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APPEAL NO: 2023AP2362

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

Plaintiffs-Respondents,

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

Intervenors-Respondents,

vs.

JOEL URMANSKI, as District Attorney for Sheboygan County, WI,

Defendant-Appellant,

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

Defendants-Respondents.

On Appeal from the Circuit Court of Dane County
Case No. 2022CV1594
The Honorable Diane Schlipper Presiding

RESPONSE BRIEF OF PHYSICIAN INTERVENORS-RESPONDENTS

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INTRODUCTION

This case is about whether an archaic statute that some see as an abortion ban can cancel out an array of modern statutes regulating abortion, such that physicians cannot provide a safe, common medical procedure for their patients. For half a century, Wisconsin physicians treating pregnant women have relied on state law to permissibly provide abortions pre-viability with the informed consent of the patient or post-viability, when an abortion was necessary to preserve the patient's health or life. Because some prosecutors now contend that they could file criminal charges against physicians under Wisconsin's archaic statute—Wisconsin Statute section 940.04, there is confusion and concern among physicians, including the Intervenor-Plaintiffs Dr. Christopher J. Ford, Jr. Kristen Lyerly, and Dr. Jennifer Jury McIntosh (together, "the Physicians"). The Physicians ask this court to declare that this archaic law is not enforceable against physicians for performing abortions—before the lives and health of pregnant women[1] are jeopardized by threatened prosecutions of healthcare providers.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Physicians request oral argument as an opportunity to answer any questions the Court may have. Oral argument and publication are warranted under the standards in sections 809.22 and 809.23(1). Wis. Stat. §§ 809.22, 809.23(1).

[1] Wisconsin statutes traditionally uses "women" or "mother" to refer to people who are or may become pregnant. Here, the Physicians will use "women" to maintain consistency and clarity with existing law, though the Physicians recognize that people across the gender spectrum may become pregnant.

STATEMENT OF THE CASE

A. Origins of Wisconsin's abortion laws

Wisconsin did not prohibit abortion at the time it gained statehood; its earliest abortion law came into existence in 1849, a year later. The 1849 statute criminalized "the willful killing of an unborn quick child" by injury to the mother or by administering to a woman "pregnant with a quick child…any medicine, drug, or substance whatever… or any instrument or other means, with intent thereby to destroy such child." Wis. Stat. § 133(10), (11) (1849). The word "quick" was deleted from each in 1858. Wis. Stat. ch. 169 § (10), (11) (1858).

Until 1955, when the criminal code was revised, the law remained essentially unchanged except for minor amendments. In 1955, the existing abortion laws were consolidated and renumbered to section 940.04, in substantially the form the statute remains today. Wis. Stat. § 940.04 (1955); 1955 Wis. Act 696. In 1972, a federal district court ruled section 940.04's prohibition on abortions of "an embryo which has not yet quickened" to be a violation of a woman's right to privacy under the ninth amendment to the U.S. Constitution, and thus unenforceable. *Babbitz v. McCann*, 310 F. Supp. 293, 301–02 (E.D. Wis. 1970). Three years later, the United States Supreme Court also concluded that such a prohibition violated women's federal constitutional rights. *Roe v. Wade*, 410 U.S. 113, 154–55 (1973).

The only substantive change to section 940.04 since 1955 occurred in 2011, with the repeal of subsections (3) and (4), which had imposed criminal penalties on a woman obtaining an abortion. 2011 Wisconsin Act 217 § 11. This Act also made clear that women may lawfully consent to and receive an abortion. 2011 Wisconsin Act 217 §§ 2, 4. Section 940.04 has not been enforced in Wisconsin since 1970.

B. Section 940.15 and Wisconsin's modern abortion laws

In 1985, the Legislature passed the "Abortion Prevention and Family Responsibility Act" which, among other things, established that a woman who obtains an abortion may not be prosecuted (Wis. Stat. § 940.13), prohibits the performance of abortions post viability except to preserve the life or health of the mother (§ 940.15(2)), and requires abortion at any stage be performed by a physician (§ 940.15(5)).[2] Other than minor changes to the felony classifications, the statute remains in its original form today.

1985 Act 56 was born out of a bipartisan Special Committee on Pregnancy Options. The original draft of the bill out of committee, 1985 AB 510, LRB-4124/1, would have expressly repealed section 940.04. However, a new amendment in the Assembly, Assembly Substitute Amendment 1, LRB s0289/2, deleted the express repeal of section 940.04 and instead created section 940.15, with a nonstatutory provision stating that section 940.15 "may not be deemed to repeal" section 940.04. This nonstatutory provision was deleted in a later revision, Amendment 6 to Assembly Substitute Amendment 1, LRB a2036/1. (*See* Pls.' App. 101; Dkt. 99 at 3.) Hence, the final version of 1985 Act 56 did not include any statutory or nonstatutory language indicating either a legislative intent to repeal or to not repeal section 940.04 with the enactment of section 940.15.

Since the passage of 1985 Act 56, the Legislature has enacted numerous additional abortion laws establishing when, where, how, and by whom abortions may lawfully be obtained and performed. These include:

[2] *See* 1985 Wisconsin Act 56, available at https://docs.legis.wisconsin.gov/1985/related/acts/56.

- **§ 69.186**, requiring hospitals, clinics, and facilities performing abortions to file an annual report containing certain information about patients (1985);

- **§ 253.10**, requiring abortion providers to give certain information to patients seeking abortions like the fetal age and resources regarding birth control, pregnancy, adoption, and abortion risks (1985);

- **§ 48.375**, requiring a minor to obtain consent to an abortion from her parent, guardian, or another family member, except under certain circumstances (1991);

- **§ 253.10** amended to impose a 24-hour waiting period for women seeking an abortion, with certain exceptions, and requiring additional information be provided to a woman seeking an abortion such as fetal development, adoption, and child support (1995);

- **§ 69.186** amended to require hospitals, clinics, and facilities to report types of abortions performed (1997);

- **§ 940.16**, imposing criminal penalties on anyone performing a partial-birth abortion anytime between fertilization and delivery (1997);

- **§ 253.105**, imposing various restrictions on medication abortions, including that a physician perform a physical examination and the same physician be physically present in the room when the medication is given to the woman at least 24 hours later, effectively prohibiting telehealth for medication abortions (2011);

- **§ 253.10** amended again to require a physician to determine whether consent is freely given and, if not, provide information on services for domestic violence victims (2011);

- **§ 253.095**, requiring a physician to have admitting privileges to a hospital within 30 miles of where the abortion is performed (2013);

- **§ 253.10** amended again to require an ultrasound be performed regardless of medical necessity unless waived in writing (2013);

- **§ 253.107**, banning abortions after 20 weeks or when the fetus is capable of experiencing pain, creating a civil remedy (2015); and

- **§ 253.10** amended again, requiring a provider to inform a patient of the fetus' post-fertilization age and odds of post-delivery survival at that age and to provide perinatal hospice information (2015).

