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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP2362

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

Plaintiffs-Respondents,

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

Intervenors-Respondents,

v.

JOEL URMANSKI, as DA for Sheboygan County, WI,

Defendant-Appellant,

ISMAEL R. OZANNE, as DA for Dane County, WI, and JOHN T. CHISHOLM, as DA for Milwaukee County, WI,

Defendants-Respondents.

ON APPEAL FROM A FINAL ORDER ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE DIANE SCHLIPPER, PRESIDING

PLAINTIFFS-RESPONDENTS' RESPONSE BRIEF

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INTRODUCTION

The People of Wisconsin deserve a final, clear answer to a question no one should have had to ask in the first place:

Under Wisconsin law, is it lawful for physicians to perform an abortion that is not necessary to save the pregnant woman from dying, or is doing so a *criminal felony*?

The United States Supreme Court's overturning of *Roe v. Wade* created immediate confusion in Wisconsin because of a law listed in the Wisconsin statutes, originating in the mid-1800s, that would directly conflict with Wisconsin's modern abortion laws if enforceable as to abortion.

The law originating in the mid-1800s, currently listed at Wis. Stat. § 940.04(1), would—if enforceable as to abortion—ban all abortions unless necessary to save the pregnant woman's life. Wisconsin statutes, however, also contain more recent laws, including Wis. Stat. § 940.15. These modern laws specifically contemplate and define parameters for physicians providing lawful abortions well beyond those necessary to save the pregnant woman's life. They regulate how such abortions may be lawfully provided and *exempt* from criminal prosecution abortions that would constitute a criminal felony under Wis. Stat. § 940.04(1). Wisconsin law cannot render the same acts both lawful and a felony.

The answer is ultimately straightforward: Wisconsin Stat. § 940.04(1) cannot be enforced as to abortion. It cannot be enforced as to abortion for multiple reasons.

First, in 1994, this Court issued a decision that resolves this case. In *Black*, this Court confronted the direct conflict that would exist if both Wis. Stat. §§ 940.04 and 940.15 applied to abortion. It applied principles courts must employ when addressing otherwise conflicting statutes and held that Wis. Stat. § 940.04(2)(a)—a subsection of Wis. Stat. § 940.04 with materially identical language to Wis. Stat. § 940.04(1)—was *not* an abortion statute but instead a feticide statute only,

in part because of the conflict in the law that would exist. The circuit court correctly held that *Black*'s rationale controls here. Urmanski offers this Court no way to distinguish *Black* and no reason to overrule it.

Second, even if this Court had not already resolved this question through *Black*, Wis. Stat. § 940.04(1) has been impliedly repealed as to abortion. Wisconsin law provides that an older law becomes unenforceable through the implied repeal doctrine if either (a) a newer law directly conflicts with the old law, or (b) a newer comprehensive regulatory scheme is fundamentally incompatible with the older prohibition. *Both* forms of implied repeal are present here.

Urmanski asks this Court to construe the mid-1800s law as rendering Wisconsin's many modern laws meaningless—to do the exact opposite of what statutory interpretation principles require. This Court should affirm the circuit court and hold that Wisconsin does *not* have an enforceable near-total abortion ban.

STATEMENT OF THE ISSUES

Urmanski presents this Court with five issues, but this appeal ultimately asks one dispositive question:

Is Wis. Stat. § 940.04(1) unenforceable as to abortion?

The circuit court answered yes.

This Court should also answer yes.

The State Plaintiffs respond to four of the five issues Urmanski presents, consolidating the last two. Urmanski's third issue involves a claim raised only by the Physician Intervenors.

1. In *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), this Court held that Wis. Stat. § 940.04(2)(a)—with materially identical language to Wis. Stat. § 940.04(1)—applies only to feticide, given the conflict that would result

with subsequently enacted Wis. Stat. § 940.15. Is subsection (1) of Wis. Stat. § 940.04 also unenforceable as to abortion under *Black*'s rationale?

The circuit court answered yes.

This Court should also answer yes.

2. Consistent with the result in *Black*, an older Wisconsin law has been impliedly repealed where either (a) it irreconcilably conflicts with a later-enacted statute or (b) a comprehensive statutory framework is subsequently enacted covering the older law's subject matter that is fundamentally incompatible with the older law. Has Wis. Stat. § 940.04(1) been impliedly repealed as to abortion?

The circuit court did not reach this question.

If this Court reaches the question, it should answer yes.

3. Is (a) Wis. Stat. § 940.04(1) unenforceable as to abortion because of its prolonged disuse and Wisconsin's long reliance on *Roe*, and (b) did State Plaintiffs have standing to raise this claim?

As to (a), the circuit court did not reach State Plaintiffs' alternative disuse argument. As to (b), the circuit court denied Urmanski's motion to dismiss and concluded the State Plaintiffs had standing. In granting final judgment, it held that one Physician Intervenor's standing was sufficient.

As to (a), this Court need not reach this question at all unless it concludes both that *Black*'s rationale does not apply and that Wis. Stat. § 940.04(1) has not been impliedly repealed. If it so concludes, then this Court should remand the question for findings of historical fact. As to (b), this Court need not address standing because Urmanski only asks this Court to address State Plaintiffs' standing if it addresses State Plaintiff's alternative disuse argument, which this Court need not do.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court granting bypass demonstrates that both oral argument and publication are warranted.

STATEMENT OF THE CASE

I. Wisconsin's pre-*Roe* statutory background.

Wisconsin Stat. § 940.04 originated in 1849. The first Wisconsin State Legislature wrote a statute prohibiting the administering of substances to, or use of instruments on, a woman pregnant with a "quick child" with the intent to destroy the child unless "necessary to preserve the life of [the] mother." Wis. Stat. ch. 133, § 11 (1849). "Quickening" was historically understood to mean the time at which the pregnant woman first detected fetal movement, which typically occurs during the fourth or fifth month of pregnancy. Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774, 1780 n.25 (1991).

In 1858, however, the Legislature revised the statute to remove the word "quick," thereafter purporting to prohibit any intentional destruction of a "child" after conception unless "necessary to preserve the life of [the] mother." *See* Wis. Stat. ch. 164, § 11 (1858). Also in 1858, the Legislature added a provision prohibiting the administering of substances or use of instruments on a pregnant woman with the intent to procure a miscarriage. Wis. Stat. ch. 169, § 58 (1858).

Other than minor amendments not relevant here, the mid-1800s ban remained largely unchanged until the 1950s. In 1955, as part of the creation of the modern criminal code, the Legislature renumbered the statute to Wis. Stat. § 940.04, added the title, "Abortion," and made some revisions,

including adding criminal penalties for a pregnant woman. Wis. Stat. § 940.04(3), (4) (1955); 1955 Wis. Act 696.[1]

Despite over 100 years of being "on the books" and open to enforcement pre-*Roe*, the near-total ban was rarely enforced. By the end of the nineteenth century, most states, like Wisconsin, had criminal laws purporting to prohibit any abortion unless necessary to save the pregnant woman's life. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. at 1784–85. And yet, scholars estimate that between 1900 and 1970, for example, one out of every three to five pregnancies ended in abortion. Mark A. Graber, *Rethinking Abortion: Equal Choice, The Constitution, and Reproductive Politics* at 41–42 (1996). By the 1960s, the consensus of both proponents and opponents of these prohibitions was that they worked no better than the Eighteenth Amendment had "worked" at stopping alcohol consumption—it did not stop. *Id.* 43–44.

II. *Roe* and Wisconsin's post-*Roe* statutory framework governing legal abortions.

In 1973, the U.S. Supreme Court declared that statutes broadly criminalizing abortion were unconstitutional. *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* specifically listed Wis. Stat. § 940.04 as unconstitutional as applied to abortion. *Id.* at 118 n.2. Accordingly, since 1973, Wis. Stat. § 940.04(1) had been affirmatively unenforceable as to abortion.

Following *Roe*, the Wisconsin Legislature enacted a comprehensive legal framework dictating when abortion was

[1] Urmanski's brief could be read as suggesting that the 1955 criminal code amendments substantively changed the scope of the therapeutic exception. (*See* Urmanski's Br. 25 n.4.) To be clear, it was the 1800s procuring miscarriage law that had an "unintentional conflict" regarding the therapeutic exception, and that law was merged into Wis. Stat. § 940.04. (R. 88:13.)

illegal and providing specific parameters for how physicians may legally perform abortions.

In 1985, the Legislature created Wis. Stat. § 940.15. Like Wis. Stat. § 940.04, Wis. Stat. § 940.15 it is a statute titled "Abortion." Both statutes also (a) identify the gestational point after which conduct is prohibited, and (b) provide exceptions to prohibition after that point. But the two statutes provide conflicting answers to both (a) and (b).

Here are both as currently listed in Wisconsin statutes:

940.04 Abortion.	**940.15 Abortion.**
(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	(1) In this section, "viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support. (2) Whoever 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. (3) Subsection (2) does not apply 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. (4) Any abortion performed under sub. (3) after viability of the fetus or unborn child, as determined by reasonable medical judgment of the woman's attending physician,

(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.	shall be performed in a hospital on an inpatient basis. (5) Whoever intentionally performs an abortion and who is not a physician is guilty of a Class I felony. (6) Any physician who intentionally performs an abortion under sub. (3) shall use that method of abortion which, of those he or she knows to be available, is in his or her medical judgment most likely to preserve the life and health of the fetus or unborn child. Nothing in this subsection requires a physician performing an abortion to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman. Any physician violating this subsection is guilty of a Class I felony. (7) Subsections (2) to (6) and s. 939.05, 939.30 or 939.31 do not apply to a woman who obtains an abortion that is in violation of this section or otherwise violates this section with respect to her unborn child or fetus.

In 1985, the Legislature also enacted Wis. Stat. § 940.13, which prohibits any prosecution of a pregnant woman for obtaining an abortion.

