274 Wis. 2d 220, 682 N.W.2d 405.

Second, whether § 940.04(2)(a) applies to consensual abortions was overshadowed by the actual issue in *Black*—whether § 940.04(2)(a) could be applied to a man who allegedly caused the death of an unborn quick child by violently assaulting the unborn child's mother. This Court concluded that § 940.04(2)(a) could be applied to such conduct. This was the primary holding in *Black*, which would have attracted the attention of legislators. Further discussions of the applicability of § 940.04(2)(a) to consensual abortion were dicta, as already discussed, and regardless were tangential to disposition of the case. Legislative acquiescence does not apply under these circumstances. *Wenke*, 2004 WI 103 at ¶ 36; *see also State v. Hansen*, 2001 WI 53, ¶ 38, 243 Wis. 2d 328, 627 N.W.2d 195.

Third, given *Black*'s statement that it was *Roe* that would prevent the application of § 940.04(2)(a) to a consensual abortion prior to viability, legislators would have been justified in assuming that, were *Roe* to be overturned (as it now has been), nothing would stand as an obstacle to applying § 940.04(2)(a) (or other parts of § 940.04) to pre-viability abortions.

Fourth, the Legislature's subsequent actions reflect a belief that § 940.04 still had some application to abortions. *See* 1997 Wis. Act 295, § 12; Wis. Stat. § 939.75(2)(b)1. There is no basis for applying the presumption of acquiescence if the Legislature did not know § 940.04 was subject to an interpretation that it did not apply to abortion. The Legislature's grouping of § 940.04 together with other abortion statutes is an indication the Legislature had no such understanding. Indeed,

numerous bills have been introduced, but not enacted, that would have repealed Wis. Stat. § 940.04. See 2023 Assembly Bill 218; 2015 Assembly Bill 880; 2015 Senate Bill 653; 2015 Assembly Bill 916; 2015 Senate Bill 701; 2007 Assembly Bill 749; 2007 Senate Bill 398; 2005 Senate Bill 721; 2005 Assembly Bill 1144. Several of these introduced bills indicate an understanding that § 940.04 continues to apply to abortions, thus weighing against application of the presumption of legislative acquiescence in this case.

Finally, application of legislative acquiescence in this case is particularly unwarranted because the State Plaintiffs and Physician Intervenors themselves each believed § 940.04(1) applied to consensual abortions (subject to their implied repeal and other legal claims). Their legal pleadings each assumed § 940.04 was a statute that by its terms banned abortions unless it had been impliedly repealed. Even published decisions of the court of appeals continued to refer to § 940.04 as an antiabortion statute, even after *Black*. *See State v. Deborah J.Z.*, 228 Wis. 2d 468, 596 N.W.2d 490 (Ct. App. 1999) ("This state's antiabortion statute, § 940.04, STATS., was rendered unenforceable by *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973)."). It is not appropriate to conclude the Legislature alone should have realized that *Black* did something *Black* never claimed to do—make § 940.04(1) applicable only to feticide, and not consensual abortions. *Cf. Wenke*, 2004 WI 103 at ¶ 36 ("It is especially unreliable to rely on legislative inaction in this case.").

II. Subsequent Legislation Has Not Repealed § 940.04's Applicability to Abortions

The circuit court did not address the State Plaintiffs' and Physician Intervenors' claim that § 940.04, to the extent it applied to abortions, conflicts with, or has been superseded by, subsequent abortion legislation. If this Court concludes § 940.04 applied to consensual abortions when it was enacted, this Court should further hold that subsequent legislation has not repealed or amended § 940.04 to the extent it applied to abortions.

Whether an implied repeal has occurred is a question of law this Court reviews de novo. *See Manthe v. Town Bd. of Town of Windsor*, 204 Wis. 2d 546, 554, 555 N.W.2d 167, 171 (Ct. App. 1996). "[R]epeal by implication is not a favored concept in the law." *Dairyland Power Co-op.*, 52 Wis. 2d at 51. "[A] strong public policy exists which favors the continuing validity of a statute except where the legislature has acted explicitly to repeal it." *State v. Gonnelly*, 173 Wis. 2d 503, 512, 496 N.W.2d 671 (Ct. App. 1992). Implied repeals or amendments may occur in either of two circumstances: (1) when the earlier act "is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together," *Dairyland Power Co-op.*, 52 Wis. 2d at 51 (internal quotation marks and citation omitted), or (2) "where the later statute covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first," *Gilkey v. Cook*, 60 Wis. 133, 18 N.W. 639, 641 (1884); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). Neither circumstance exists here.

A. Section 940.04's prohibition on performing abortions does not conflict with subsequent statutes.

1. Section 940.04(1) and (5) do not conflict with § 940.15.

Both the State Plaintiffs and the Physician Intervenors alleged that § 940.04(1) conflicts with § 940.15. Section 940.15 prohibits abortions post-viability and has an exception for abortions necessary to preserve both the health and life of the mother. According to the State Plaintiffs and the Physician Intervenors, because § 940.15 does not prohibit pre-viability abortions or abortions necessary to preserve the health, but not life, of the mother, the statute conflicts with § 940.04(1) (which prohibits such abortions). Both the State Plaintiffs and the Physician Intervenors make the same mistake: they construe the absence of a prohibition of certain abortions in § 940.15 as a declaration by the Legislature that such abortions are lawful. In other words, the State Plaintiffs and the Physician Intervenors effectively read § 940.15 as creating a statutory right to abortions not otherwise prohibited in § 940.15.

Simply because § 940.15 does not criminalize certain abortions that are prohibited under § 940.04(1) does not mean the statutes conflict, however. Rather, the relationship between § 940.04(1) and (5) and § 940.15 presents a case of overlapping criminal prohibitions that can produce different results when applied to the same conduct. That two statutes cover the same conduct or produce different results when applied to the same conduct does not mean they are in conflict. *See Radzanower*, 426 U.S. at 155.