Notably, neither section 940.15 nor any of the other modern abortion laws expressly reference *Roe v. Wade*, 410 U.S. 113, rely on it, or relinquish their enforceability should it be overturned. *Roe*, of course, is the 1973 U.S. Supreme Court case which recognized that a right to abortion falls within the 14th Amendment Due Process Clauses' individual right to privacy, and expressly referenced section 940.04 as an unconstitutional law. *Roe,* 410 US at 118 fn.2. *Roe* remained the law until June 24, 2022, when the U.S. Supreme Court handed down its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overturning *Roe* and its progeny, and ending recognition of a federal right to obtain or perform an abortion.

C. Procedural history.

Attorney General Josh Kaul, the Wisconsin Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and Sheldon A. Wasserman[3] as Chair of that Board (the "State Plaintiffs") commenced this lawsuit on June 28, 2022 as a declaratory judgment action. Their complaint was amended on September 16, 2022 to include the present District Attorney Defendants and dismiss legislative defendants.

[3] Dr. Clarence P. Chou, is now Chair of the Medical Examining Board.

The Physicians' motion to intervene in that lawsuit as Plaintiffs was granted on November 3, 2022.

On November 18, 2022, the Dane County Circuit Court (the Honorable Diane Schlipper presiding) denied Defendant Joel Urmanski's motion to dismiss the State Plaintiffs' and the Physicians' complaints, based on its finding that section 940.04 is a feticide statute. On December 5, 2023, the circuit court granted the Physicians' motion for summary judgment and declared that section 940.04 does not apply to abortions.

On February 20, 2024, Urmanski filed a Petition to Bypass the Court of Appeals, which this Court granted on July 2, 2024. Urmanski filed his opening brief on August 12, 2024, and the Physicians file this timely response.

STANDARD OF REVIEW

This is a case about statutory interpretation, meaning this court reviews the circuit court's ruling de novo. *Wisconsin Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶ 26, 299 Wis. 2d 561, 576, 729 N.W.2d 396, 403.

ARGUMENT

In this case, every road leads to the same conclusion: section 940.04 cannot be enforced against physicians who provide abortion care. First, subsequent legislation about abortion has superseded and repealed section 940.04 as an abortion statute. Second, as the circuit court determined, consistent with this Court's precedent, section 940.04 must be read as a feticide ban, not a law about abortion. Third, if read as limiting abortion, section 940.04 would infringe on the Physicians' constitutional right to due process. The disuse of the statute over the past half-century only strengthens this due process argument. Section 940.04 simply cannot

be enforced to limit abortions in any way consistent with Wisconsin law and our state and federal Constitutions.

I. Subsequent legislation about abortion has superseded and repealed section 940.04 as an abortion statute.

Implied repeal may occur in either of two ways, both of which apply to section 940.04. In the first, an earlier act "is so manifestly inconsistent and repugnant to [a] later act that they cannot reasonably stand together." *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878, 881 (1971). In the second, a "later statute covers the whole subject of the earlier and embraces new provisions which plainly show that it was intended as a substitute for the first." *Gilkey v. Cook*, 60 Wis. 133, 18 N.W. 639, 641 (1884). Although it is true that implied repeal is generally disfavored, disfavor is not absolute and only maintains force where the statute claimed to be repealed is one of "longstanding and frequent use." *Dairyland Power Co-op*, 52 Wis. 2d at 51. Here, the question is whether an 1849 statute (including its later revisions) that has not been applied for 50 years has been impliedly repealed by numerous subsequent laws.

Each avenue leads to implied repeal of section 940.04. The comprehensive scheme of abortion statutes the Legislature has enacted in the past half century is manifestly inconsistent with and repugnant to a reading of section 940.04 as banning all abortions from conception until live birth. And the comprehensive, modern statutory scheme now clearly governs the whole subject of abortion. This is true for several reasons, starting with the obvious: the Legislature is not in the business of enacting meaningless statutes describing in detail the procedures and circumstances to perform an act that is prohibited entirely by a different statute. In

essence, Urmanski asks the Court to interpret decades of enactments by the Legislature as mere fools' errands—on the books with zero legal effect—now that *Roe* has fallen, even though none of them declare such an intent.[4] This requires, as Urmanski provides in his brief, a complex and at times contradictory interpretation of the existing abortion statutes in order to construe them to revive section 940.04.

This Court should not do what the Legislature itself declined to do: convert section 940.04 into a trigger ban. Numerous states enacted such trigger-ban abortion statutes.[5] Wisconsin did not. Instead, the Legislature consistently and methodically enacted numerous abortion statutes over decades that together make clear when, how, and by whom abortions *may* be performed. They establish that pre-viability abortions performed by a physician who complies with numerous statutory and regulatory requirements are legal, as are post-viability abortions performed by a physician which are necessary to save the life or health of the pregnant patient.

A. Because it is impossible to comply with both section 940.04 and section 940.15 if section 940.04 applies to abortion, the more specific, later-enacted statute must apply.

Sections 940.04 and 940.15 are fundamentally incompatible—Physicians cannot comply with both. Section 940.04 is manifestly

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[4] This theory has been rejected by other courts. For example, in Arizona, where the Arizona Court of Appeals recently declared unenforceable against physicians an older, comprehensive abortion ban in part, because the legislature had "conspicuously avoided statutory language stating the [old ban] should govern irrespective of other law should *Roe* be overturned." *Planned Parenthood Arizona, Inc. v. Brnovich*, No. 2 CA-CV 2022-0116, 2022 WL 18015858 (Ariz. Ct. App. Dec. 30, 2022).

[5] *See, e.g.*, Ky. Rev. Stat. Ann. § 311.772; Mo. Ann. Stat. § 188.017.

repugnant to section 940.15, and in a competition between an older, more general statute, and a newer, more specific one, the newer and more specific statute is the one left standing. *See Dairyland Power Co-op.*, 52 Wis. 2d at 51; *Gilkey*, 60 Wis. 133.