In 1985 and since, the Legislature also enacted numerous provisions establishing a detailed statutory framework for physicians providing lawful abortions, including notice and logistical requirements. Wisconsin Stat. § 253.10, for example, provides that an abortion may not be

performed unless the woman has given "voluntary and informed consent," which includes requirements for providing certain information in advance and an ultrasound. Wisconsin Stat. § 253.105 provides that "[n]o person may give an abortion-inducing drug to a woman unless the physician who prescribed, or otherwise provided, the abortion-inducing drug for the woman" performs a physical examination and is present when the drug is given. Wisconsin Stat. § 253.107 provides further limitations on the performance of an abortion after "the probable postfertilization age of the unborn child is 20 or more weeks." And other laws regulate a variety of other matters related to lawful abortions, such as funding and judicial waivers for parental consent. *See* Wis. Stat. §§ 20.927, 20.9275, 48.375, 809.105, 895.037.

While creating this comprehensive post-*Roe* legal framework, the Legislature did not directly repeal the then-unenforceable near-total ban listed in Wis. Stat. § 940.04(1), even though it recognized the conflict if that provision were to apply to abortion.

When enacting Wis. Stat. § 940.15 in 1985, the Legislature contemplated including a provision that would have prohibited Wis. Stat. § 940.15 (listed in drafting originally as Wis. Stat. § 940.045) from repealing Wis. Stat. § 940.04: "NO IMPLIED REPEAL. The creation of section 940.045 of the statutes by this act may not be deemed to repeal section 940.04 of the statute." That language was struck from the bill that became law, 1985 Wis. Act 56. (R. 99:3–6.)

Since *Roe* and the 1985 enactment of Wis. Stat. § 940.15, the Legislature has made no amendments to Wis. Stat. § 940.04(1)'s relevant language.

III. The U.S. Supreme Court decided *Dobbs*.

On June 24, 2022—nearly 50 years after *Roe*—the U.S. Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization*, 517 U.S. 215 (2022). *Dobbs* constituted "the first time in history" where the Supreme Court had "[r]escind[ed] an individual right in its entirety and confer[red] it on the State[s]." 517 U.S. at 411 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

IV. Procedural background.

A. State Plaintiffs brought two claims and Physician Intervenors subsequently joined the case.

Four days after the U.S. Supreme Court's decision in *Dobbs*, State Plaintiffs brought suit seeking a declaration that Wis. Stat. § 940.04(1) is unenforceable as applied to abortion.

State Plaintiffs pled two separate, alternative counts. First, State Plaintiffs alleged that Wis. Stat. § 940.04(1) is unenforceable as applied to abortion because subsequent statutes superseded that application (Count I). (R. 34 ¶¶ 30–54.) State Plaintiffs explained that in *Black*, 188 Wis. 2d 639, this Court held that a subsection of Wis. Stat. § 940.04 applies only to feticide and concluded that treating it as an abortion statute would be inconsistent with Wis. Stat. § 940.15. (R. 34 ¶¶ 41, 52.) State Plaintiffs also asserted that treating Wis. Stat. § 940.04(1) as enforceable as to abortion would conflict with multiple other, later-enacted Wisconsin statutes defining the parameters under which lawful abortions may be provided. (R. 34 ¶¶ 30–54.)

Second, State Plaintiffs alleged that Wis. Stat. § 940.04(1) is unenforceable as to abortion because of the statute's long disuse and the public's reliance on *Roe*. (Count II). (R. 34 ¶¶ 55–63.)

Three physicians subsequently sought to intervene, also asserting that Wis. Stat. § 940.04(1) cannot be enforced as to abortion (R. 68; 75), and the court granted that motion, (R. 80).

State Plaintiffs and Physician Intervenors named as defendants the district attorneys in three counties where abortion services had been provided prior to *Dobbs*. (R. 34; 75.) One of those defendants, District Attorney Urmanski, had publicly stated that he would enforce Wis. Stat. § 940.04(1) against a physician who performs an abortion. (R. 34 ¶ 26; 75 ¶ 11.) Urmanski has continued to assert that he believes Wis. Stat. § 940.04(1) prohibits performing abortions and that he has a duty to enforce the law. (R. 152 ¶ 26.)

B. The circuit court denied Urmanski's motion to dismiss.

Urmanski moved to dismiss the case. (R. 88–91.) The circuit court denied Urmanski's motions to dismiss on July 7, 2023. (R. 147.) The court held that this Court's "unambiguous" interpretation of Wis. Stat. § 940.04(2)(a)—a "nearly-identical and closely related" subsection of Wis. Stat. § 940.04(1)—in the *Black* case "tells us what [Wis. Stat. § 940.04(1)] means. 'It is a feticide statute only.'" (R. 147:12 (quoting *Black*, 188 Wis. 2d at 647).)

The circuit court explained that interpreting the two subsections inconsistently would "be unreasonable and produce an absurd result." (R. 147:11.) The court also emphasized that the Legislature did not change the relevant statutory language following *Black*, a choice that indicated the Legislature's acquiescence to this Court's interpretation. (R. 147:12.) With *Black* dispositive on the motion before it, the circuit court declined to address State Plaintiffs' and Physician Intervenors' other arguments. (R. 147:20–21.)

C. State Plaintiffs and Physician Intervenors both moved for judgment; the circuit court issued a final order declaring that Wis. Stat. § 940.04 does not prohibit abortion.

State Plaintiffs and Physician Intervenors then moved for judgment on the pleadings. (R. 156–59.) State Plaintiffs sought judgment only on Count I of their complaint, concerning whether *Black* controlled or, alternatively, whether Wis. Stat. § 940.04(1) had been impliedly repealed. (R. 157.) Physician Intervenors sought judgment on similar theories and also that Wis. Stat. § 904.04(1) would violate due process if applied to abortion (R. 159); the court converted Physician Intervenors' motion to a motion for summary judgment (R. 160:7).

In its resulting decision and order, the circuit court granted the declaratory judgment sought by State Plaintiffs and Intervenors: that "Wis. Stat. § 940.04 does not prohibit abortions." (R. 183:2.) In its decision, the court explained that Urmanski had not raised new arguments different than what the court already had rejected at the motion to dismiss phase, and it adopted the motion to dismiss order's reasoning for purposes of the dispositive motions. (R. 183:8–9.) In entering its declaratory judgment, the court declined to enter an injunction, ruling it was unnecessary. (R. 183:11–14.)

Urmanski then appealed, and Urmanski, State Plaintiffs, and Physician Intervenors all sought bypass, which this Court granted. This Court denied State Plaintiffs' supplemental bypass petition request to also address, as an alternative argument in this case, whether individual liberties guaranteed by the Wisconsin Constitution would

prohibit a near-total abortion ban if Wis. Stat. § 940.04(1) were otherwise enforceable as to abortion.[2]

STANDARD OF REVIEW

The circuit court granted judgment in the posture of ruling on State Plaintiffs' motion for judgment on the pleadings and Physician Intervenors' motion for summary judgment. This Court reviews both de novo. *See Schuster v. Altenberg*, 144 Wis. 2d 223, 228, 424 N.W.2d 159 (1988).

ARGUMENT

The circuit court correctly held that this Court's rationale in *Black*, addressing another subsection of Wis. Stat. § 940.04 with materially indistinguishable language, controls to answer the dispositive question here: Wis. Stat. § 940.04(1) cannot be enforced as to abortion. That is all the more true because, even without *Black*, the implied repeal doctrine would compel the same result. Wisconsin Stat. § 940.15 and Wisconsin's modern comprehensive scheme for regulating lawful abortions cannot co-exist with Wis. Stat. § 940.04(1), if Wis. Stat. § 940.04(1) applied to abortion.

Urmanski cannot offer this Court any way to distinguish *Black* or any reason to overturn it. His proposed resolution of the statutory conflict would effectively repeal numerous modern laws, not harmonize the laws. Urmanski's argument—that the conflict does not require Wis. Stat. § 940.04(1)'s implied repeal as to abortion because criminal statutes may "overlap"—rests on a fundamental misunderstanding of criminal prohibitions: the same act may be illegal under more than one criminal prohibition

[2] This Court granted an original action petition to address that question in *Planned Parenthood of Wisconsin v. Joel Urmanski*, 2024AP330-OA.

("overlapping" criminal prohibitions), but the same act cannot be simultaneously lawful and a felony under Wisconsin law.

I. Wisconsin Stat. § 940.04(1) is unenforceable as applied to abortion under *State v. Black* because it is a feticide statute only.

Under the rationale of this Court's holding in *Black*, Wis. Stat. § 940.04(1) is unenforceable as applied to abortion because it is a feticide statute only. Urmanski's suggestion that this Court circumvent *Black* by interpreting nearly identical subsections of the same statute to mean opposite things further proves that *Black*'s rationale controls here. Urmanski also does not offer any persuasive reason why this Court should depart from stare decisis, particularly given the conflict that would exist with Wisconsin's modern abortion laws if Wis. Stat. § 940.04(1) were enforceable as to abortion.

Moreover, the Legislature's inaction and actions following *Black* demonstrate its acquiescence to this Court's decision. Urmanski cannot escape that the Legislature has not changed the prohibited conduct in either Wis. Stat. §§ 940.04(2)(a) or 940.04(1) since *Black*.

A. In *Black*, this Court held that the aggravated conduct provision of Wis. Stat. § 940.04(1)—Wis. Stat. § 940.04(2)(a)—is not applicable to abortion.

In *Black*, this Court was confronted with the direct conflict between Wis. Stat. § 940.04 and the 1985 statute, Wis. Stat. § 940.15, that would exist if both statutes were enforceable as to abortion. The Court concluded that no conflict existed because the subsection of Wis. Stat. § 940.04 at issue was "not an abortion statute. It makes no mention of an abortive type procedure. Rather, it proscribes the intentional criminal act of feticide." *Black*, 188 Wis. 2d at 646.

Black concerned subsection (2)(a) of Wis. Stat. § 940.04. That subsection prohibits "any person, other than the mother," from "[i]ntentionally destroy[ing] the life of an unborn quick child." *Black*, 188 Wis. 2d at 641; Wis. Stat. § 940.04(2)(a).

The defendant in *Black* was charged under Wis. Stat. § 940.04(2)(a) after he violently assaulted his pregnant wife five days before her due date. *Black*, 188 Wis. 2d at 641. He argued he could not be convicted because Wis. Stat. § 940.04(2)(a) was an "abortion" statute, as evidenced by "the title of the statute, 'abortion,'" and he asserted that the statute was "impliedly repealed when the legislature enacted sec. 940.15." *Id*. at 644–45.