Wisconsin law contains several partially overlapping prohibitions that may or may not apply to a particular abortion depending on the circumstances. *See* § 940.16 (partial-birth), § 940.15 (post-viability), § 940.04(1) and § 253.107 (twenty-week ban). That these laws partially overlap and some conduct may fall within the scope of one, while falling outside the scope of others, does not mean the statutes conflict. Such partially overlapping prohibitions are commonplace in criminal law. *See generally Batchelder*, 442 U.S. at 123; *Villamil*, 2017 WI 74 at ¶¶ 42-49.

Indeed, this Court has rejected arguments like the ones on which the State Plaintiffs and Physician Intervenors stake their claim of conflict. In *Grandberry,* the defendant's conduct—having a handgun in the glove compartment of his vehicle—complied with the Safe Transport Statute, but the defendant was nevertheless charged with violating the Concealed Carry Statute because he did not have a concealed carry permit. 2018 WI 29, ¶¶ 2-3. The defendant argued that statutes conflict when the same conduct can comply with one statute yet violate another. This Court rejected this argument because it was possible for the defendant to engage in different conduct—obtaining a concealed carry permit or placing his firearms out of reach—that would have complied with both statutes. *Id.* at ¶¶ 3, 21-30. In short, this Court held that a conflict between laws does not exist simply because the same conduct would violate one statute but not the other. *Id.* at ¶¶ 20-21. Rather, for a conflict to exist between statutes, it must be impossible to comply with both statutes. *Id.* at ¶ 21; *see also Randolph v. IMBS, Inc.*, 368 F.3d 726, 731

(7th Cir. 2004) ("Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.").

Here, it is not impossible to comply with both § 940.04(1) and (5) and § 940.15. A physician can comply with both § 940.04(1) and (5) and § 940.15 by not performing any abortions unless doing so was necessary to save the life of the mother. In other words, a physician who conforms his or her conduct to § 940.04(1) and (5) will necessarily also comply with § 940.15. Thus, there is no conflict.

Ultimately, § 940.15 does not contain any language expressly permitting abortions or protecting a statutory right to an abortion. Rather, § 940.15 says nothing one way or the other about the legality of abortions before viability or to protect a woman's health—it just does not prohibit them. The mere absence of a prohibition in § 940.15 does not make it impossible to comply with both § 940.15 and § 940.04. Because a physician who adheres his or her conduct to § 940.04's requirements is not violating § 940.15, the statutes do not conflict. *See Grandberry*, 2018 WI 29 at ¶ 30 (no conflict where reasonable means exist for complying with both statutes).

Finally, even if § 940.04 and § 940.15 conflict (they do not), the subsequent law "abrogates the older only to the extent that it is inconsistent and irreconcilable with it." *McLoughlin v. Malnar*, 237 Wis. 492, 297 N.W. 370, 372 (1941). Those parts of the law that do not conflict with the subsequent law remain in effect. Thus, if this Court were to agree with the language in *Black* that attempting to apply § 940.04(2)(a) to post-viability abortions would conflict with § 940.15, but its application to pre-viability abortions was only blocked by *Roe*, any conflict between § 940.04(1) and § 940.15 would be limited to post-viability abortions. Section 940.04(1) would still prohibit pre-viability abortions, because *Roe* has been overturned. Regardless, *Black* was wrong to the extent it stated that applying § 940.04(2)(a) to post-viability abortions would conflict with § 940.15, because it is not impossible to comply with both statutes, and that aspect of *Black* should be overruled to the extent necessary as already discussed.

2. Section 940.04(1) and (5) do not conflict with other abortion statutes.

The State Plaintiffs and Physician Intervenors also identified other statutes they alleged superseded § 940.04, but such claims are without merit. For example, both the State Plaintiffs and Physician Intervenors referenced § 253.105 as a statute that is incompatible with enforcement of § 940.04. Section 253.105 simply prohibits giving a woman an abortion-inducing drug unless the prescribing physician satisfies certain conditions. It does not contain language legalizing abortions that § 940.04(1) would prohibit or language otherwise making compliance with both § 253.105 and § 940.04 impossible. Indeed, § 253.105 disclaims any intent of affecting the legality of otherwise unlawful abortions by providing that "[n]othing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." § 253.105(6). By its plain terms, this language establishes that, in a conflict between that statute and a criminal prohibition making abortion unlawful, the criminal prohibition prevails. Thus, to the extent § 253.105 does conflict with § 940.04(1), § 940.04(1) must prevail.

The State Plaintiffs' and Physician Intervenors' reliance on § 253.10 fails for the same reasons. Section 253.10 simply provides additional conditions that must be satisfied to perform an otherwise lawful abortion. It does not expressly legalize abortions merely because the performing physician obtains voluntary and informed written consent. It is not impossible to comply with both § 940.04(1) and § 253.10. Indeed, § 253.10, like § 253.105, expressly provides that "[n]othing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." § 253.10(8).

It is the same story with § 253.107. That statute prohibits abortions 20 or more weeks after fertilization and also expressly provides that "[n]othing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." § 253.107(3), (7). Nothing in the statute expressly provides that abortions less than 20 weeks after fertilization are

lawful, however, and the statute disclaims any such intent. Rather, § 253.107 is another overlapping criminal prohibition on certain types of abortions that can exist side by side with § 940.04. It is not impossible to comply with both § 253.107 and § 940.04 and, to the extent an abortion could be prosecuted as a violation of either § 253.107 or § 940.04(1), a prosecution may proceed under either. See Wis. Stat. § 939.65.