1. It is impossible to comply with both sections 940.04 and 940.15 because 940.04 is manifestly repugnant to 940.15.

On its face, section 940.04 contradicts and is manifestly repugnant to the later-enacted section 940.15. Urmanski's contrary arguments are unpersuasive. First, Urmanski's statutory construction argument is premised on the fallacy that the statutes can be harmonized. He argues this can be accomplished by a physician "not performing any abortions unless doing so was necessary to save the life of the mother." (Urmanski Br. at 37.) But this construction does not harmonize the two abortion statutes, it obliterates section 940.15—making this statute and all other modern abortion statutes mere surplusage.

Second, Urmanski ignores the fact that even the very life-saving abortion that he says reconciles the statutes would violate section 940.04. This is because that life-saving abortion would not and could not be performed in a "licensed maternity hospital" as required under section 940.04(5)(c). At the time the Legislature enacted section 940.04, a "licensed maternity hospital" was not simply a type of hospital, as Urmanski claims, but one holding a specific license for receiving, treating, and caring for certain women who were pregnant or within two weeks after childbirth. Wis. Stat. § 140.35(1), (2) (1955) ("The person or persons conducting any such maternity hospital shall obtain an annual license from the state board of health, and no person conducting a maternity

hospital shall receive a woman because of pregnancy or in childbirth or within 2 weeks after childbirth, without first obtaining such license.") The license contained a numerical limit for the number of patients who could be treated and expired in December each year if certain requirements were not met. *Id*. Although there are certainly facilities in Wisconsin which treat pregnant or laboring women,[6] there is no longer any hospital licensed as a "maternity hospital" in the State of Wisconsin because the licensure no longer exists. *See* Wis. Stat. ch. 50 and Wis. Admin. Code ch. DHS 124 (regulating Wisconsin hospitals, with no licensure for maternity hospitals).

Urmanski brushes off the statute's plain language, arguing that even if no such licensed maternity hospitals exist, the subsection provides an exception to the requirement if "an emergency prevents" compliance and, under Urmanski's theory, the categorical nonexistence of licensed maternity hospitals in Wisconsin would present just such an emergency. (Def. Br. 31; R.91 at 34.) That the exception's impossibility could itself supply the "emergency" required to comply with the exception is nonsensical and must be rejected. Urmanski further attempts to trivialize the "licensed maternity hospital" requirement of section 940.04 by theorizing that the Legislature simply meant a "maternity hospital" as that classification was defined at the time section 940.04 was enacted. (Def. Br. 31; Dkt. 91 at 34.) Such an interpretation, however, would render the word "licensed" in the statute mere surplusage, offending basic rules of statutory construction. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI

[6] Urmanski provides a 2017 list of Births by County, City, and Facility Occurrence (Dkt. #88 at 45-50 (Thome Aff. at Ex. D)), but this does not demonstrate that any facility would qualify to hold a license as a maternity hospital in Wisconsin as that hospital was defined in 1955. (*See* Def. Br. 31; Dkt. 91 at 34.)

58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

The Court must presume that when the Legislature eliminated the classification of licensed maternity hospitals, it knew of its effect on section 940.04. *In re Commitment of W.*, 2011 WI 83, ¶ 61, 336 Wis. 2d 578, 606, 800 N.W.2d 929, 943 ("The legislature is presumed to know the law, and to know the legal effect of its actions."). The Legislature subsequently passed different abortion statutes, including section 940.15, with the knowledge that no abortion could comply with section 940.04 due to the absence of licensed maternity hospitals, instead requiring life- or health-saving abortions be performed "in a hospital on an inpatient basis." Wis. Stat. § 940.15(4).

2. As the more recent and specific statute, section 940.15 eclipses section 940.04.

Because section 940.04 and section 940.15 irreconcilably conflict, only the more specific and more recent statute, section 940.15, may stand. As the older, more general, and obsolete statute, section 940.04 must fall. "Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; ***but if there is any conflict, the latter will prevail***." *State v. Amato*, 126 Wis. 2d 212, 217, 376 N.W.2d 75, 78 (Ct. App. 1985) (emphasis added), *quoting* 2A Sutherland, Statutory Construction § 51.05 (4th ed. 1973); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 327 (2012) ("[A] provision that flatly contradicts an earlier-enacted provision repeals it.")

This rule that the specific governs the more general "is especially true when the specific statute is enacted after the enactment of the general statute." *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206, 209 (1970). Although the general/specific canon is not automatic, it is "resorted to when the legislative intent is not otherwise clear from a reading of the two provisions in question." *Dairyland Power Co-op*, 52 Wis. 2d at 53.

Here, the general/specific principle of statutory construction must operate with full effect. Section 940.04(1) purports to prohibit abortions at any stage of pregnancy, from conception to live birth, except to save the life of the mother; section 940.04(2) prohibits the abortion of an unborn quick child. Section 940.15, on the other hand, more specifically details that abortions pre- and post-viability are illegal unless performed by a physician, and abortions post-viability are illegal unless necessary to save the life or health of the woman. Wis. Stat. § 940.15 (5), (3). Subsection (1) defines viability, who must determine it, and against what standard. Subsection (3) specifies that life- or health-saving abortions post-viability are legal, subsection (4) that "a hospital on an inpatient basis" is acceptable rather than a licensed maternity hospital, and subsection (6) how a physician must select the procedure for a life- or health-saving abortion. It cannot seriously be disputed that section 940.15 is more specific than section 940.04.

The irreconcilability of the statutes in the case at hand is similar to statutes examined in *Westra v. State Farm Mut. Auto. Ins. Co.*, 2013 WI App 93, 349 Wis. 2d 409. There, the court concluded two insurance statutes "irreconcilably conflicted" where the first "clearly and unambiguously" prohibited insurance policy anti-stacking provisions, but in a later statute

permitted insurance companies to use anti-stacking provisions to some extent, limiting the number of stacked policies to three. *Id.* ¶ 12. The court reasoned the two statutes were irreconcilable because one "essentially prohibited anti-stacking provisions…, while [the other] served to allow such provisions with some restrictions. Such a conflict is irreconcilable because the statutes required stacking of insurance coverage without limit while simultaneously allowing provisions restricting the stacking of such coverage." *Id*. ¶ 13. Because the statutes could not be harmonized, the court applied the more specific law. *Id*. ¶ 27.