This Court rejected that Wis. Stat. § 940.04(2)(a) was an abortion statute: "We conclude that the words of the statute could hardly be clearer. The statute plainly proscribes feticide." *Id*. at 642 (footnote omitted). Wisconsin Stat. § 940.04(2)(a) "*is not an abortion statute*." *Id*. at 646 (emphasis added).

Unlike Wis. Stat. § 940.04(2)(a), the court explained, Wis. Stat. § 940.15—a newer statute also titled "Abortion"—"places restrictions . . . on consensual abortions: medical procedures, performed with the consent of the woman, which result in the termination of a pregnancy." *Black*, 188 Wis. 2d at 646. "Section 940.04(2)(a), on the other hand," "makes no mention of an abortive type procedure. Rather, it proscribes the intentional criminal act of feticide: the intentional destruction of an unborn quick child presumably without the consent of the mother." *Id.*

In so holding, this Court rejected the challenger's attempt to interpret the meaning of the statutory text based on the title of the statute or the legislative history. As to the title of Wis. Stat. § 940.04—"Abortion"—this Court stressed that "[i]n the face of such plain and unambiguous language we must disregard the title of the statute." *Black*, 188 Wis. 2d

at 645. Statutory titles "may be used only to resolve doubt" as to statutory meaning, not to create ambiguity or doubt in the statutory text. *Id.* So too, this Court reasoned, as to the legislative history of Wis. Stat. § 940.04: "The legislative history. . . is a maze of past statutes, amendments, repeals and recreations leading us to conclude that it offers no clearer indication of the legislature's intent than that indicated by the statute's own text." *Id.* at 642 n.1.

In reaching its holding, this Court in *Black* stressed that the reason Wis. Stat. § 940.04(2)(a) could not be understood to apply to "a physician performing a consensual abortion after viability" was that such application "would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it." *Black*, 188 Wis. 2d at 646.

Thus, "in order to construe secs. 940.04(2)(a) and 940.15, consistently," this Court held that each statute had to have "a distinct role." *Black*, 188 Wis. 2d at 646. As discussed more in section II below, this Court's conclusion was indeed correct.

B. Under *Black*'s rationale, Wis. Stat. § 940.04(1) is a feticide statute only, *not* an abortion statute. Urmanski offers no way to distinguish *Black*'s rationale and no reason to overturn it.

This Court's rationale in *Black* compels the holding that Wis. Stat. § 940.04(1) is unenforceable as to abortion. *Black*'s rationale resolves this entire appeal.

1. Every component of *Black*'s rationale regarding Wis. Stat. § 940.04(2)(a) applies with equal force to the nearly identical language in Wis. Stat. § 940.04(1).

Wisconsin Stat. § 940.04(1)—at issue here—by its text proscribes the same conduct as Wis. Stat. § 940.04(2)(a), except that Wis. Stat. § 940.04(2)(a) applies later in pregnancy (to an "unborn quick child" versus "unborn child") and, in turn, imposes a higher penalty (a Class E felony versus a Class H felony):

- Wis. Stat. § 940.04(1): "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony."

- Wis. Stat. § 940.04(2)(a): "Any person, other than the mother, who . . . [i]ntentionally destroys the life of an unborn quick child . . . is guilty of a Class E felony."

The Wisconsin Criminal Jury Instructions also recognize that "[t]he only difference between the two subsections is that sub. (2)(a) applies a more serious penalty where the defendant destroys the life of an unborn 'quick' child." Wis. JI–Crim. 1125 n.2 (2006).

Every component of this Court's statutory interpretation analysis in *Black* applies with equal force to Wis. Stat. § 940.04(1): Just as with Wis. Stat. § 940.04(2)(a), Wis. Stat. § 940.04(1) "makes no mention of an abortive type procedure." *Black*, 188 Wis. 2d at 646. Just as with Wis. Stat. § 940.04(2)(a), the language of Wis. Stat. § 940.04(1) "could hardly be clearer"—it "plainly proscribes feticide." *Id.* at 642. Just as with Wis. Stat. § 940.04(2)(a), this Court cannot create ambiguity in Wis. Stat. § 940.04(1) through the statutory title. *Id.* at 645. Just as with Wis. Stat. § 940.04(2)(a), this Court cannot consider the "maze" of "legislative history" to create doubt or ambiguity but instead must follow Wis. Stat.

§ 940.04(1)'s "own text." *Id.* at 642 n.1. And just as with Wis. Stat. § 940.04(2)(a), Wis. Stat. § 940.04(1) cannot be understood to apply to "a physician performing a consensual abortion" because that "would be inconsistent with the newer sec. 940.15." *Id.* at 646.

As the circuit court properly recognized, there is no way to distinguish *Black*'s analysis of Wis. Stat. § 940.04(2)(a) from an analysis of Wis. Stat. § 940.04(1). Rather, it would be unreasonable and absurd to define these two subsections differently when their language and context is *identical* except for the word "quick" and the correspondingly higher penalty. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (Statutory language is construed "reasonably, to avoid absurd or unreasonable results.").[3]

This Court should follow *Black* and confirm that Wis. Stat. § 940.04(1), like Wis. Stat. § 940.04(2)(a), is unenforceable as to abortion.

2. Urmanski cannot offer this Court any way to distinguish *Black*'s rationale here.

Faced with a binding decision interpreting nearly identical language as unenforceable as to abortion, Urmanski tries a few different angles with *Black*. All fail.

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[3] The same analysis would apply to Wis. Stat. § 940.04(2)(b). That subsection prohibits "[a]ny person, other than the mother" from "[c]aus[ing] the death of the mother by an act done *with intent to destroy the life of an unborn child*." The language of Wis. Stat. § 940.04(2)(b), just like Wis. Stat. § 940.04(1), proscribes an act committed to intentionally destroy an "unborn child." There is no separate mens rea for Wis. Stat. § 940.04(2)(b); rather, Wis. Stat. § 940.04(2)(a) addresses when an "unborn quick child" is destroyed via feticide and Wis. Stat. § 940.04(2)(b) addresses when the pregnant woman is killed via intended feticide.

He first suggests that this Court could somehow disregard *Black* because this Court in *Black* stated that it was only addressing "sec. 940.04(2)(a) and make[s] no attempt to construe any other sections of sec. 940.04." *Black*, 188 Wis. 2d at 647 n.2. This argument gets him nowhere.

To start, it is no surprise that this Court chose to address only the subsection of the statute before it: the defendant was charged only under Wis. Stat. § 940.04(2)(a). And, at the time, any attempt to apply Wis. Stat. § 940.04(1) "to a physician performing a consensual abortion prior to viability" would have been "unconstitutional under *Roe v. Wade*." *Black*, 188 Wis. 2d at 641, 646.

But that this Court decided the case before it in *Black* does not mean that *Black*'s rationale does not control here. At a broad and basic level, if correct, that would mean this Court would have to address every legal or factual scenario to create precedent. That's not how it works.

But more directly here, there is no way to interpret Wis. Stat. § 940.04(2)(a)'s language as *not* prohibiting abortion per *Black* but simultaneously interpret Wis. Stat. § 940.04(1)'s nearly identical language as prohibiting abortion. The two provisions are identical other than the word "quick" and the severity of the penalty. *Compare* Wis. Stat. § 940.04(1), *with* Wis. Stat. § 940.04(2)(a).

Urmanski concedes the language of these two provisions is "similar" and "does not dispute that words and phrases are 'presumed to bear the same meaning throughout a text.'" (Urmanski's Br. 30 (citation omitted)).

He argues that such a presumption is "not absolute," although he doesn't explain when it would not apply. (Urmanski's Br. 30). Indeed, the cases he cites for support declined to assign different meanings to the same statutory language. *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶¶ 12–13, 367 Wis. 2d 712, 877 N.W.2d 604

(rejecting different meanings for "give"/"given"); *General Castings Corp. v. Winstead*, 156 Wis. 2d 752, 758–59, 457 N.W.2d 557 (Ct. App. 1990) (rejecting different meanings for "employment"). The cases Urmanski relies on instead stress that courts must "avoid" and "reject" interpreting the same language in the same statutes to have different meanings "unless the context clearly requires such an approach." *Planned Parenthood*, 367 Wis. 2d 712, ¶ 12 (quoting *General Castings*, 156 Wis. 2d at 759). Here, Urmanski offers no context that would "clearly require[]" treating one subsection as prohibiting abortion but the other not. *Id.*

Urmanski's theory is that two provisions in the same criminal statute, one the aggravated version of the other, should be read such that one subsection could proscribe a type of conduct that the same language in the other subsection does not. That absurd idea enjoys no support.

Urmanski also suggests that *Black*'s holding—that Wis. Stat. § 940.04(2)(a) cannot be read as enforceable as to abortion—could be dismissed as dicta because "*Black* did not involve consensual abortions." (*See* Urmanski's Br. 30.) That is also a non-starter. The *central* question in *Black* asked whether Wis. Stat. § 940.04(2)(a) prohibited abortion or feticide, given the defendant's argument that it could not apply to him because it applied to abortion. That the defendant in *Black* had committed an act of feticide, not abortion, does not render the very rationale that led this Court to conclude he could be prosecuted dicta.[4]

[4] This too is why Urmanski's reliance on Sartin does not help him. There this Court held to be dicta language from an earlier opinion suggesting that a "different rule might apply" in different factual circumstances. (See Urmanski's Br. 30 (citing State v. Sartin, 200 Wis. 2d 47, 60, 546 N.W.2d 449 (1996)); see also Sartin, 200 Wis. 2d at 60 (emphasis added).

Urmanski's attempts to distinguish *Black*'s rationale just further reveal that it dispositively controls.

3. Urmanski offers this Court no valid reason to depart from stare decisis.

With no way to distinguish *Black*, Urmanski next argues that this Court should overrule it. He does not engage with the criteria this Court uses to consider whether to do so; if he had, he would not be able to meet any of the factors to overturn it.

a. None of the factors this Court considers as weighing in favor of overturning precedent are present here.