The State Plaintiffs' and Physician Intervenors' reliance on various other provisions in Wisconsin's regulatory framework for abortions, such as state laws relating to parental consent for abortions for minors, Wis. Stat. §§ 48.257, 48.375, requiring physicians to have admitting privileges in a hospital within 30 miles of the location of the abortion, Wis. Stat. § 253.095(2), and prohibiting the use of public funds to pay for the performance of an abortion, Wis. Stat. § 20.927, fails for similar reasons. Nothing in these statutes purports to expressly legalize abortions that are not covered by their terms or otherwise makes it impossible for a physician to comply with those statutes and § 940.04. Rather, these statutes simply provide a regulatory framework that applies to those abortions that would be legal under § 940.04, and a physician would not violate those statutes by conforming his or her conduct to § 940.04. Thus, there is no conflict.

B. Wisconsin's subsequent abortion statutes do not clearly indicate a legislative intent to repeal § 940.04.

There is also no merit to any claim that § 940.15 and other later statutes addressing abortion were plainly intended as substitutes for § 940.04. Simply because other statutes regulate the subject matter of abortion does not establish an implied repeal. *See State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 114 Wis. 386, 129 N.W. 623, 627 (1911) ("Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together."). Indeed, it is common that multiple statutes will regulate a specific subject. *Cf. Grandberry*, 2018 WI 29 at ¶35 (noting that it would be absurd for due process to require "that every regulation on a certain subject be in the same statute").

In fact, Wisconsin law allows for the same conduct to be governed by completely overlapping statutes, and leaves to district attorneys the choice of which statute to enforce when both apply to the same conduct. *See* Wis. Stat. § 939.65; *State v. Cissell*, 127 Wis. 2d 205, 378 N.W.2d 691 (1985); *State v. Ploeckelman*, 2007 WI App 31, 299 Wis. 2d 251, 729 N.W.2d 784.

As already discussed, many of the statutes on which the State Plaintiffs and Physician Intervenors rely make clear those statutes are not intended to replace or repeal an otherwise applicable ban on abortion. *See, e.g.*, Wis. Stat. § 253.10(8); § 253.105(6); § 253.107(7). There obviously is no clear intent to substitute these newer laws for § 940.04.

With respect to § 940.15, one cannot conclude § 940.15 is intended to cover the whole subject of regulation of abortion when Wisconsin law contains various statutes prohibiting abortions under varying circumstances and subject to enumerated exceptions. *See, e.g.* Wis. Stat. § 253.107 (20-week ban); Wis. Stat. § 940.16 (partial-birth abortion ban). Given the strong presumption against implied repeals, there is no basis for concluding that § 940.15 replaced § 940.04.

Indeed, the legislative history of § 940.15 shows that statute was not intended as a substitute for § 940.04. Specifically, the Legislature, when it enacted § 940.15, considered expressly repealing § 940.04 but chose not to do so. The initial draft of 1985 Assembly Bill 510, which ultimately became the act that enacted Wis. Stat. § 940.15 did contain a provision that would have expressly repealed § 940.04. Initial Draft of 1985 Assembly Bill 510, 1985-86 Legislature, LRB-4124/1 at 2 (R.88:40 ("940.04 of the statutes is repealed and recreated to read").) That language was removed during the legislative process, however, and the final version of the bill did not contain language repealing § 940.04. See 1985 Wis. Act 56.

Specifically, the Assembly adopted a substitute amendment that removed the language repealing Wis. Stat. § 940.04. Subsequent memos prepared by the Legislative Fiscal Bureau and Wisconsin Legislative Council dated October 16, 1985 discussed the proposed substitute amendment and acknowledged it did not

repeal the provisions of § 940.04 at issue in this case.[5] (R.136:4-5; R.137:3-4.) Further, a senate amendment that would have expressly repealed § 940.04 was subsequently introduced in the drafting process, but it was then withdrawn. (R.141:1-4.) Under these circumstances, it is not appropriate to conclude an implied repeal has occurred. *See Gonnelly*, 173 Wis. 2d at 513 ("That it was considered and rejected deflates the states argument of implied repeal. It is not for this court to do what the legislature has chosen not to do." (emphasis added)). If the actual intent of the Legislature was to repeal § 940.04 via § 940.15, it is strange the Legislature would consider and reject a statutory provision accomplishing that intent. *Dairyland Power Co-op.*, 52 Wis. 2d at 52.

Further, the Legislature has continued to amend § 940.04 in the years after it enacted § 940.15. In 2011, for example, the Legislature enacted a law that repealed the then-existing § 940.04(3) and (4), which made it a crime for a pregnant woman to destroy the life of her unborn child or to consent to its destruction by another. 2011 Wisconsin Act 217. If the Legislature had intended § 940.15 to supersede § 940.04, it would not have made a subsequent amendment to expressly repeal certain of § 940.04's provisions. *See Dairyland Power Co-op.*, 52 Wis. 2d at 52-53.

Finally, as already discussed, several bills have been introduced in the last two decades that would have repealed Wis. Stat. § 940.04, but none have been enacted. In arguing that § 940.04's abortion ban has been repealed, the State Plaintiffs and Physician Intervenors are asking this Court for a result the Legislature has repeatedly refused to provide. This Court should refuse to give Plaintiffs and Intervenors what the Legislature chose not to do.

[5] These memos appear to have been prepared at a time when the proposed substitute amendment also included "NO IMPLIED REPEAL" language that was removed from the substitute amendment before it was adopted. This fact should not be interpreted as establishing clear legislative intent to repeal § 940.04, however. That the Legislature considered but did not include "NO IMPLIED REPEAL" language says little, because there is already a strong presumption against implied repeal. There is simply no need to include such language. That the Legislature considered but rejected an express repeal of § 940.04 is far more telling, however, and should suffice to demonstrate why there is no clear intent that § 940.15 be a substitute for § 940.04.