Westra is similar to the matter at hand, where section 940.04(1) would purport to ban abortions altogether from "conception until born alive," while section 940.15 allows them "with some restrictions"—i.e. when performed by a physician either pre-viability, and when performed by a physician in order to save the life or health of the mother post-viability. Wis. Stat. §§ 940.15(5), (3). The latter, which is more specific, must control.

At its core, Urmanski's argument is that section 940.04 swallows whole section 940.15 and all subsequent statutes the Legislature enacted describing how lawful abortions may be performed—making all of these statutes superfluous. Clearly, section 940.15 establishes the foundation for when abortions *may* be lawfully performed; not, as Urmanski contends, just another way in which abortions are unlawful.

The fact that neither section 940.15 nor subsequent enactments are explicit in conferring a right to abortion does not mean they do not establish that abortions are legal. Criminal statutes are framed as prohibitions, not affirmations of rights. By creating section 940.15 and other regulatory statutes governing abortion, the Legislature has created a

regulatory framework in which abortion is lawful under numerous circumstances. (See section I.A.3, *infra*.)[7]

Furthermore, section 940.04 has never been updated to reflect modern medical technology, medical standards, or hospital licensure law, similar to section 940.15 and later-enacted statutes. That the Legislature troubled itself to do this again and again with subsequent laws over the years, but did not bother with the archaic section 940.04, demonstrates without reasonable doubt that the later-enacted, more specific statutes governing abortion prevail.

In sum, it is impossible to comply with both sections 940.04 and 940.15, and in such an event, the later and more specific section 940.15 and later enactments must control over section 940.04.

3. Section 940.15 and other statutes together encompass the whole subject of abortion and embrace new provisions which show they are a substitute for section 940.04.

By passing a detailed set of modern abortion statutes, the Legislature impliedly repealed section 940.04 as a statute covering abortion. Implied repeal may occur where a "later statute covers the whole subject of the earlier and embraces new provisions which plainly show that it was intended as a substitute for the first." *Gilkey v. Cook*, 60 Wis. 133, 18 N.W. 639, 641 (1884). The whole subject of abortion includes who may perform them, where, how and at what stage of pregnancy. Section 940.04, read at face value, speaks to these on a limited basis: an abortion may be performed by the mother, or by a physician only in a licensed maternity

[7] The question of a state constitutional right to obtain or perform an abortion is currently pending before this Court in *Planned Parenthood v. Urmanski*, 2024AP330. In accordance with the Court's order of July 2, 2024, this brief does not address that issue.

hospital (barring a medical emergency) if necessary to save the life of the mother. Wis. Stat. §§ 940.04(1), (5). These provisions would apply beginning at "conception." Wis. Stat. § 940.04(6).

These limits are in direct conflict with the Abortion Prevention and Family Responsibility Act and numerous statutes enacted since the passage of the Act, which occupy section 940.04's entire field *and more*, encompassing the subject matter of abortion more comprehensively and including new, more specific provisions showing plainly that they were meant to replace section 940.04.

The most significant of these is the Abortion Prevention and Family Responsibility Act, which created section 940.15, and which unquestionably is more encompassing and more specific than section 940.04. To be clear, section 940.15 is not simply a post-viability abortion statute, as Urmanski insists. (Def. Br. 15; Dkt. 91 at 18) ("Section 940.15 says nothing one way or the other about the legality of abortions before viability.") Section 940.15 speaks to both pre- and post-viability abortions. Under (2) and (3), post-viability abortions are illegal unless performed by a physician in order to preserve the life or health of the mother. Under (5), both pre- and post-viability abortions are illegal unless performed by a physician. ("Whoever intentionally performs an abortion and who is not a physician is guilty of a Class I felony.") By the plain language of subs. (5), therefore, the legality of a pre-viability abortion is established: when it is performed by a physician. Section 940.15 is not silent on pre-viability abortion; it covers the legality of abortion throughout the entire pregnancy.

Beyond covering the entire length of pregnancy, section 940.15 provides greater specificity about abortion than section 940.04, which plainly shows its provisions are a substitute for section 940.04(1).

Subsection (1) defines viability, who must determine it, and against what standard. ("[V]iability 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.") Subsection (3) maintains the health-saving exception of subsection 940.04(5) while also providing an additional exception, preserving the health of the mother, that section 940.04 does not. Subsection (4) specifies that rather than the "licensed maternity hospital" of section 940.04, an abortion to save the mother's life or health may be performed "in a hospital on an inpatient basis." Subsection (6) dictates how a physician must select the procedure for a life- or health-saving abortion. Subsection (7) specifies that none of the prohibitions apply to the expecting mother. Considered in sum, the statute covers the entire ground of section 940.04—the full duration of pregnancy—and more, serving as a more specific, fleshed-out substitute for section 940.04.

And the Legislature did not stop there.

- It enacted section 940.16, also addressing pre-and post-viability abortion by prohibiting the procedure of "partial-birth abortion" from the time of "fertilization until [] completely delivered," except when specifically necessary to save a mother's life "endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself."
- It enacted section 253.105, providing that a physician may provide a medication abortion prescription if the physician first performs the mother's physical exam 24 hours in advance

and is physically present in the room when the medications are given to the woman. § 253.105(2).

- It enacted section 253.095, requiring a physician have admitting privileges to a hospital within 30 miles of where she performs an abortion.[8]
- It enacted section 253.107, specifying that an abortion may not be performed after the probable postfertilization age of the fetus is 20 weeks unless the mother is undergoing a medical emergency.
- And the Legislature enacted section 253.10 and amended it several times, imposing a 24-hour waiting period for women seeking an abortion, requiring certain informed consent and that additional information be provided to the mother such as fetal development stage, adoption options, and child support laws.

Without any compelling legal authority, Urmanski argues that all of these more recent legislative enactments evaporate because *Roe* was overturned, that various statutory construction principles demand the statutes' erasure because the U.S. Supreme Court overturned the federal constitutional right to abortion. But *Roe* did not require the Wisconsin Legislature to enact section 940.15 or *any* of these later statutes.