If Urmanski had discussed this Court's stare decisis factors, he would not have been able to satisfy any of them. This Court "follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. And while there are exceptions to that rule, "existing law will not be abandoned lightly." *Id.* (citation omitted). Indeed, *Dobbs* itself—and the resultant confusion about Wisconsin law—is a once-in-a-generation reminder of the importance of adherence to these principles.

None of the circumstances where this Court may decide to dispense with its adherence to stare decisis are present here.

First, there has been no change or development in the law that "undermine[s] the rationale behind [the] decision." *Johnson Controls*, 264 Wis. 2d 60, ¶ 98. The relevant text of Wis. Stat. § 940.04 as to the conduct prohibited in both subsections (2)(a) and (1) is the same as when *Black* was

decided. And, as explained further below, given legislative acquiescence since *Black*, the basis for *Black* has only become more solidified in the law.

Second, there is no "need to make a decision correspond to newly ascertained facts," *Johnson Controls*, 264 Wis. 2d 60, ¶ 98, as no facts matter to how Wis. Stat. § 940.04 is interpreted as a matter of law.

Third, there is no "showing that the precedent has become detrimental to coherence and consistency in the law." *Johnson Controls*, 264 Wis. 2d 60, ¶ 98. To the contrary, animating *Black*'s analysis was the correct conclusion that, if Wis. Stat. § 940.04 were interpreted as enforceable as to abortion, it "would be inconsistent with the newer sec. 940.15." *Black*, 188 Wis. 2d at 646. Wisconsin criminal law cannot make the same act both lawful and a felony. Nor can an entire statutory framework for regulating lawful abortion be "harmonized" with Wis. Stat. § 940.04 by having the mid-1800s statute render superfluous the modern regulatory framework. If anything, adherence to *Black* is even more essential for "coherence and consistency in the law" now than when it was decided, because of the conflict that would otherwise exist in the law now given *Dobbs*.

Lastly, *Black* is not "unsound in principle" or "unworkable in practice" and, instead, "reliance interests are implicated." *Johnson Controls, Inc.*, 264 Wis. 2d 60, ¶ 99. For one, nothing about *Black* is "unworkable;" rather, Wisconsin has operated under a system where there was no ban for many decades. Likewise, there are substantial reliance interests in the continuing validity of Wisconsin's modern statutory scheme for regulation of lawful abortion.

b. *Black*'s rationale is consistent with *Kalal*.

Instead of engaging with the stare decisis factors, Urmanski instead suggests that *Black* is inconsistent with the "interpretive methodology" articulated in *Kalal*., 271 Wis. 2d 633, which this Court decided after *Black*.

Black is consistent with *Kalal*—Urmanski just disagrees with *Black*.

To start, *Kalal* did not purport to change how Wisconsin courts interpreted statutes. Rather, it sought to clarify the rules and collect them one place. *Kalal* explained, "our cases generally adhere to a methodology that relies primarily on intrinsic sources of statutory meaning and confines resort to extrinsic sources of legislative intent to cases in which the statutory language is ambiguous." *Kalal*, 271 Wis. 2d 633, ¶ 43. *Kalal* explained that when the language of the statute is "plain," the court "ordinarily stop[s] the inquiry." *Id.* ¶ 45 (citation omitted).

Black did exactly what *Kalal* counsels. The *Black* Court applied the "plain and unambiguous" language of Wis. Stat. § 940.04(2)(a) as *Kalal* requires. *Black*, 188 Wis. 2d at 644. The Court did not rely on extrinsic sources. *See Kalal*, 271 Wis. 2d 633, ¶ 51 (The "rule prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute."). Further, *Black* did not rely on the statute's title to vary the textual meaning, also consistent with modern interpretive principles. *See State v. Lopez*, 2019 WI 101, ¶ 28, 389 Wis. 2d 156, 936 N.W.2d 125 (A "statute's title may not be used to contradict its text or to create ambiguity where its meaning is plain."). *Black* is consistent with *Kalal* and contemporary statutory interpretation.

Urmanski asserts that *"Black* improperly interpreted § 940.04(2)(a) in isolation, without reference to the language of surrounding or closely-related statutes." (Urmanski's Br.

31.) Again incorrect: this Court's analysis focused on the need to avoid the direct conflict that would exist if one statute, Wis. Stat. § 940.15, provided for lawful abortion, while another, also titled "Abortion," purported to make abortion a felony. The Court specifically considered the statute in its context.

Urmanski argues that *Black* improperly "relied on the harmonious reading canon and the existence of a perceived inconsistency between Wis. Stat. § 940.04(2)(a) and § 940.15." (Urmanski's Br. 32.) But *Black*'s approach was entirely consistent with the approach *Kalal* later articulated: "[S]tatutory language is interpreted" "as part of a whole," "in relation to the language of . . . closely-related statutes," "reasonably, to avoid absurd or unreasonable results," and, "where possible[,] to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 271 Wis. 2d 633, ¶ 46. This Court was confronted with two laws, both titled "Abortion," that provided conflicting prohibitions and exemptions for when abortion would and would not be lawful (if both applied to abortion). This Court recognized that, given the conflict, both statutes could not apply to abortion. This Court also realized that the plain statutory language of Wis. Stat. § 940.04, unlike Wis. Stat. § 940.15, makes no mention of "abortion" itself. Instead, it prohibits the intentional destruction of, there, an "unborn quick child." So, instead of striking Wis. Stat. § 940.04(2)(a) in full because it could not apply to abortion, it recognized that its language was not "surplusage"—it prohibited feticide. All of that approach is consistent with *Kalal*.

C. The Legislature's acquiescence to *Black*'s rationale further confirms its soundness here.

Since *Black*, the Legislature has made no changes to the conduct prohibited by Wis. Stat. § 940.04(1) or (2)(a), despite passing numerous other laws prohibiting acts committed against an "unborn child." That combination of inaction on

Wis. Stat. § 940.04(1) and (2)(a) and action on other laws further confirms the ongoing soundness of *Black*. Urmanski's efforts to argue against legislative acquiescence, here again, instead prove its strength.

1. The Legislature's inaction on Wis. Stat. § 940.04 and action on other statutes following *Black* confirm its acquiescence to this Court's rationale.

As part of a plain language analysis, courts follow the rule that "legislative inaction in the wake of judicial construction of a statute indicates legislative acquiescence." *Estate of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759; *see also In re Custody of A.J.S.*, 2018 WI App 30, ¶¶ 13–15, 382 Wis. 2d 180, 913 N.W.2d 189. The Court "presume[s] that the legislature is aware that absent some kind of response this court's interpretation of [a] statute remains in effect." *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993). Thus, when the Legislature does not "change the law" after this Court's decision interpreting it, the Legislature "has acknowledged that the courts' interpretation . . . is correct," and future courts are "constrained not to alter their construction." *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d 626, 633–34, 157 N.W.2d 648 (1968).

Importantly, the principles of legislative acquiescence apply with particular force where the Legislature takes different action on the subject matter but does not change the language interpreted by the court. *See Estate of Miller*, 378 Wis. 2d 358, ¶ 51; *Olson*, 175 Wis. 2d at 641–42; *State v. Rector*, 2023 WI 41, ¶ 25 n.7, 407 Wis. 2d 321, 990 N.W.2d 213.

For example, in *Olson*, this Court considered a change to an offense's penalties where the Court had previously interpreted the elements of that offense. This Court interpreted Wisconsin's first-offense operating-after-

revocation statute as requiring proof that the defendant acted knowingly. *Olson*, 175 Wis. 2d at 634. After that decision, the Legislature amended the *penalty* multiple times, but it did not change the elements of the offense itself. *Id.* at 640–42. The *Olson* court explained that the Legislature's "repeated revisions" of the penalty for the offense "without expressly overturning [the prior supreme court decision] suggests legislative acquiescence with the holding" of the prior decision. *Id.* at 641–42.

Applied here, these principles show that the Legislature acquiesced to this Court's holding in *Black*. Following *Black*, the Legislature did not change the conduct prohibited by Wis. Stat. § 940.04(1) or (2)(a).

Instead, in 1997, it amended different criminal homicide, injury, and battery statutes to penalize particular enumerated crimes committed against an "unborn child" in over a dozen respects. *See*, *e.g.*, 1997 Wis. Act 295, § 15 (amending Wis. Stat. § 940.01, first-degree intentional homicide statute, to include a provision making it a Class A felony to cause the death of an unborn child with intent to kill that unborn child, the pregnant woman, or another), § 16 (amending Wis. Stat. § 940.02, first-degree reckless homicide statute, to include a Class B felony for recklessly causing the death of an unborn child under circumstances that show utter disregard); *see also, e.g.,* 1997 Wis. Act 295, §§ 18, 21, 23, 24, 27, 31, 32, 34, 36, 38, 39.

The Legislature's choice to make these many amendments, but *not* to amend the conduct prohibited by Wis. Stat. § 940.04(2)(a), reflects its acquiescence to the *Black* Court's holding. *Estate of Miller*, 378 Wis. 2d 358, ¶ 51; *Olson*, 175 Wis. 2d at 641–42; *Rector*, 407 Wis. 2d 321, ¶ 25 n.7.

2. Urmanski's attempts to argue against legislative acquiescence further prove its application here.

Urmanski offers three unsuccessful responses to legislative acquiescence. He attempts to downplay the holding of *Black* or describe it as required by *Roe*, (*see* Urmanski's Br. 32–34), but that is not what the Court held. He urges the Court not to consider legislative acquiescence, but the case he cites is not on point. And he suggests that the Legislature did change the statutes to override *Black*, but he misunderstands what they say.

Urmanski's view that legislative change was unneeded given *Black*'s holding ignores the plain language of the case: this Court held that Wis. Stat. § 940.04(2)(a) "is not an abortion statute." *Black*, 188 Wis. 2d at 646. And his argument relating to *Roe* makes no sense in the context of considering legislative acquiescence. He argues that because this Court in *Black* explained that any attempt to apply Wis. Stat. § 940.04(2)(a) to the performance of an abortion "prior to viability would be unconstitutional under *Roe*," *Black*, 188 Wis. 2d at 646, the Legislature would have thought that "nothing would stand as an obstacle" to applying Wis. Stat. § 940.04 to pre-viability abortions should *Roe* be overturned. (Urmanski's Br. 33.) But the *Black* Court applied the statutory language at issue to an "unborn quick child." *Black*, 188 Wis. 2d at 644; Wis. Stat. § 940.04(2)(a). If Wis. Stat. § 940.04(2)(a) applied to abortion, it would have been a later (i.e. post-quickening) prohibition, not a "prior to viability" prohibition at issue in *Roe*. Had the Legislature wanted the language of Wis. Stat. § 940.04(2)(a) to apply to abortion, it could have amended the statutory text interpreted by *Black*. It did not.