III. The Physician Intervenors' Due Process Claims Based on Vagueness and Impossibility Should Be Dismissed

Count II of the Physician Intervenors' Complaint sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions "because it is premised on arcane language, belies modern medicine, and contains impossible requirements." (R.75:13, App.045). Subsequent briefing clarified that Count II alleged violations of the due process clauses of the U.S. and Wisconsin constitutions, under theories of void-for-vagueness and impossibility. If this Court concludes § 940.04(1) still applies to abortions as a matter of statutory interpretation, this Court should also conclude Count II of the Physician Intervenors' Complaint is subject to dismissal. The Physician Intervenors failed to allege a meritorious facial vagueness or impossibility challenge to § 940.04's applicability to abortion.

A. The Physician Intervenors raise a facial challenge to the statute.

First, although the Physician Intervenors sought a declaration that § 940.04 is unenforceable "as applied" to abortions, this is a facial challenge. The Physician Intervenors do not challenge an application of § 940.04 to the Physician Intervenors' specific circumstances or to the performance of a specific abortion. *See Gabler v. Crime Victim Rights Board*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384. Rather, they challenge the application of § 940.04 to abortions as a category. *Id*.

"A facial challenge to the constitutionality of a statute presents a question of law" that this Court reviews independently. *Mayo v. Wisconsin Injured Patients and Fams. Comp. Fund*, 2018 WI 78, ¶ 23, 383 Wis. 2d 1, 914 N.W.2d 678. This Court presumes the statute is constitutional and resolves any doubts in favor of the constitutionality of the statute. *Id.* at ¶ 26. "In order to be successful, the challenger must prove the statute is unconstitutional beyond a reasonable doubt." *Id.* at ¶ 27 (cleaned up). For a facial challenge to succeed under the Wisconsin Constitution, a party must demonstrate the law cannot be constitutionally enforced under any circumstances. *Mayo*, 2018 WI 78 at ¶ 24; *Gabler*, 2017 WI 67 at ¶ 29.

B. The Physician Intervenors' vagueness claims necessarily fail.

The void-for-vagueness doctrine "rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714, 718 (1976). "A statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence regarding what it prohibits and if it fails to provide an objective standard for enforcement." *State v. McKellips*, 2016 WI 51, ¶ 41, 369 Wis.2d 437, 881 N.W.2d 258. This is a two-pronged standard that asks (1) whether the statute is "so ambiguous that one who is intent upon obedience cannot tell when proscribed conduct is approached" and (2) whether "a trier of fact must apply its own standards of culpability rather than those set out in the statute." *State v. Ruesch*, 214 Wis. 2d 548, 561-62, 571 N.W.2d 898 (Ct. App. 1997). The law does not require, however, that "the line between lawful and unlawful conduct be drawn with absolute clarity and precision" or that a statute "be so specific as to delineate each and every mode of conduct embraced by its terms." *McKellips*, 2016 WI 51 at ¶ 41 (cleaned up). "A fair degree of definiteness is all that is required." *Id.* (cleaned up).

Facial vagueness challenges not involving the First Amendment are disfavored. *See Planned Parenthood of Ind. & Ky. v. Marion Cty. Prosecutor*, 7 F.4th 594, 603-04 (7th Cir. 2021). This Court has observed that "when a court reviews a facial vagueness challenge, provided it does not implicate protected conduct, a court upholds the challenge only if the enactment is impermissibly vague in all of its applications." *State v. Wood*, 2010 WI 17, ¶ 44 n.15, 323 Wis. 2d 321, 780 N.W.2d 63. Under federal law, a vague provision is not constitutional "merely because there is some conduct that clearly falls within the provision's grasp," *Johnson v. United States*, 576 U.S. 591, 595 (2015), but the existence of clear-cut cases constituting a core of prohibited conduct will render a statute immune from a pre-enforcement facial challenge. *See Planned Parenthood of Ind. & Ky.*, 7 F.4th at 604-05.

Here, § 940.04(1) has a core of prohibited conduct that would not implicate any of Physician Intervenors' vagueness concerns: it would plainly prohibit abortions on otherwise healthy mothers early in gestation. Although the Physician Intervenors make several allegations amounting to a claim that § 940.04 should be void for vagueness because physicians will have difficulty determining whether certain abortions are lawful, (R.75:14, App.046), their complaint does not contain any allegations suggesting such abortions would involve most applications of § 940.04. There are no allegations demonstrating this is a case in which uncertainty is "so pervasive that most of a law's potential applications are impossible to evaluate." *Trustees of Ind. Univ. v. Curry*, 918 F.3d 537, 540 (2019). Although there may be some abortions that present difficult questions regarding whether the life, as opposed to health, of the mother is at risk, or whether the fetus is a "quick child," such concerns involve application of the statute on the margins. "Some uncertainty at the margins does not condemn a statute." *Trustees of Ind. Univ.*, 918 F.3d at 540; *see also Courtney*, 74 Wis. 2d at 711. Any vagueness concerns arising from application of § 940.04 to a borderline case can be addressed through an as-applied challenge.

1. The challenge to the term "quick" in § 940.04(2) must fail.

The Physician Intervenors alleged § 940.04(2)(a) "provides no one may destroy the life of an 'unborn quick child,'" that the term "quick child" is "antiquated slang" that "holds no medical or scientific significance, and is no longer in use," and that "it is impossible for a Wisconsin physician to know whether an otherwise lawful abortion is unlawful because the fetus somehow meets this nonexistent threshold." (R.75:13-14, App.045-46.) These allegations fail to establish § 940.04 is unconstitutionally vague as applied to all abortions for several reasons.

First, whether the term "quick" in § 940.04(2)(a) is an arcane term is irrelevant to whether § 940.04(1) may be applied to prohibit abortions. Section 940.04(1) does not use that term and prohibits abortions from conception until birth without regard to whether the child has "quickened." Any lack of fair notice presented by the term

"quick child" in § 940.04(2)(a) does not establish § 940.04(1) is unconstitutionally vague. Any vagueness problem presented by the term would only relate to the potential application of the more serious crime in § 940.04(2)(a), not the lesser-included offense in § 940.04(1).