Rather than accept *Babbitz*'s and *Roe*'s bare-minimum constitutional mandate, the Legislature intentionally and voluntarily enacted new laws--including section 940.15, to enshrine the ability of pregnant persons to secure an abortion into Wisconsin's statutory scheme, too. The Legislature did so without reference to *Roe*, and without explicit provisions discontinuing section 940.15's enforceability in the absence of *Roe*. *See* 1985 Act 56 (creating section 940.15 without reference to *Babbitz* or *Roe*).

[8] This provision was held unconstitutional and enjoined in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, Case No. 13-cv-465-wmc, 94 F. Supp. 3d 949 (2013).

Nothing in section 940.15 limits its recognition of the right to abortion. Urmanski points out that three statutes, sections 253.10(8), 253.105(6), and 253.107(7), include a construction clause providing "[n]othing in this section may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." (Def. Br. 19-20; Dkt. 91 at 22-24.) But the Legislature did not include the clause in section 940.15 itself, yet another reason the plain language of the statute should be construed as superseding section 940.04, creating a right to and making lawful pre-viability abortions. Where it appears in chapter 253, the clause does nothing to explain what rights to obtain or perform an abortion the Legislature understood to exist at the time the clauses were enacted in 1995, 2011, and 2015,[9] respectively, long after section 940.15 became law. Hence, the clause does not rule out that section 940.15 *did* "creat[e] or recogniz[e] a right to abortion" independent of section 940.04. At best, the clause is ambiguous and sheds no light on this Court's task.

In sum, the newer and more comprehensive laws the Legislature enacted defining when, how, where, and by whom abortions may be performed clearly replace the antiquated, less-defined reaches of section 940.04. Section 940.15 and other modern abortion statutes encompass the whole subject of abortion and embrace new provisions which plainly show they were intended as a substitute for the old law, and this Court should recognize the implied repeal of section 940.04 as a result.

[9] *See* 1995 Act 309 § 4; 2011 Act 217 § 10; and 2015 Act 56 § 7.

II. In the alternative, consistent with *State v. Black,* section 940.04 is a feticide statute that does not prohibit consensual abortions.

This Court has already issued a ruling that compels the conclusion that section 940.04 is a feticide statute, not an abortion statute: *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994). Urmanski's attempts to undermine or overrule *Black* are unpersuasive in light of this controlling decision.

A. Under *State v. Black*, section 940.04 is a feticide statute.

In *Black*, the Court held that, despite the statute's "Abortion" title, section 940.04(2)(a) is not an abortion statute at all; rather, it prohibits (nonconsensual) feticide of a "quick" child. *Black,* 188 Wis. 2d at 642. To reach this finding, the Court relied on the text of the statute: "We conclude that the words of the statute could hardly be clearer. The statute plainly proscribes feticide, the action alleged of Black." *Id.* at 642. The language of section 940.04(1) mirrors the language of section 940.04(2) when it declares: "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." Subsection (2) also criminalizes the act of intentionally destroying the life on an unborn child but adds the word "quick."

Black is the only Wisconsin Supreme Court opinion interpreting any provision of section 940.04 against section 940.15. Although the court ultimately rejected the defendant's argument that section 940.15 had impliedly repealed subsection (2)(a), declining to opine on subsection (1) in the process, the court did so by explaining:

> In order to construe secs. 940.04(2)(a) and 940.15, consistently, we view each statute as having a distinct role. **Section 940.15 places**

> **restrictions (consistent with *Roe v. Wade)* on consensual abortions: medical procedures, performed with the consent of the woman, which result in the termination of a pregnancy by expulsion of the fetus from the woman's uterus.** Section 940.04(2)(a), on the other hand, is not an abortion statute. It 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.

Black, 188 Wis. 2d at 646 (emphasis added). Defining section 940.15 as the statute governing "consensual abortions" was essential to the court's holding that the statutes could be harmonized and therefore, there was no implied repeal of subsection (2)(a). Furthermore, the court found no legislative history indicating that subsection (2)(a), which shares the legislative history of subsection (1), was intended for consensual abortion versus feticide. *Black,* 188 Wis. 2d at 642 fn. 1 ("The legislative history of sec. 940.04(2)(a), Stats., 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.")

B. The Legislature has acquiesced to the Court's decision in *Black*.

After the *Black* ruling, the Legislature's actions only reinforced this Court's decision. *Black* interpreted section 940.15, not section 940.04, as the "consensual abortion" statute. This left subsection 940.04(2)(a) with no impact on abortion. Yet the Legislature did not revise this statute to override the supreme court's decision; nor did it revise the nearly-identical section 940.04(1) to make it clearly applicable to consensual abortion or to demonstrate it is not, like subsection (2)(a), merely a feticide statute. To the contrary, it *removed* subsections (3) and (4), which penalized the mother for consenting to or obtaining an abortion and would have been inconsistent

with a feticide statute (feticide requiring non-consent of the mother), further aligning sections 940.04 and 940.15 with the *Black* court's interpretation. This was tacit approval of *Black*'s interpretation of section 940.15 as ***the*** consensual abortion statute. *See Reiter v. Dyken*, 95 Wis. 2d 461, 471, 290 N.W.2d 510, 515 (1980) ("The legislature is presumed to know that in absence of its changing the law, ***the construction put upon it by the courts will remain unchanged.***" (Emphasis added.)) Had the Legislature disagreed with *Black*'s interpretation of section 940.15 as the consensual abortion statute, over the past thirty years—including after the *Dobbs* decision was issued—it could have acted accordingly to change the law, including by inserting trigger language into section 940.04 so that it would take effect if *Roe* was ever overturned. The Legislature took no such action.

Further, the Legislature enacted numerous other laws specifying when, how, and by whom consensual abortions may be performed after *Black* was decided in 1994. When it did so, it was "presumed to be aware of existing laws and the courts' interpretations of those laws." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 618, 786 N.W.2d 177, 200–01. *Black* informed these later enactments, each of which furthers the Physicians' analysis that physicians may perform pre-viability abortions within the framework provided by section 940.15, and post-viability abortions when necessary to preserve the life or health of the mother. These are Wisconsin's enforceable consensual abortion laws—not section 940.04.