Urmanski discourages legislative acquiescence as a consideration, relying on *Wenke v. Gehl Co.*, 2004 WI 103, 274 Wis. 2d 220, 682 N.W.2d 405, where this Court declined to give significant weight to acquiescence. (*See* Urmanski's Br. 32–33.) But the court holding the Legislature had declined to act on in *Wenke* was a "nuanced concept" (a statute of repose), and the Legislature had taken no action at all regarding the subject matter. *Id.* ¶ 36. Neither limitation exists here.

Black directly held that Wis. Stat. § 940.04(2)(a) is "not an abortion statute." 188 Wis. 2d at 646. That is not nuance: it went to the core of whether statutory language criminally prohibited abortion. And the Legislature has taken related action—enacting new statutes also prohibiting acts, including feticide, against unborn children—but has not changed the language this Court interpreted in *Black*.

Urmanski suggests that it would be unfair to hold the Legislature to knowing *Black*'s rationale would control when others, he claims, did not. He points to a 1999 court of appeals case, but the court there merely noted in a footnote that Wisconsin's "antiabortion statute, § 940.04 STATS., was rendered unenforceable by *Roe*." (*See* Urmanski's Br. 34) (quoting *State v. Deborah J.Z.*, 228 Wis. 2d 468, 479 n.8, 596 N.W.2d 490 (Ct. App. 1999)). It was not a reasoned explanation of the rationale underlying *Black*. And Urmanski's depictions of the pleadings in this case, (Urmanski's Br. 34), forget that the State Plaintiffs' Complaint directly discussed *Black*, (R. 4:18, 20–21 (original complaint); R. 34:18, 20 (amended complaint)). Regardless, the Legislature as law-writer was expected to know the law, especially a holding on an issue where it frequently considered legislation.

Urmanski points to the actions the Legislature did take following *Black*, but those don't help him. (*See* Urmanski's Br. 33–34, 19, 24.) Urmanski points to Wis. Stat. § 939.75(2)(b)1.,

but that provides *exceptions* to the post-*Black* laws prohibiting crimes against an "unborn child" for abortions, and it stated that it "does not limit the applicability of ss. 940.04, 940.13, 940.15, and 940.16 to an induced abortion." Wis. Stat. § 939.75(2)(b)1. He even tries to transform this exception to liability from other statutes for abortion into implied criminal liability to prosecute abortion under Wis. Stat. § 940.04, but Wis. Stat. § 939.75(2)(b)1. says nothing about a grant of authority for separate prosecution.

Indeed, consider that one of the statutes listed in Wis. Stat. § 939.75(2)(b)1. is Wis. Stat. § 940.13. Wisconsin Stat. § 940.13 does not provide a substantive statute authorizing abortion prosecutions. Just the opposite: it prohibits prosecution of a pregnant woman for an abortion or violation of any other abortion statute. Wis. Stat. § 940.13. That the Legislature created new laws with an exception but left already listed statutes unaffected by the new exception further supports, not detracts from, legislative acquiescence.

Urmanski also notes that there have been "numerous bills" "introduced, but not enacted" on Wis. Stat. § 940.04 since *Black*, (*see* Urmanski's Br. 33–34), but that just reinforces application of legislative acquiescence here. *Olson,* 175 Wis. 2d at 640–42; *Cf. Wenke,* 247 Wis. 2d 220, ¶ 36.

As this Court explained in *Olson*, the Legislature cannot overrule a prior court decision through separate statutory provisions without changing the previously interpreted text itself. *Olson*, 175 Wis. 2d at 641–42. That never happened here. Although the Legislature enacted new statutes three years after *Black* on the subject of crimes against an "unborn child," it did not change the text this Court interpreted in *Black*.

* * *

This Court should affirm that *Black*'s rationale controls here: Wis. Stat. § 940.04(1) is not enforceable as to abortion.

II. Even without *Black*, the result would be the same. The implied repeal doctrine prohibits Wis. Stat. § 940.04(1)'s enforcement as to abortion.

Black reached the right result because this Court correctly recognized that the alternative was untenable: if Wis. Stat. § 940.04 applied to abortion, then it would be inconsistent with the more recently enacted Wis. Stat. § 940.15. And that means that even if *Black* were disregarded, the result here would be the same—Wisconsin's principles of implied repeal would prohibit Wis. Stat. § 940.04(1)'s enforcement as to abortion.

A. Later law impliedly repeals an earlier statute when the two laws directly conflict or when later laws comprehensively regulate the area, especially as applied to criminal laws.

Wisconsin law recognizes that an earlier statute has been impliedly repealed by later statutes in two circumstances. And the justification for applying implied repeal is especially compelling where, as here, the subject is criminal law.

First, a later-enacted law impliedly repeals an earlier law where an "irreconcilable" conflict exists between the two laws—where the later-enacted statute "contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force." *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971) (citation omitted). "The rule of law is harmed" whenever "a statute that directly contradicts an earlier enactment is not held to repeal it." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 331 (2012).

Second, implied repeal occurs "by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with the subject." *Wisth v. Mitchell*, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971) (citation omitted). A "regulatory scheme," by its nature, authorizes conduct that is "contrary or inconsistent" to a near-total ban of that same regulated conduct. *Eichenseer v. Madison-Dane Cnty. Tavern League, Inc.*, 2008 WI 38, ¶ 66, 308 Wis. 2d 684, 748 N.W.2d 154 (citation omitted).

Courts must be particularly strict in recognizing implied repeal when the conflict occurs between criminal penal statutes. In *State v. Christensen*, 110 Wis. 2d 538, 329 N.W.2d 382 (1983), this Court emphasized that while there is "strong public policy favoring the continuing validity of a statute except where the legislature has acted explicitly to repeal it . . . there is an even *stronger* public policy in favor of the strict construction of penal statutes *where there is doubt as to the statutory scheme*." *Id.* at 546 (emphasis added). Courts must favor resolving a criminal-law statutory conflict because citizens must have "notice as to what conduct is criminal." *Id*.

In *Christensen*, the court held that an earlier provision criminalizing abuse of an inmate in a residential care institution was impliedly repealed when a related residential care institution licensing statute was repealed because it left "doubts as to what conduct is subject to penal sanctions." *Id.* at 543, 547–48. In the criminal-law context, a court's duty to remove that doubt must outweigh any concerns it might have about holding an earlier law superseded. *Id.* at 546.

Indeed, as Justice Rebecca Bradley more recently explained, "[a]ny reasonable doubt about the application of a penal law must be resolved in favor of liberty." *State v. Kizer*, 2022 WI 58, ¶ 31, 403 Wis. 2d 142, 976 N.W.2d 356 (R. Bradley, J., concurring) (citation omitted). "When it comes

to laws imposing criminal punishment" specifically, "[i]f 'uncertainty exists' because an ordinary person cannot unravel the web of complexity created by the legislature, 'the law gives way to liberty.'" *Id.* ¶ 32 (citation omitted).

B. If Wis. Stat. § 940.04(1) applies to abortion, it has been impliedly repealed by Wisconsin's post-*Roe* abortion statutes.

If otherwise enforceable as to abortion, Wis. Stat. § 940.04(1) has been impliedly repealed under both forms of the doctrine: it directly conflicts with another statute, Wis. Stat. § 940.15, and is fundamentally inconsistent with Wisconsin's comprehensive scheme for regulating lawful abortion. Recognizing implied repeal here is particularly critical because the conflict exists in the context of criminal laws.

1. Wis. Stat. §§ 940.04(1) and 940.15 directly conflict if both apply to abortion.

The first type of conflict can be seen by reference to Wis. Stat. § 940.15, enacted in 1985. It criminalizes an abortion only after the point of "viability," which means "that stage of fetal development when . . . there is a reasonable likelihood of sustained survival of the fetus outside the womb." Wis. Stat. § 940.15(1), (2). It is a Class I felony. That prohibition does not apply "if the abortion is necessary to preserve the life or health of the woman." Wis. Stat. § 940.15(3).

Wisconsin Stat. § 940.04(1), if applied to abortion, would purport to criminalize the very abortions that are lawful under Wis. Stat. § 940.15. Wisconsin Stat. § 940.04(1) provides that "[a]ny person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." "Unborn child" means "a human being from the time of conception." Wis. Stat. § 940.04(6). The only

exception is "to save the life of the mother." Wis. Stat. § 940.04(5).

If Wis. Stat. § 940.04(1) applied to abortion, then Wis. Stat. §§ 940.04(1) and 940.15(2) are irreconcilable with each other.

First, Wis. Stat. § 940.15 prohibits abortion only "after the fetus or unborn child reaches viability," while Wis. Stat. § 940.04 would prohibit any abortion "from the time of conception."

Second, Wis. Stat. § 940.15 recognizes exceptions to the prohibition where an abortion is necessary to preserve the life *or health* of the pregnant woman, while Wis. Stat. § 940.04 would recognize an exception only when the abortion is necessary to save the pregnant woman's *life*.

Such direct conflict about when abortion is and is not lawful would demand the conclusion that the earlier law (Wis. Stat. § 940.04) was impliedly repealed by the later law (Wis. Stat. § 940.15).

Notably, nothing in Wis. Stat. § 940.15 makes it narrower in scope than Wis. Stat. § 940.04. To the contrary, both statutes would draw a line as to when providing an abortion is illegal and make exceptions based on particular medical circumstances. Wisconsin Stat. § 940.15 also makes it a felony for anyone "who is not a physician" to perform an abortion, full stop—*not* limited to any particular timeframe of pregnancy. Wis. Stat. § 940.15(5). The statutes cover the same ground but provide directly conflicting answers, and the later statute therefore would impliedly repeal the earlier.