Second, the term "quick child" is not unconstitutionally vague. When the Legislature enacted § 940.04(2), the term "quick child" had a well-established meaning in Wisconsin law and it is presumed the Legislature acted with that meaning in mind. *See In re John Doe Petition*, 2010 WI App 142 at ¶ 11. A quick child is a child "that has developed so that it moves within the mother's womb," *State v. Timm*, 244 Wis. 508, 511, 12 N.W.2d 670 (1944), which "does not occur till four or five months of pregnancy have elapsed," *Foster v. State*, 182 Wis. 298, 196 N.W. 233, 234 (1923); *see also* Black's Law Dictionary (12th ed. 2024) (defining "quickening" as "[t]he first motion felt in the womb by the mother of the fetus, usu. occurring near the middle of the pregnancy"). This definition provides fair notice of the prohibited conduct and objective standards for enforcement. *See, e.g.*, *Smith v. Newsome*, 815 F.2d 1386, 1387 (11th Cir. 1987) (rejecting vagueness challenge to a Georgia feticide statute that applied to the killing of "an unborn child so far developed as to be ordinarily call[ed] 'quick'"); *Brinkley v. State*, 253 Ga. 541, 542-44, 322 S.E.2d 49 (Ga. 1984) (same). A statute is not vague simply because one must interpret the statute through reference to other materials, such as dictionaries, other statutes, or caselaw. *Balistreri v. State*, 83 Wis. 2d 440, 450, 265 N.W.2d 290, 294 (1978); *see also Rose v. Locke*, 423 U.S. 48, 50 (1975).

It might sometimes be difficult to determine whether an unborn child is "quick," but that does not mean it is not a recognized term in the law that provides fair notice of prohibited conduct. "[I]t is not sufficient to void a criminal statute or regulation to show merely that the boundaries of the area of proscribed conduct are somewhat hazy." *Courtney*, 74 Wis. 2d at 711.

Finally, even if abortions post-quickening were not prohibited by § 940.04(1)—they are—§ 940.04(1) would still prohibit a clear-cut and discernable

core of conduct. The abortion of an unborn child at the six- to eight-week stage of the pregnancy, for example, would not involve the abortion of a "quick" child and prosecution of such an offense under § 940.04(1) would not present the vagueness concerns raised by Physician Intervenors. *See Foster*, 182 Wis. 298, 196 N.W. 233 (abortion of two months' embryo should not have been prosecuted under statute that only applied to abortion resulting in the death of a quick child). Similarly, although application of § 940.04(2)(a) to an abortion depends on whether the unborn child is "quick," the statute would plainly apply to late-term abortions beyond the fourth or fifth month of pregnancy. The existence of such clear-cut cases renders the statute immune from a pre-enforcement facial challenge. The Physician Intervenors' vagueness argument does not provide a basis for a broad declaration that § 940.04, including § 940.04(1), cannot constitutionally apply to abortions in any circumstance.

2. The challenge to § 940.04(5)'s exception for abortions performed if "necessary, or advised by 2 other physicians as necessary, to save the life of the mother" must fail.

The Physician Intervenors also alleged § 940.04(5) is impermissibly vague because the exception "does not provide any standard by which a physician may determine necessity," (R.75:14, App.046), and because there is no exception for the health of the mother, doctors will find it difficult to determine whether a mother's life, as opposed to just her health, is at risk. (*Id*.) These allegations do not establish that § 940.04(5) is unconstitutionally vague on its face or justify the Physician Intervenors' requested relief.

First, § 940.04(5) gives fair notice of what it requires for an abortion to be a therapeutic abortion that is not prohibited by § 940.04(1) or (2). This Court interpreted substantially similar predecessor language to § 940.04(5) in *Hatchard*. *Hatchard* held that a physician charged with performing an abortion is entitled to the statutory exception when either (1) the physician demonstrates that two other physicians determined the abortion was necessary or (2) the evidence at trial demonstrates the abortion was necessary. 48 N.W. at 382.

To the extent the Physician Intervenors' concern is the meaning of the phrase "necessary … to save the life of the mother," their claim is not a novel one. In *Babbitz v. McCann*, a three-judge federal district court rejected this argument, ruling the language in § 940.04(5) "is not indefinite or vague" and that "[i]n our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning." 310 F. Supp. 293, 297 (E.D. Wis. 1970). Prior to the U.S. Supreme Court's decision in *Roe*, most courts rejected vagueness challenges to abortion statutes containing exceptions like § 940.04(5), even if some of those courts also ruled the statutes were unconstitutional on other grounds. *See, e.g.*, *Crossen v. Attorney General of Com. of Ky.*, 344 F. Supp. 587, 590 (E.D. Ky. 1972), *judgment vacated in light of Roe*, 93 S. Ct. 1413; *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970); *Cheaney v. Indiana*, 285 N.E.2d 265, 271 (Ind. 1972); *State v. Abodeely*, 179 N.W.2d 347, 354 (Iowa 1970); *State v. Munson*, 86 S.D. 663, 671, 201 N.W.2d 123, 127 (S.D. 1972), *vacated and remanded in light of Roe v. Wade* by 410 U.S. 950. *But see, e.g.*, *People v. Belous*, 458 P.2d 194 (Cal. 1969) (holding the phrase "unless the same is necessary to preserve her life" to be unconstitutionally vague and uncertain).

Regardless of the prior caselaw, the term "necessary," as it is used in § 940.04(5) and read in context, is capable of a practical construction that provides fair notice of an objective standard. An abortion is necessary to save the life of the mother when "it is reasonably certain that a woman's continued pregnancy will result in her death." *Crossen*, 344 F. Supp. at 590; Black's Law Dictionary (12th ed. 2024), necessary (defining "necessary" as "needed for some purpose or reason; essential"). Indeed, whether a medical procedure is necessary is the type of determination that doctors are routinely called upon to perform—there is nothing vague about the word "necessary" in this context.