As the circuit court recognized, this Court's logic in *Black* regarding subsection (2)(a) applies with equal force to subsection (1): the plain and unambiguous language of subsection (1) describes feticide, an intentional destruction of an unborn child, and the statutory title is not controlling in

the face of this plain and unambiguous language. *Black,* 188 Wis. 2d at 645; R. 147 at 9–12; R. 183 at 8–9. Subsection (5), the only reference to therapeutic abortion, does not become surplusage; it applies to subsection (2)(b), providing an exception for an abortion performed in order to save the life of the mother that tragically results in her death. *State ex rel. Kalal*, 2004 WI 58, ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

In sum, as an additional or alternative basis for concluding that section 940.04 does not apply to abortions, the Court should interpret section 940.04(1) consistent with the Supreme Court's analysis in *Black* and find it is a feticide statute.

C. There is no need to overrule *State v. Black*.

No special justification exists to overcome the principle of *stare decisis* and overrule *State v. Black*. This Court will consider overturning precedent only when presented with a "special justification," which may include legal developments that have "undermined the rationale behind a decision"; new facts; "a showing that the precedent has become detrimental to coherence and consistency in the law"; or when "the prior decision is unsound in principle… unworkable in practice… and… reliance interests are implicated." *Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, ¶ 39, 412 Wis. 2d 594, 612, 8 N.W.3d 429, 438 (citing *Johnson Controls, Inc. v. Emp. Ins. of Wausau*, 2003 WI 108, §94, 264 Wis. 2d 60, 665 N.W.2d 257). None of these scenarios applies here.

The law has developed in ways that only further bolster the rationale in *State v. Black*. As described in section I.A.2, *supra*, the Legislature has passed numerous laws that regulate abortion, including

after *Black*, and in the past 30 years, the Legislature has not updated section 940.04 to contradict the Court's ruling in *Black.*

Urmanski's argument that this Court's decision in *State ex rel. Kalal* requires overruling *Black* is puzzling and incorrect. (Urmanski Br. at 31.) *Kalal* famously stands for the proposition that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal,* 2004 WI 58, ¶ 45 (cleaned up). The *Black* court's text-first approach to interpreting section 940.04(2) is consistent with this principle. And the *Black* court did consider section 940.04(2) in context, contrary to Urmanski's contention, and consistent with *Kalal*'s other main holding on statutory interpretation: "Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Id.*, 2004 WI 58, ¶ 46. The court in *Black* considered section 940.04 in the context of section 940.15, a surrounding and closely-related statute. *Black*, 188 Wis. 2d 639 at 645–46. Taken to its logical conclusion, Urmanski's argument would create a special justification for overturning any statutory interpretation case issued before 2004, because none of them will cite or mirror *Kalal*. That would be absurd.

This Court's decision in *State v. Grandberry* also does not undermine the *Black* decision. 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. Urmanski's argument on this point overstates the holdings of both *Grandberry* and *Black.* He writes: "*Black* improperly assumed separate statutes must be construed as governing distinct types of conduct, 188 Wis. 2d at 646, but this is inconsistent with the reality that the same conduct can be governed by multiple statutes. *See Grandberry,* 2018 WI 29 at ¶ 35."

(Urmanski Br. at 31.) *Black* makes no such global assumption; rather, because sections 940.04 and 940.15 would otherwise contradict each other, the court chose to "view each statute as having a distinct role." *Black*, 188 Wis. 2d at 646.

Grandberry does not foreclose such analysis. The question in *Grandberry* was whether the defendant could be held criminally liable for violating the Concealed Carry Statute even though his conduct—placing his loaded handgun in his glove compartment—complied with the Safe Transport Statute. *Grandberry*, 2018 WI 29, ¶¶ 2–3. Grandberry argued that the two statutes conflicted, but the court rejected this argument, finding that the statutes serve two different purposes and that it was not impossible to comply with both—a person could transport a loaded handgun in the glove compartment of his car, so long as the individual possessed a concealed carry permit. *Id.* ¶¶ 20–21. The unremarkable principle Urmanski cites from *Grandberry*, that different statutes can apply to the same conduct, does not contradict the *Black* decision. *Id.* ¶ 35. Notably, interpreting section 940.04 as applied to abortions would mean that it had no distinct purpose and would be regulating the exact same conduct as section 940.15—abortion.

Finally, the post-*Black* legislation Urmanski cites does not create the kind of inconsistency or incoherence that would justify overturning *Black*. Urmanski states that 1997 Wisconsin Act 295 "contain[s] language indicating section 940.04 applies to induced abortions." (Urmanski Br. at 32.) The Act, which relates in part to feticide, purports to "not limit the applicability of ss. 940.04,. 940.13, 940.15 and 940.16 to an induced abortion." But no legislation was needed to limit the applicability of section 940.04 to an abortion; the Supreme Court did that in *Black*. And it

was well understood in 1997 that section 940.04 was unenforceable as written. *Babbitz*, 310 F. Supp. 293, 301–02; *Roe v. Wade*, 410 U.S. at 154–55. Nor has the *Black* decision shown itself to be unsound in principle, unworkable in practice, or detrimental to any reliance interests. Urmanski argues that the decision was wrong because "it is not impossible to comply with both statutes "(Urmanski Br. at 32,) but as explained in section I.A, *supra*, it is indeed impossible to comply with both sections 940.04 and 940.15.

D. Urmanski's reliance on history and certain canons of statutory interpretation is misplaced and unpersuasive.

The Court's ruling in *Black* is controlling, and Urmanski's attempt to circumvent it with a kitchen sink approach of arguments based on history and the canons of statutory interpretation is both superfluous and unpersuasive. Ultimately, the question before the court is not how best to read a long-dead statute, but how to interpret our current statutory scheme around abortion. However, Urmanski's arguments are unpersuasive even on their own terms.

1. The statutory history, legislative history, and contemporaneous applications of section 940.04 cannot overcome *Black*.

In *Black*, this Court determined that section 940.04 was, based on its text, a feticide statute, declining to engage in legislative and statutory history analysis because there was no ambiguity to resolve: "neither the legislative history nor the title of the statute can be used to create ambiguity in the statute." *Black*, 188 Wis. 2d at 642 n.1. Even so, the Court engaged with the legislative history enough to note that it was "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.* Urmanski's contradictory analyses and arguments are unpersuasive.

First, while it is true that the Legislature did not enact an early draft of 1985 Act 56 declaring section 940.15 an "express repeal" of section 940.04, it also did not enact a proposed nonstatutory provision declaring section 940.15 "should not be deemed to repeal" section 940.04. That nonstatutory provision was deleted in a later revision of the Act. *See* Assembly Amendment 6 to Assembly Substitute Amendment 1, LRB a2036/1 (R. 99:3). The final Act excluded statutory language for *express* repeal of section 940.04, but also excluded language against *implied* repeal. In other words, although express repeal was taken off the table, implied repeal was not.