Nor would it be any answer to say that Wis. Stat. § 940.15(2) does not affirmatively grant an express "statutory right to an abortion." (*See* Urmanski's Br. 37.) That's not how criminal law works.

Criminal law does not tell us what is *legal*; it tells us what is *illegal* and then delineates the scope of and exceptions to the prohibition. *See, e.g.,* Wis. Stat. § 939.48(1) (providing the self-defense privilege to criminal liability and explaining that an "actor may not intentionally use force which is intended or likely to cause death or great bodily harm *unless* the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself"). This is why, for criminal prohibitions, "if one is told that he will be chastised for doing a certain thing unless he does it in a certain way, it is equivalent to telling him that if he does it in the prescribed way he will not be punished." *State v. Buck*, 262 P.2d 495, 501 (Or. 1953).

Consider two hypothetical Wisconsin criminal laws regarding crosswalks. One law says: "It is a felony to cross the street unless the walk symbol is illuminated." The other law says: "It is a felony to cross the street for any reason unless necessary to save the life of another pedestrian." Both of those laws could not simultaneously be Wisconsin criminal law, because the former specifically exempts from criminal penalty behavior that the latter would criminalize. So too here, if Wis. Stat. §§ 940.15 and 940.04(1) both applied to abortion.

Given the direct conflict that would exist, the later enactment of Wis. Stat. § 940.15 would compel the conclusion that Wis. Stat. § 940.04(1) has been impliedly repealed.

2. Wisconsin Stat. § 940.04(1) is fundamentally incompatible with Wisconsin's comprehensive regulatory framework for lawful abortions.

Implied repeal also applies in a second way. Wisconsin Stat. § 940.04(1), if applied to abortion, is fundamentally incompatible with Wisconsin's comprehensive framework for regulating lawful abortions—addressing the who, what, when, where, how, and funding of lawful abortions.

To illustrate, Wisconsin's modern regulatory scheme requires that an abortion be performed by a physician, Wis. Stat. § 940.15(5); regulates post-viability abortions, Wis. Stat. §§ 940.15(2), 253.107; restricts partial-birth abortions, Wis. Stat. § 940.16; imposes requirements on how medication abortions may be provided, Wis. Stat. § 253.105; mandates voluntary and informed consent with numerous requirements to ensure such consent, Wis. Stat. § 253.10; requires parental consent for a minor to be provided with an abortion and addresses how that requirement may be waived by a court, Wis. Stat. §§ 48.257, 48.375, 809.105, 895.037; requires facilities providing abortions to file an annual report with details about the abortions provided, Wis. Stat. § 69.186; and generally prohibits governmental subsidy of abortions with exceptions including for cases of rape or incest, Wis. Stat. § 20.927.

The chapter 253 framework establishes that physicians act lawfully when they comply with the extensive regulatory provisions for their medical practice. As courts have recognized, "it is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited." *Weeks v. Connick*, 733 F. Supp. 1036, 1038 (E.D. La. 1990); *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (same).

The comprehensive statutory framework is not only fundamentally incompatible with a near-total abortion ban—it would also be rendered almost entirely superfluous if Wis. Stat. § 940.04(1) applied to abortion. For example:

- Wisconsin Stat. § 253.10's many requirements to ensure that a woman provides voluntary and informed consent before obtaining an abortion—including 24-hour waiting requirements and showing of an ultrasound—are superfluous if the only circumstance in which a

Wisconsin woman could ever obtain an abortion is if she will otherwise die.

- Wisconsin Stat. § 253.105's regulations of medication abortion, including requiring a physician to perform a physical examination prior to prescribing abortion-inducing drugs and be physically present in the room when the drugs are given, are superfluous if the only circumstance in which a Wisconsin woman could ever obtain an abortion is if she will otherwise die.

- Wisconsin Stat. § 253.107's additional requirements for the provision of abortions after 20 weeks of probable postfertilization age would be superfluous if the only circumstance in which a Wisconsin woman could ever obtain an abortion is if she will otherwise die.

- Wisconsin Stat. § 48.375, which requires parental consent before a minor may obtain an abortion, with exceptions that include sexual assault and medical emergency, would be superfluous if the only circumstance in which a Wisconsin woman could ever obtain an abortion is if she will otherwise die.

Wisconsin's "regulatory scheme" "authoriz[es]. . . conduct" that is "contrary or inconsistent" with a near-total abortion ban. *See Eichenseer*, 308 Wis. 2d 684, ¶ 66 (citation omitted). Wisconsin Stat. § 940.04(1), if applied to abortion, would be impliedly repealed for this second reason.

3. Many other courts have recognized implied repeal when confronted with conflicting abortion laws.

Consistent with the foregoing, other courts have recognized both versions of implied repeal.

As to direct conflict between two statutes, the Seventh Circuit concluded that a Wisconsin abortion law was impliedly repealed in *Karlin v. Foust*, 188 F.3d 446, 468–71

(7th Cir. 1999). The case addressed competing exceptions to a 24-hour waiting period for performing an abortion on a minor: one turning on "reasonable medical judgment" about whether there was a "significant threat" to health, and the other on whether "to the best of [the physician's] medical judgment based on the facts of the case . . . a medical emergency exists." *Id.* at 468. Applying Wisconsin's implied-repeal precedent, the court explained that the former was an "objective" test whereas the latter was a "subjective" one. *Id.* at 468–69. Because those conflicting tests concerned the same "circumstances" and were "manifestly inconsistent," the court ruled that the later-enacted law impliedly repealed the earlier one. *Id.* 469–471.

Similarly, in *Buck*, 262 P.2d 495, the Oregon Supreme Court ruled that a newer "Medical Practice Act" containing a health exception impliedly repealed an older criminal abortion law that broadly banned abortion. *Id.* at 496–503. "It would be paradoxical, indeed, if the state were permitted to prosecute a doctor for a violation of the Criminal Abortion Act when, under the Medical Practice Act, he was permitted to do the very thing he was prosecuted for." *Id.* at 501.

As to the second type of implied repeal, courts have applied the doctrine to abortion statutes where there is a subsequent, comprehensive regulatory scheme that is incompatible with a blanket ban. This occurred in the Fifth Circuit's analysis of Texas abortion laws paralleling Wisconsin's laws. *McCorvey*, 385 F.3d at 849. Texas had a pre-*Roe* law that criminalized abortion and a post-*Roe* statutory regime that regulated lawful abortions: "Currently, Texas regulates abortion in a number of ways. . . . Texas also regulates the practices and procedures of abortion clinics through its Public Health and Safety Code." *Id.* at 849. The court held that the later regime impliedly repealed the pre-*Roe* law: the "regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion. There is

no way to enforce both sets of laws; the current regulations are intended to form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." *Id.*

A federal court reached similar conclusions about Arkansas abortion laws in *Smith v. Bentley*, 493 F. Supp. 916, 923–24 (E.D. Ark. 1980), ruling that implied repeal applied where "the Legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new." *Id.* at 923 (citation omitted).

In some cases, both types of implied repeal apply. In *Weeks*, 733 F. Supp. at 1038–39, a federal court held that a post-*Roe* Louisiana law restricting "post-viability abortions" and containing extensive post-*Roe* regulations impliedly repealed an older, blanket abortion ban both because the newer statute conflicted and because the regulations meant that "abortions are permissible if set guidelines are followed."

As these examples show, a number of courts across the country have considered competing state abortion laws and concluded that earlier broad bans were impliedly repealed by later statutes. This Court thus is on firm ground in recognizing implied repeal here, both under Wisconsin law and in light of similar decisions from other jurisdictions.

C. Urmanski's arguments flip implied repeal on its head and misunderstand the notice requirements of criminal law.

Urmanski's arguments ask this Court to do the opposite of what implied repeal requires. His view would effectively repeal numerous modern Wisconsin abortion laws, including Wis. Stat. § 940.15, by concluding that Wis. Stat. § 940.04(1) renders them meaningless. His arguments also misunderstand fundamental notice requirements for criminal statutes.

1. Urmanski's interpretation would effectively repeal both Wis. Stat. § 940.15 and Wisconsin's comprehensive statutory regime for regulating lawful abortions.

Urmanski offers no way for this Court to interpret Wis. Stat. § 940.04(1) as applied to abortion in a way that doesn't wholesale repeal later-enacted statutes, including Wis. Stat. § 940.15 and most of Wisconsin's statutory regime for regulating lawful abortions. That's because there is no way to do so.

Urmanski first argues that "there is no conflict" between Wis. Stat. § 940.04(1) and Wis. Stat. § 940.15 because a "physician who conforms his or her conduct to § 940.04(1) and (5) will necessarily also comply with § 940.15." (Urmanski's Br. 26–27, 37.)

Put another way, he argues the statutes can be harmonized because Wis. Stat. § 940.04(1) could completely swallow—i.e., render superfluous—Wis. Stat. § 940.15. That's not harmonizing the statutes: "Construing one statute to void others would make no sense and would lead to unreasonable and absurd results." *In Re Commitment of Matthew A.B.*, 231 Wis. 2d 688, 709, 605 N.W.2d 598 (1999) (citation omitted).

Urmanski tries to fight the direct conflict that would exist between Wis. Stat. §§ 940.04 and 940.15 (which this Court already recognized in *Black*) by asserting that Wis. Stat. § 940.15 is not "intended to cover the whole subject of regulation of abortion." (Urmanski's Br. 40.) How not?

Wisconsin Stat. § 940.15 (also titled "Abortion") provides the point in gestation after which abortion is illegal, meaning it is legal before that point. Wis. Stat. § 940.15(2). It prohibits anyone from "perform[ing] an abortion. . . who is not a physician," regardless of the gestational stage of pregnancy. Wis. Stat. § 940.15(5). It exempts a "woman who obtains an

abortion that is in violation of this section." Wis. Stat. § 940.15(7).

For physicians, Wis. Stat. § 940.15 contains an exception after the delineated gestational point for the health of the pregnant woman, which explicitly authorizes a physician to perform an abortion at any stage if "necessary to preserve the life or health of the woman." Wis. Stat. § 940.15(3). It directs that such later abortions "shall be performed in a hospital on an inpatient basis." Wis. Stat. § 940.15(4). It also instructs physicians on the "method of abortion" for post-viability abortions and imposes penalties for physicians who do not comply with those requirements. Wis. Stat. § 940.15(6). Those provisions make clear that a physician acts legally if he or she complies with those requirements.