Indeed, the exception in § 940.04(5) is based on similar statutory language that existed since the first codification of Wisconsin's abortion laws in 1849. See Ch. 133, Sec. 11, 1849 (prohibiting abortion "unless the same shall have been

necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose"). Such language served the needs of the State and provided adequate notice to its citizens for over a hundred years, until *Roe* rendered § 940.04 unenforceable for other reasons. During that time, a challenge to the statute on vagueness grounds was rejected. *Babbitz*, 310 F. Supp. at 297. There is no basis for now invalidating on vagueness grounds statutory language that was "clear enough for satisfactory use for over 100 years." *Abodeely*, 179 N.W.2d at 354; *see also Cheaney*, 285 N.E.2d at 271.

Finally, to the extent the Physician Intervenors raise concerns regarding the ability of physicians to distinguish between what jeopardizes a pregnant patient's life versus only her health, this is not a proper facial challenge. Although there may be some abortions that present difficult questions regarding whether the life, as opposed to health, of the mother is at risk, there are no allegations or evidence suggesting such abortions would be implicated in most applications of § 940.04. A prosecution under § 940.04(1) for an elective abortion on a woman who was not experiencing health complications would not implicate Intervenors' concerns regarding the clarity of § 940.04(5). Further, the existence of difficult cases, or the absence of a clear and precise demarcation between lawful and unlawful conduct, does not mean a statute is unconstitutionally vague. *Courtney*, 74 Wis. 2d at 711. "The law does not require the line between lawful and unlawful conduct be drawn with absolute clarity and precision." *McKellips*, 2016 WI 51 at ¶ 41 (internal quotation marks and citation omitted).

3. Reliance on other statutes to create vagueness concerns must fail.

Finally, if the Physician Intervenors suggest they lack fair notice due to other subsequent statutes regulating the subject of abortion, the answer to their concerns is "elegant in its simplicity": read § 940.04. *See Grandberry*, 2018 WI 29 at ¶ 35. Simply because conduct "can comply with one statute while simultaneously violating the other" does not mean a vagueness problem exists. *Id.* "Due process

does not demand that every regulation on a certain subject be in the same statute; such a requirement would be absurd." *Id.* "Rather, where multiple statutes govern a defendant's conduct, due process requires that the terms of the statute under which the defendant was charged be sufficiently clear." *Id.* As already discussed, § 940.04(1) is properly interpreted as applying to consensual abortions, and § 940.04(1) provides sufficient notice to a person of ordinary intelligence that it is illegal to perform an abortion unless the statutory exception in § 940.04(5) is satisfied.

C. Physician Intervenors' arguments regarding impossibility of compliance do not support a facial challenge to § 940.04.

Finally, the Physician Intervenors alleged it is impossible to comply with the requirements for performing a therapeutic abortion under § 940.04(5)(c). Specifically, that provision requires that a therapeutic abortion must, "[u]nless an emergency prevents," be "performed in a licensed maternity hospital." The Physician Intervenors alleged there is no such thing as a "licensed maternity hospital," and it would be impossible for a Wisconsin physician to perform a life-saving abortion in one. In short, the Physician Intervenors allege that applying § 940.04 to abortions would violate due process because compliance with the statute is impossible. *See, e.g.*, *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992). This claim fails for multiple reasons.

First, even if there are no facilities that meet the definition of "licensed maternity hospital" under § 940.04(5), the statute allows life-saving abortions to be performed elsewhere in an emergency, thus allowing a life-saving abortion in a location other than a licensed maternity hospital if no such hospitals exist. If an abortion is "necessary, or is advised by 2 other physicians as necessary, to save the life of the mother," and there are no licensed maternity hospitals available, an emergency would exist, and a physician would not violate § 940.04(5) by performing the abortion somewhere other than a licensed maternity hospital.

Further, this issue only affects the subset of abortions that otherwise meet the exemption under § 940.04(5) and does not provide a basis for declaring § 940.04 on its face cannot apply to any abortions. Even if no licensed maternity hospitals exist, such that it is impossible to perform a life-saving abortion in one and it would violate due process to prosecute a physician for failing to comply with that aspect of § 940.04(5), § 940.04(1) and (5) can still constitutionally be applied to prohibit performing those abortions that do not implicate § 940.04(5) at all. To the extent a physician is prosecuted for performing a lifesaving abortion somewhere other than a "licensed maternity hospital," the physician could raise this argument via an as-applied challenge in the enforcement action. This argument does not provide a basis, however, for declaring that § 940.04 on its face cannot apply to abortions, when there is a core of conduct prohibited by § 940.04(1) that does not implicate the exception in § 940.04(5). This Court must thus dismiss the facial challenge asking for a declaration that § 940.04 does not apply to abortions as a category.

Next, at the time § 940.04 was enacted, Wisconsin law defined a "maternity hospital" as: "a place in which any person, firm, association or corporation receives, treats or cares for more than one woman within a period of 6 months because of pregnancy or in childbirth or within 2 weeks after childbirth, but not counting in case of an individual, women related to such person or his or her spouse by consanguinity within the sixth degree of kindred computed accordingly to the civil law." Wis. Stat. § 140.35 (1955 version). Any persons conducting such a hospital were required to obtain a license and could not receive a woman because of pregnancy or in childbirth or within 2 weeks after childbirth without such a license. *Id.* In short, the reference to a "licensed maternity hospital" is a reference to a facility that treats or cares for two or more women within a period of six months because of their pregnancy, childbirth, or within 2 weeks after childbirth and is licensed to do so. Although they may no longer be called "maternity hospitals" or licensed as such, numerous licensed facilities that would meet these criteria likely exist across the

state of Wisconsin and this Court can take judicial notice of their existence. *See* R.88:45-50 (Births by County, City, and Facility of Occurrence, Wisconsin, 2017).