Second, Urmanski argues that because the Legislature later repealed section 940.04(3) and (4) in 2011, it necessarily confirmed that section 940.04(1) is enforceable. (Def. Br. 41.) Not true. *Dairyland Power Co-op*, which Urmanski cites for this proposition, indicates that later *broadening* the operation of a specific provision claimed to be impliedly repealed may demonstrate against implied repeal, not that legislative action to narrow the scope of a different subsection (i.e. removing a group of potential defendants—pregnant women) evidences against implied repeal of the separate subsection at issue. Any evidence of an intent to revive the remaining subsections of section 940.04 by eliminating subsections (3) and (4) is conspicuously absent from the legislative history. And as described in greater detail in section II.D.4 *infra*, the Legislature's removal of subsections (3) and (4) is consistent with an interpretation of

subsection (1) as a feticide statute and not a consensual abortion statute at all, consistent with *State v. Black*.

Nor does section 990.001(7), regarding the construction of revised statutes, undermine the Court's decision in *Black* or the circuit court's decision in this case. Urmanski points to a 1955 note on the revision of section 940.04 that describes it as an abortion ban and says this is evidence that this is still the state of the law. The Physicians do not dispute that in 1955, section 940.04 regulated abortion. But that is no longer the state of the law: in *Black*, the Supreme Court ruled that section 940.04 is a feticide statute. Pre-*Black* legislative history is irrelevant. As a result, Urmanski's reliance on legislative history does not save him.

2. Urmanski cannot resurrect section 940.04 by using the canons of construction.

Urmanski's reliance on the canons of construction suffers from at least two fundamental flaws. (Urmanski Br. 23–24.) First, canons of construction do not come into play unless a statute is ambiguous, which this court in *Black* ruled is not true of section 940.04. Second, applying canons of questionable persuasiveness to a long-dead statute misses the forest for the trees: the statute is not in effect as an abortion statute, and has not been for 50 years, which makes analyzing it under the canons a particularly fruitless endeavor. The question before this court is not how section 940.04 should have been interpreted when it was first passed, but what statutes govern abortion in Wisconsin in 2024. Section 940.04 is not a valid abortion statute, whether because it was impliedly repealed, or because it is a feticide statute.

Canons of construction have their place, but it is not in this case. "Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face." *State v. Peters*, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 482, 665 N.W.2d 171, 174. As discussed above, section 940.04 "has a plain and reasonable meaning on its face"—it is a feticide statute. There is thus simply no need to delve into the canons.

However, even if the Court chooses to examine Urmanski's canon arguments on the merits, his arguments fail. He suggests that section 940.04(5) would be surplusage if section 940.04 is not read as an abortion statute—but the Physicians argue that the entire statute is obsolete, overtaken by our modern scheme of abortion statutes. Urmanski also invokes the *expressio unius* canon to argue that because subsection (5) permits a certain subset of abortions, subsection (1) must be read to outlaw the rest—but this makes no sense where the entire statute is obsolete. Urmanski presents no arguments that compel this Court to overturn *State v. Black*. The decision should stand.

III. If applied against consensual abortions, section 940.04 would violate the Physicians' due process rights.

Enforcing section 940.04 against physicians as an abortion law would be unconstitutionally vague and fundamentally unfair, in violation of due process. Section 940.04 is premised on arcane language, belies modern medicine, contains impossible requirements, and is wholly inconsistent with abortion laws enacted within the last half century. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453

(1939). Wisconsin physicians today can only speculate about when they may lawfully perform an abortion without risk of prosecution. (R.75:10–11.) Hence, any enforcement of section 940.04 against physicians for providing consensual abortions consistent with the numerous more recent abortion laws would violate the principles of due process. Such enforcement against physicians should be barred.

Before proceeding through each of the constitutional infirmities of applying the against abortions, it is important to note the very real risks that both physicians and women face as long as the threat of its enforcement looms. Physicians must choose between exercising their best medical judgment—and risking a felony charge. They face putting off necessary care to avoid prosecution, thus risking the health and lives of their patients, and potentially subjecting themselves to malpractice liability. (R. 70-72.) Urmanski's suggestion that section 940.04 speaks clearly enough on the circumstances of many or most abortions to be enforceable (Urmanski Br. at 48) brushes off the extremely high stakes for women and physicians in a landscape where local law enforcement and prosecutors have differing views on the legality of abortion. Those stakes include physicians' licenses to practice medicine, their financial security, and their patients' health and very lives. This underscores the gravity of the constitutional harms the Physicians allege.

A. Standards for when a statute is considered void for vagueness or fundamentally unfair.

The vagueness doctrine derives from the Fifth and Fourteenth Amendments, the Fifth applying to the federal government and the Fourteenth to the states. *Johnson v. United States*, 576 U.S. 591, 595 (2015). No

state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Likewise, the Wisconsin Constitution provides: "No person may be held to answer for a criminal offense without due process of law[.]" Wis. Const. Art. I, § 8 (1). "Perhaps the most basic of due process's customary protections is the demand of fair notice." *Sessions v. Dimaya*, 584 U.S. 148, 177, 138 S.Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) (citations omitted).

There are two components to vagueness: "A statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence regarding what it prohibits and if it fails to provide an objective standard for enforcement." *State v. McKellips*, 2016 WI 51, ¶ 41, 369 Wis. 2d 437, 467, citing *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, 576 U.S. at 595, quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

The vagueness doctrine supports the separation of powers. *Sessions*, 584 U.S. at 181 (Gorsuch, J., concurring). "It is for the people, through their elected representatives, to choose the rules that will govern their future conduct." *Id.* citing The Federalist No. 78, at 465 (A. Hamilton). The Constitution assigns to judges the judicial power to decide cases and controversies, not "license to craft new laws to govern future conduct." *Id.*, citing U.S. Const. Art. III, § 2; *Osborn v. Bank of United States*, 9 Wheat. 738, 866, 6 L.Ed. 204 (1824). Although Urmanski repeatedly acknowledges that it is for the legislature and governor to decide what Wisconsin abortion law is, he nonetheless continues to press the judiciary to resuscitate a long-

dead ban on abortion (Urmanski Br. at 14, 25, 40–41). Just as this court should not "craft new laws," it also should not revive a long-dead law—especially when doing so would nullify fifty years of subsequent legislation enacted by elected representatives.