None of those provisions do statutory work if the only circumstance in which a woman could lawfully have an abortion is if necessary to prevent her from dying.

Urmanski continues to assert that Wis. Stat. § 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." (Urmanski's Br. 37). This again not only misunderstands criminal law, it also doesn't harmonize the statutes.

Take, for example, the case of a college student who finds out she is eight weeks pregnant as the result of a sexual assault. Can the physician perform the abortion, or will doing so constitute a *criminal felony*? Wisconsin Stat. § 940.15(2) says lawful, but Wis. Stat. § 940.04(1)—if applied to abortion—would say a felony.

Take, as another example, the case of a pregnant woman who, post-viability, suffers a medical emergency that requires either the termination of the pregnancy or severe lifelong organ damage. Can the physician perform the

abortion, or will doing so constitute a *criminal felony*? Wisconsin Stat. § 940.15(3) says lawful, but Wis. Stat. § 940.04(1)—if applied to abortion—would say a felony.

Urmanski fares no better trying to argue against the reality that Wisconsin's comprehensive statutory framework for the regulation of lawful abortion is fundamentally incompatible with a statute that would purport to prohibit any abortion beyond those necessary to save the pregnant woman from dying.

Instead of confronting the fact that his reading of Wis. Stat. § 940.04(1) would render the vast majority of Wisconsin's many modern abortion laws superfluous, Urmanski instead pivots to language in some (but not all) of chapter 253's provisions saying that nothing in the statute "may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." (Urmanski's Br. 18, 38.) That language does not help him.

First, several of Wisconsin's abortion regulations have no such savings language, including Wis. Stat. §§ 253.095, 48.257, 48.375, and 20.927. Second, even where it does exist, statutory history shows that the language refers not to Wis. Stat. § 940.04(1) but to *Wis. Stat. § 940.15*, which was enacted at the same time or before the regulations containing that language. That is, several of the abortion provisions in chapter 253 were enacted in 1985 together with Wis. Stat. § 940.15. Others were enacted later. None of these provisions were enacted when the near-total ban in Wis. Stat. § 940.04(1) could have been enforced as to abortion. These provisions therefore make sense only when construed in light of the narrower limits of Wis. Stat. § 940.15—where abortions may occur in more circumstances and, thus, are amenable to the regulations concerning those broader circumstances.

Even more fundamentally, Urmanski offers no support for the concept that the Legislature can avoid statutory conflict simply by providing that a few regulations didn't create a "right to abortion." The question is not whether any regulations created a right, but rather whether the existence of conflicting statutes and regulatory scheme leave the public in an untenable "quandary" about which laws apply. *Karlin*, 188 F.3d at 468. As the federal court recognized in *Weeks*, there is no support for the idea that a "bald statement" from the Legislature stating that it would prefer no conflict to exist can alleviate the conflict or change the implied repeal analysis. *See* 733 F. Supp. at 1039.

One other point bears mention here: Urmanski's arguments could be read as hinting that the Wisconsin Legislature, at least as to some of the modern laws in chapter 253, wrote something it did not—a version of a so-called abortion "trigger law." Prior to *Dobbs*, over a dozen state legislatures created abortion "trigger laws" providing that in the event that the Supreme Court overturned *Roe*, a restrictive abortion ban should take effect. *See, e.g.,* Mo. Ann. Stat. § 188.017. Wisconsin, notably, has no such law. And the construction language in certain (but not all) provisions in chapter 253 offers nothing that would resolve the direct conflict with Wis. Stat. § 940.15 if Wis. Stat. § 940.04(1) applied to abortion.

Lastly, Urmanski argues that State Plaintiffs' position leads to surplusage in Wis. Stat. § 940.04(5), but that also fails. (*See* Urmanski's Br. 23–25) That provision provides that Wis. Stat. § 940.04 "does not apply to a therapeutic abortion" which is "performed by a physician and "[i]s necessary . . . to save the life of the mother."

Urmanski's surplusage argument is wrong: Wis. Stat. § 940.04(5) is doing work in the feticide statute—it's just not the work Urmanski says it should do. Wisconsin Stat. § 940.04(5) makes clear that the statutory prohibitions cannot

apply to abortion, even in extreme circumstances. As to Wis. Stat. § 940.04(1), Wis. Stat. § 940.04(5) reinforces that where a pregnant woman will die if she does not receive an abortion, the absence of the otherwise-necessary requirements to ensure voluntary and informed consent does not transform the abortion into feticide under Wis. Stat. § 940.04(1). Similarly, it reinforces that physicians are not criminally liable under Wis. Stat. § 940.04(2)(b) in the event a pregnant woman dies.

There thus is no surplusage issue. To the contrary, it is *Urmanski* who asks this Court to declare the vast majority of Wisconsin's modern abortion laws surplusage in favor of a near-total ban originating in the mid-1800s.

2. Urmanski's "overlap" theory ignores that Wisconsin criminal law cannot treat the same act as both lawful and a felony.

Throughout his brief, Urmanski also mistakenly asserts that Wis. Stat. § 940.04(1) and Wis. Stat. § 940.15 are "[o]verlapping criminal statutes," which are "common and permitted in the law," such that no conflict exists between the two. (*See* Urmanski's Br. 31, 36, 38–39.) He misunderstands the caselaw he tries to rely on and the law regarding notice requirements for criminal prohibitions.

As a general rule, the same act may be illegal under multiple criminal statutes. Where conduct is always unlawful, an individual has notice of that unlawfulness; it is simply the type of punishment that may vary. These are the types of statutes found in the cases Urmanski relies on, like *State v. Villamil*, where the same act was criminal under two statutes but punishable as either a misdemeanor or felony. 2017 WI 74, 377 Wis. 2d 1, 898 N.W.2d 482. *Villamil* and *Edwards v. United States*, 814 F.2d 486 (7th Cir. 1987), the

other criminal "overlap" case to which Urmanski primarily points, (Urmanski's Br. 31, 36, 38–39), rely on *Batchelder*.

The U.S. Supreme Court in *Batchelder* rejected a due process challenge to criminal statutes that both made an act illegal but offered different punishments for it: "[W]hen an act *violates more than one criminal statute*, the Government may prosecute[] under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (emphasis added).

That is not the case when the same act is lawful under one state statute and illegal under another: an individual cannot know whether conduct is lawful when two statutes say directly opposite things. Indeed, *Batchelder* recognized that those circumstances were different—that an act being illegal under multiple statutes is different from circumstances involving "positive repugnancy between the provisions," where implied repeal *would* apply. *Id.* at 122 (citation omitted).[5]

This Court said nothing to the contrary in *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. (*See* Urmanski Br. 31–32, 36–39.) *Grandberry* held that no conflict existed between two statutes because it rejected the argument that the same conduct would violate one statute but not the other. *Id.* ¶¶ 21–23. It held that the two statutes served different purposes and imposed distinct *additional* prohibitions that the other did not; therefore, "compliance with both statutes is not only possible, it is required." *Id.* ¶ 21.

The defendant in *Grandberry* argued that Wisconsin's safe transport and concealed carry statutes conflicted because the same conduct of "placing a loaded handgun in a motor

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[5] Urmanski also cites *Radzanower v. Touche Ross & Co.,* (Urmanski's Br. 35–36), but the court there held that it was not a scenario where the schemes "cannot mutually coexist." 426 U.S. 148, 155 (1976).

vehicle" "can comply with the Safe Transport Statute yet violate the Concealed Carry Statute." *Id.* ¶ 20. This Court rejected the argument that complying with one statute would violate the other: the safe transport statute regulated the transportation of firearms in cars to ensure safe transportation, while the concealed carry statute regulated carrying firearms to ensure public safety. *Id.* ¶ 21.

Unlike the crosswalk hypothetical discussed in section 2.B.1 above, here's a hypothetical corresponding with *Grandberry*:

- Law 1—It is illegal for pedestrians to cross the street unless the walk sign is illuminated.
- Law 2—It is illegal for pedestrians to cross the street with a dog unless the dog is on a leash.

There's no conflict there. The statutes serve distinct purposes and a pedestrian walking a dog has to comply with both. A pedestrian could not say that if he's walking a dog across the street, he could do so without the walk sign illuminated. That was the argument this Court rejected in *Grandberry*.

Here, in contrast, if both Wis. Stat. §§ 940.04 and 940.15 applied to abortion, both could not apply in force. There would be "no way to enforce both sets of laws." *McCorvey*, 385 F.3d at 849. A Wisconsin physician could not perform an abortion unnecessary to save the pregnant woman's life that is both in compliance with Wis. Stat. § 940.15 and does not violate Wis. Stat. § 940.04(1). Urmanski's overlap theory is simply incorrect.

D. Urmanski's attempts to rely on pre-1985 statutory history and caselaw and legislative history from 1985 onward do not help him.

Urmanski dedicates much of his brief to trying to prove that, before Wisconsin enacted Wis. Stat. § 940.15 in 1985 following *Roe*, the Wisconsin Legislature and Wisconsin

courts understood that Wis. Stat. § 940.04(1) was meant to prohibit abortion. That argument does nothing to help him because it all predates the conflict that requires implied repeal.

He points to Wis. Stat. § 990.001(7)'s discussion of how a revision bill note may be indicative of legislative intent, and then tries to direct this Court's attention to the comment to Wis. Stat. § 940.04(1) from the 1950s. (Urmanski's Br. 25–26.) He discusses a small handful of cases from the late 1800s to the 1960s where provisions of Wis. Stat. § 940.04 were used to prosecute abortion. (Urmanski's Br. 16–17, 24–25) (citing cases). And he notes that *Roe* itself recognized Wis. Stat. § 940.04 as a near-total abortion ban. (Urmanski's Br. 17.)

None of that matters because it all predates Wisconsin's modern abortion laws. Put differently, none of that argument matters to the analysis of whether Wis. Stat. § 940.04(1) has been impliedly repealed as to abortion, because it all predates the laws that impliedly repealed it. Indeed, the whole point of the implied repeal doctrine—particularly critical in the context of criminal prohibitions—is what controls when the subsequent laws are enacted and conflict exists.