IV. Section 940.04 Is Not Unenforceable Due to Disuse or Reliance on *Roe*

Count II of the State Plaintiffs' Amended Complaint alleged "§ 940.04 is unenforceable as applied to abortions because of its disuse and in light of reliance on *Roe v. Wade* and its progeny" and sought a declaration "that Wis. Stat. § 940.04 cannot be enforced as applied to abortions until and unless new legislation is enacted into law." (R.34:24, App.028). Count II fails to state a claim for relief, even if § 940.04 otherwise would apply to abortions, for two reasons. First, it fails as a matter of law. Second, as explained in Part V, the State Plaintiffs lack standing to make this claim.

A. The doctrine of desuetude is incompatible with Wisconsin law.

The State Plaintiffs' claim that § 940.04 cannot be enforced due to disuse is, essentially, a claim of desuetude: "a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use." *United States v. Elliott*, 266 F. Supp. 318, 325 (E.D.N.Y. 1967). No Wisconsin court has held that an enacted statute can become unenforceable due to disuse. Rather, the Legislature, not the courts, sets this State's public policy, and courts have a duty to enforce statutes as written. *See Wisconsin Justice Initiative, Inc. v. W.E.C.*, 2023 WI 38, ¶ 20, 407 Wis. 2d 87, 106, 990 N.W.2d 122. (collecting cases). Indeed, "[t]he American judiciary normally rejects the principle of desuetude[.]" Singer, 2 Sutherland Statutory Construction § 34:6 (8th ed.); *see also* Scalia & Garner at 336 ("A statute is not repealed by nonuse or desuetude.").

During the proceedings below, the State Plaintiffs cited this Court's decision in *Williams v. Traveler's Insurance Co.*, 168 Wis. 456, 169 N.W. 609, 611 (1918), but that case did not hold that a court can declare a statute unenforceable due to disuse. The correct reading of that decision is that the court interpreted the statute to give effect to all parts of the statute—a well-known principle of statutory

interpretation. *Williams*, 169 N.W. at 611 (explaining that statutory provision would be superfluous if it did not apply to the situation before the court).

The State Plaintiffs also relied on *Poe v. Ullman*, 367 U.S. 497 (1961). *Poe* held that a pre-enforcement challenge to the constitutionality of certain state laws was not justiciable due to a lack of enforcement of the statutes. *Poe* stands for the proposition that, when there is a long institutional history of disuse of a statute, a plaintiff does not face a credible threat of prosecution and lacks standing to pursue a pre-enforcement challenge. *See, e.g.*, *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003). Nothing in *Poe* suggests a statute becomes unenforceable due to disuse. The U.S. Supreme Court has rejected that proposition. *See District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953) (explaining that "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal").

Finally, the State Plaintiffs relied on cases from West Virginia, which is an outlier. *See* Scalia & Garner at 337 ("Only West Virginia cases hold that desuetude invalidates. We think they are wrong."). On the other side of the ledger, numerous courts have refused to hold that laws can become void due to desuetude, using reasoning that is consistent with Wisconsin law. *See, e.g.*, *De La Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1251 n.8 (M.D. Ala. 2016) ("Desuetude does not rob a statute of its legal effect."); *Stopera v. DiMarco*, 218 Mich. App. 565, 554 N.W.2d 379, 381 (1996) (rejecting desuetude argument in context of adultery statute); *Commonwealth v. Stowell*, 389 Mass. 171, 449 N.E.2d 357, 361 (1983) (same). The State Plaintiffs' claim that § 940.04 is unenforceable due to "disuse" must fail. It is incompatible with democratic government and the role our Legislature plays in determining the public policy of our state. Scalia & Garner at 338.

B. Even if a viable theory, desuetude does not apply here.

Even if this Court recognizes *desuetude* as a viable theory, it should not apply here. Here, there has not been open, notorious and pervasive violation of the statute

for a long period with a conspicuous policy of nonenforcement of the statute. *State v. Donley*, 216 W. Va. 368, 373, 607 S.E.2d 474, 479 (2004).

First, in the period prior to *Roe*, public records conclusively establish § 940.04 and its predecessor statutes were enforced by Wisconsin officials as bans on abortion. *See, e.g.*, *Mac Gresens*, 40 Wis. 2d 179 (upholding conviction for the crime of committing an abortion in violation of Wis. Stat. § 940.04(1)); *Cohen*, 31 Wis. 2d 97 (same); *see also State v. Harling*, 44 Wis. 2d 266, 170 N.W.2d 720 (1969) (upholding conviction under Wis. Stat. § 940.04(2) for the crime of performing an abortion); *State ex rel. Tingley v. Hanley*, 248 Wis. 578, 22 N.W.2d 510 (1946); *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891). There was no "conspicuous policy of nonenforcement" during this time.

Second, there was no "conspicuous policy of nonenforcement of the statute" by Wisconsin officials after *Roe*. It is true Wisconsin officials could not enforce § 940.04 when doing so would have been unconstitutional under *Roe* and its progeny. But the desuetude doctrine addresses circumstances in which state officials have voluntarily adopted an "undeviating policy of nullification … [that] bespeaks more than prosecutorial paralysis." *Comm. on Legal Ethics of the W. Va. State Bar v. Printz*, 416 S.E.2d 720, 726 (W.V. 1992) (quoting *Poe*, 367 U.S. at 501). Here, state officials could not enforce § 940.04 because of federal court decisions the U.S. Supreme Court has since overruled. That is prosecutorial paralysis, not a policy of nullification. Nor can it reasonably be argued there was open, notorious and pervasive violation of the statute during this time period, because performing abortions would not have been seen as illegal due to *Roe*.

Finally, § 940.04 is not "a basically obsolete or empty law whose function has long since passed." *U.S. v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967). Nor was a lack of enforcement of § 940.04 due to "the silent agreement of everyone." *Printz*, 416 S.E.2d at 725 n.3. Abortion—and the extent to which it should be regulated—remains one of the most contested political issues in our society. Section 940.04 is not comparable to laws "forbidding the sale of candy cigarettes,

or prohibiting kite flying, or banning the exhibition of films depicting a felony." *Elliott*, 266 F. Supp. at 326.

Nor does this case present a situation where the fairness and equal protection concerns underlying the doctrine are present. The State Plaintiffs are not criminal defendants who were unaware of § 940.04 and are suddenly faced with unexpected criminal penalties. Rather, they are state officials who have pre-emptively sued to prevent its enforcement. *See Jamgotchian v. State Horse Racing Commission*, 269 F. Supp. 3d 604, 618 (M.D. Pa. 2017).

C. Reliance on *Roe v. Wade* does not require the enactment of new legislation.

Ultimately, State Plaintiffs can rely only on the fact that, while *Roe* and its progeny were in effect, Wisconsin officials were unable to enforce the ban in § 940.04(1) against abortions. They suggest this created reliance interests and allege that "a law that has been deemed a violation of a constitutionally protected civil liberty for nearly half a century and has not subsequently again been enacted as law cannot be said to have the consent of the governed" and that this "is particularly true where, as here, women in Wisconsin did not have the right to vote when the Wisconsin Legislature enacted the criminal ban in the mid-1800s." (R.34:24, App.028.) The State Plaintiffs are wrong.

First, suggesting the abortion ban reflected in § 940.04(1) was enacted in the mid-1800s when "women in Wisconsin did not have the right to vote" is misleading. Wisconsin does have a long history of prohibiting abortion dating back to its founding, but § 940.04 was reenacted in 1955.

The State Plaintiffs also get things backward when they suggest § 940.04 no longer has the consent of the governed and must be reenacted. "If a decision declaring a statute unconstitutional is subsequently overruled, the operative force of the act is restored by the overruling decision without any necessity for reenactment." Singer, 1 Sutherland Statutes and Statutory Construction § 2:7 (7th ed.); *see also Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. Mun. App. 1952) (collecting cases). This

Court has recognized this principle. *See Cty. of Door v. Hayes-Brook*, 153 Wis. 2d 1, 27, 449 N.W.2d 601, 612 (1990) (Abrahamson, J., concurring) (citing *State v. Field*, 118 Wis. 2d 269, 274, 347 N.W.2d 365 (1984)).

In sum, although enforcement of the statute may have been unconstitutional under *Roe* and its progeny, § 940.04 remained on the books. Due to the overruling of *Roe* and its progeny, the operative force of § 940.04 has been restored. The Legislature need not reenact the statute so it can be enforced.

V. The State Plaintiffs Lack Standing

Count II of the State Plaintiffs' Amended Complaint is also subject to dismissal because it fails to present a justiciable controversy.

Urmanski does not dispute that one of the Physician Intervenors presents a justiciable controversy as to Urmanski. This Court recently held that it is immaterial whether a party is an intervenor for purposes of applying the "one-good-plaintiff" rule. *Clarke v. WEC*, 2023 WI 79, ¶39 n.19, 410 Wis. 2d 1, 998 N.W.2d 370.[6] Still, even if the standing of the Physician Intervenors suffices for the claims they raise, the claim that § 940.04 is unenforceable against abortions due to disuse was not included in the Physician Intervenors' complaint. The State Plaintiffs must demonstrate their own standing for that separate claim. *See Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) ("At least one plaintiff must demonstrate standing for each claim and form of requested relief."); *see also Chicago Joe's Tea Room, LLC v. Village of Broadview*, 894 F.3d 807, 813 (7th Cir. 2018) ("[A] plaintiff must have standing for each form of relief sought.").

The State Plaintiffs do not assert legally protectable interests in this controversy and lack standing to pursue their claim that § 940.04 cannot be enforced due to disuse. *See Fabick v. Evers*, 2021 WI 28, ¶ 9, 396 Wis. 2d 231, 956 N.W.2d 856. The State Plaintiffs are not threatened with prosecution, nor do they seek to

[6] This Court does not appear to have addressed this Court's jurisprudence that an intervention should not be able to breathe life into a nonexistent lawsuit. *See Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983) (internal quotation marks and citation omitted).

apply the statute against Urmanski. The State Plaintiffs are state officials and entities who seek "clarity" regarding the applicability of § 940.04 to third parties who perform abortions. This is a textbook example of a request for an advisory opinion.

Indeed, this case is analogous to *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627 (1936), where this Court determined no justiciable controversy existed when there was a difference of opinion between the governor and the secretary of state regarding the governor's ability to make certain appointments. The court explained that a "[d]ifference of opinion is not enough to make a justiciable controversy" and that the secretary of state's opinions did not prevent or invade any of the governor's powers. 264 N.W. at 629. Here, Urmanski's difference of opinion as to the enforceability of § 940.04 also does not prevent or invade any of the State Plaintiffs' powers and does not create a justiciable controversy. *See also Wisconsin Pharmaceutical Ass'n v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953).

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court and remand with instructions to dismiss the State Plaintiffs' and Physician Intervenors' complaints and to enter judgment for Urmanski. Section 940.04(1) can be applied to prosecute the performance of consensual abortions.

Dated this 12th day of August, 2024.

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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, as well as this Court's July 2, 2024 order setting a word limit of 15,400 words. The length of this brief is 15,217 words. Word processing software (Microsoft Word) was used to determine the length of this brief. The word count above is inclusive of all words in this brief's Statement of the Case, Standard of Review, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 12th day of August, 2024.

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CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of August, 2024.

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