His arguments regarding legislative understanding since Wisconsin adopted its modern abortion laws (i.e., from 1985 onward) are a prime example of why statutory interpretation does not start with legislative history or guesses at legislative intent—why, it is instead the "enacted law, not the unenacted intent, that is binding on the public." *Kalal*, 271 Wis. 2d 633, ¶ 44.

Urmanski argues that the drafting file for the 1985 Act creating Wis. Stat. § 940.15 reflects that the Legislature understood that its enactment would *not* impliedly repeal Wis. Stat. § 940.04. (*See* Urmanski's Br. 17–18.) But two can play that game: the drafting file contains evidence that the Legislature did understand implied repeal would be in play.

It considered including language, "NO IMPLIED REPEAL," but decided *against* doing that. (R. 99:3–6.)

Urmanski similarly argues that it matters that the Legislature has made changes to Wis. Stat. § 940.04 since enacting Wis. Stat. § 940.15 without expressly repealing it. (Urmanski's Br. 41.) But those amendments addressed provisions of Wis. Stat. § 940.04 not in conflict here: changing the penalty as part of truth-in-sentencing legislation and removing language providing for the prosecution of the pregnant woman. 2001 Wis. Act 109, § 586; 2011 Wis. Act 217, § 11.

If anything, the 2011 amendment further reveals how willing the Wisconsin Legislature was to let provisions of Wis. Stat. § 940.04 that would directly conflict with modern abortion laws if Wis. Stat. § 940.04 applied to abortion stay listed "on the books." Though the Legislature enacted Wis. Stat. § 940.13—prohibiting a pregnant woman from being criminally prosecuted for obtaining an abortion—in 1985, it was not until 26 years later that the Legislature repealed Wis. Stat. § 940.04(3), which, by its text, authorized authorize prosecution of a pregnant woman. *Compare* 1985 Wis. Act 56, § 34, *with* 2011 Wis. Act 217, § 11.

Urmanski also points to Wis. Stat. § 939.75(2)(b)1., (Urmanski Br. 19, 24, 31, 33), but, as argued in section I.C.2 above, that statute does not help him.

Lastly, Urmanski's stress on how the Legislature did not expressly repeal Wis. Stat. § 940.04 does not move the needle for the implied repeal analysis. Had the Legislature done so, there would not have been the massive confusion that resulted in Wisconsin post-*Dobbs* and no reason for this Court to be considering implied repeal. Implied repeal considers whether statutes, on their faces, conflict. The analysis does not turn on whether the Legislature did or did not take certain actions.

If anything, the existence of *Roe* and the fact that, pre-*Dobbs*, the U.S. Supreme Court had never before rescinded an individual liberty in its entirety, gave the Legislature reason to not expend legislative energy expressly repealing Wis. Stat. § 940.04: it had been rendered a nullity as to abortion by *Roe*, but was still doing work as a feticide statute per *Black*. A court presumes that "the legislature acts with full knowledge of existing statutes and how the courts have interpreted these statutes." *State v. Victory Fireworks, Inc.*, 230 Wis. 2d 721, 727, 602 N.W.2d 128 (Ct. App. 1999).

In all, Urmanski has no answer to the simple fact that Wis. Stat. § 940.15 and Wisconsin's other modern laws regulating lawful abortion cannot coexist in force if Wis. Stat. § 940.04(1) also applies to abortion. If Wis. Stat. § 940.04(1) were otherwise enforceable as to abortion, it has been impliedly repealed.

III. This Court need not address State Plaintiffs' alternative argument that Wis. Stat. § 940.04(1) is unenforceable as to abortion based on longstanding disuse. It therefore also need not address State Plaintiffs' standing.

Urmanski asks this Court to hold that State Plaintiffs' alternative disuse claim fails as a matter of law and that State Plaintiffs lacked standing to raise it. This Court need not consider either question.

In their complaint, State Plaintiffs pled an alternative count, Count II, seeking the same relief as in Count I: that Wis. Stat. § 940.04(1) is unenforceable as to abortion. (R. 34 ¶¶ 55–63.) Count II was based on disuse (or desuetude) and alleged that Wis. Stat. § 940.04(1) had become unenforceable as to abortion because it had not been enforced against abortion for many decades and that, even pre-*Roe*, had only been rarely enforced. State Plaintiffs did not seek judgment on the pleadings on Count II because it depends on the resolution of historical facts. (*See* R. 146:91–92 (discussion at

oral argument); R. 157 (brief in support of judgment on the pleadings).)

This Court need not consider State Plaintiffs' alternative disuse claim at all because Wis. Stat. § 940.04(1) is unenforceable as to abortion under both *Black* and Wisconsin's implied repeal doctrine. If, and only if, this Court should nevertheless reject those arguments, then it should remand for further consideration of State Plaintiffs' alternative disuse claim to develop the relevant historical facts.

Whether an archaic statute can be rendered unenforceable through prolonged disuse in Wisconsin is a novel question, as Urmanski recognizes. (*See* Urmanski's Br. 51.) Akin to fair-notice requirements and vagueness prohibitions, the desuetude doctrine is grounded in the tenet that law must be based on the consent of the governed instead of the whims of particular individuals: "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it." *Comm. on Legal Ethics of the W. Va. State Bar v. Printz*, 416 S.E.2d 720, 724 (W. Va. 1992).

While the ultimate question is a legal one, its resolution depends on significant consideration of historical facts. For example, West Virginia courts ask whether there was an "open, notorious and pervasive violation of the statute for a long period" and whether there was a "conspicuous policy of nonenforcement." *Comm. On Legal Ethics*, 416 S.E.2d at 726.

Indeed, Urmanski points to a small handful of cases where Wis. Stat. § 940.04 was enforced as to abortion in the over-100-year-period prior to *Roe*. (*See* Urmanski's Br. 53.) State Plaintiffs could respond by offering citations supporting that Wisconsin history reflects continuous and prevalent disregard for purported criminal abortion bans for over 100 years in favor of women continuing to obtain pre-quickening

abortions. (*See, e.g.,* R. 98:36–40 (State Plaintiffs' response in the circuit court.)

Ultimately, however, consideration of the legal question itself—particularly as a novel question—would depend on historical factual development, and that factual development should occur before this Court considers the issue. *See, e.g., State v. Field,* 118 Wis. 2d 269, 288, 347 N.W.2d 365 (1984) (juxtaposing the propriety of this Court's consideration of legal questions without trial court development that are "not at all dependent upon the development of a factual record" versus those legal questions that do so depend). While this Court need not consider State Plaintiffs' disuse argument at all, if it holds that Wis. Stat. § 940.04(1) would otherwise be enforceable as to abortion, it should remand State Plaintiffs' disuse claim for further factual development.

And because this Court need not consider State Plaintiffs' disuse claim, it also need not consider State Plaintiffs' standing. Urmanski "does not dispute that one of the Physician Intervenors presents a justiciable controversy." (Urmanski's Br. 55.) He also does not dispute that this Court recently again acknowledged that "it is immaterial whether a party is an intervenor for purposes of applying the 'one-good-plaintiff rule.'" (Urmanski's Br. 55 (citing *Clarke v. WEC*, 2023 WI 79, ¶ 39 n.19, 410 Wis. 2d 1, 998 N.W.2d 370).)[6]

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[6] Urmanski suggests in a footnote that perhaps this Court in *Clarke* failed to consider *Fox*, which he cites for the proposition that "intervention should not be able to breathe life into a nonexistent lawsuit." (*See* Urmanski's Br. 55 n.6) (citing *Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983). It is Urmanski, not this Court, that misses key differences: *Fox* concerned the ramifications for a party's failure to meet the requisite chapter 227-specific filing deadlines. 112 Wis. 2d at 536–37. Looking to non-chapter 227 federal caselaw, the court specifically noted that an intervenor's claims *will* be able to continue where the intervenor has a separate basis for jurisdiction (which the untimely chapter 227 party did not have). *Id.*

He therefore properly does not ask this Court to address State Plaintiffs' standing for consideration of whether *Black*'s rationale controls or whether Wis. Stat. § 940.04(1) is unenforceable as to abortion because it's been impliedly repealed. (*See* Urmanski's Br. 55–56.) He instead only asks this Court to address standing to resolve State Plaintiffs' alternative disuse argument. (*See* Urmanski's Br. 55–56.) As this Court need not address that alternative disuse argument, there's no need to address standing.

If there were a need to address standing, State Plaintiffs would more than satisfy it. In short, Wisconsin precedent reflects that the Attorney General may bring declaratory judgment actions to determine a statute's enforceability where the matter is "of vital concern. . . to the entire public." *In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W. 633, 634 (1936). And the Department of Safety and Professional Services and the Medical Examining Board and its chair have statutory duties including investigation and potential discipline for law violations, which necessarily requires an ability to understand what is and is not enforceable Wisconsin Law against physicians for providing abortions. *See* Wis. Stat. §§ 448.02, 448.03; Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i). Ultimately, though, this Court need not address State Plaintiffs' standing to raise its alternative disuse argument, because this Court need not address that alternative disuse argument.

* * *

The circuit court properly ruled that *Black* controls the outcome here: just like Wis. Stat. § 940.04(2)(a), the materially identical Wis. Stat. § 940.04(1) does not apply to abortion. Not only does that give effect to the precedent, but that outcome is dictated by fundamental principles of statutory interpretation. Were it otherwise, there would be an irreconcilable conflict between the historical Wis. Stat. § 940.04(1) and the modern Wis. Stat. § 940.15 and a host of

regulations. In the face of such a conflict, the later-enacted laws must be given effect, and the historical criminal law cannot be enforced against abortion. In other words, no matter how the issue is analyzed, there is only one proper conclusion: Wis. Stat. § 940.04(1) is unenforceable as to abortion. This Court should rule accordingly and provide important clarity to the citizens of Wisconsin.

CONCLUSION

The Court should affirm the final judgment of the circuit court declaring that Wis. Stat. § 940.04(1) is unenforceable as to abortion.

Dated this 11th day of September 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font and according to this Court's July 2, 2024, order. The length of this brief is 14,552 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 11th day of September 2024.

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