Due process also includes a more nebulous, but equally important, "requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Lassiter v. Dep't of Social Services of Durham County, N.C.*, 452 U.S. 18 (1981); *see also In re Termination of Parental Rights to Daniel R.S.*, 2005 WI 160, ¶5 n.4, 286 Wis. 2d 278, 706 N.W.2d 269 (citing *Lassiter*). When a crime has an essential element that one cannot possibly perform, fundamental fairness is implicated. *United States v. Dalton*, 960 F.2d 121, 123-24 (10th Cir. 1992), citing 1 W. LaFave & A. Scott, Jr., Substantive Criminal Law § 3.3(c) at 291 (1986) ("one cannot be criminally liable for failing to do an act which he is physically incapable of performing").

Section 940.04 both: (1) fails to give fair notice to a person of ordinary intelligence regarding what it prohibits, and (2) fails to provide an objective standard for enforcement. *McKellips*, 2016 WI 51, ¶ 41. In addition, section 940.04 includes an impossible condition, which violates fundamental fairness. And it is not merely the language of section 940.04 which creates these failures; it is also the interplay between this antiquated statute and numerous, more recent enactments governing abortions.

B. Section 940.04 fails to give physicians fair notice of what it prohibits.

In 2024, against the backdrop of modern medical science and the array of modern statutes regulating abortion, section 940.04 does not give

physicians or persons of ordinary intelligence fair notice of what it prohibits. *See McKellips*, 2016 WI 51, ¶ 41. Examination of various terms and concepts included in section 940.04 illuminates this problem.

1. "Quickening" is a meaningless term today and attempting to apply it in the abortion context would put physicians in conflict with other statutes.

The term "quick child" is scientifically meaningless and incompatible with terms used in other abortion statutes. Under section 940.15, "viability" is the relevant term and is defined as "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." Wis. Stat. § 940.15(1). Under section 253.107(3)(a), abortions after 20 weeks are prohibited, unless the patient is experiencing a medical emergency. The varying terms or standards among the various abortion statutes causes a lack of fair notice.

Urmanski argues that the term "quick child" is not unconstitutionally vague because at the time the Legislature enacted section 940.04(2), the term had a well-established meaning in Wisconsin law. (Urmanski Br. at 45.) Urmanski, however, offers no legal authority for the notion that Legislature's historic understanding of the term means that people of ordinary intelligence ***today*** understand the term. Even the U.S. Supreme Court has noted that the exact meaning of "quickening" is subject to debate. *Dobbs v. Jackson Women's Health Org'n*, 142 S.Ct. 2228, 2249, n. 24 (2023) (citing differing definitions ranging from "live" child, a fetus at 6 weeks, or at least by the 16th to 18th week).

Read as an abortion statute, section 940.04 creates two categories of illegal abortions: those of unborn "quick" children, section 940.04(2)(a), and those of any post-conception embryo or fetus, section 940.04(1). Because "quick" is a meaningless term, *both* sections fail to give fair notice of what conduct they prohibit. Physicians have no way of knowing which pregnancies would fall under which subsection.

2. The exception for "therapeutic abortions" is inconsistent with other statutes regulating abortion.

Section 940.04(5) makes an exception for a "therapeutic abortion" which, in the context of modern abortion statutes, is insufficiently clear to provide fair notice of the scope of the exception. The statute defines a "therapeutic abortion" as one that "[i]s necessary, or is advised by 2 other physicians as necessary, to save the life of the mother" and "[u]nless an emergency prevents, is performed in a licensed maternity hospital." These conditions are inconsistent with section 940.15(3) and other, more recent abortion statutes. Under section 940.15, physicians are permitted to perform pre-viability abortions for any reason and post-viability abortions to "preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician." Wis. Stat. § 940.15(3).

The statutory requirements for a waiting period, ultrasound, and certain information sharing are waived if there is a "medical emergency" which includes both risk of death and "serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." Wis. Stat. §§ 253.10(2)(d); (3)f.; (3g).

Minors have access to abortions without parental consent or judicial bypass if, *inter alia*: "[t]he person who intends to perform or induce the abortion believes, to the best of his or her medical judgment based on the facts of the case before him or her, that a medical emergency exists that complicates the pregnancy so as to require an immediate abortion." Wis. Stat. § 48.375(4)(b)1.

The conditions set forth under section 940.04—limiting application solely to save a patient's life—are wholly inconsistent with standards in the later-enacted abortion laws. Physicians are not able to discern the zone of proscribed conduct. Section 940.04 cannot be held to be enforceable without creating a lack of fair notice of what conduct is prohibited.

Urmanski relies exclusively on pre-*Roe v. Wade* cases to support his contention that section 940.04(5) gives fair notice of what constitutes a permissible, therapeutic abortion, but those cases cannot carry the day. The single case he cites in support of the clarity of the term "therapeutic abortion" dates from 1891, an entirely different era of both medical science and jurisprudence. *Hatchard v. State*, 79 Wis. 357, 48 N.W. 370. The same can be said of the cases from the late 1960s and early 1970s that he cites to support his argument that the statute's reference to providing abortions only when "necessary… to save the life of the mother." (Urmanski Br. at 47.) None of these cases considered the language of section 940.04 (or other historic bans) in light of numerous more recently enacted abortion statutes. Nor did the decisions consider that section 940.04 has not been enforced for more than fifty years. Those cases do not control here.

Urmanski's argument that vagueness cannot exist based on conflicts between statutes is based on the same misreading of *Grandberry* discussed in part II.C, *supra*. In *Grandberry,* it was possible to comply with the two

statutes at once. *Grandberry*, 2018 WI 29, ¶¶ 20–21. By contrast, Wisconsin physicians cannot comply with both sections 940.04 and 940.15—unless they totally disregard section 940.15 (and other modern-day statutes), as discussed in part I.A, *supra*.

The varying standards are not only vague and injurious to patient care, they also jeopardize fundamental fairness.

C. Section 940.04(5)'s reference to a "licensed maternity hospital" renders compliance with the statute impossible, which violates fundamental fairness.

Because section 940.04(5) permits "therapeutic abortions" to be performed only in a specific kind of hospital that no longer exists, compliance with the statute is impossible, which means the statute violates due process

Although the licensing requirements for hospitals have changed, the Legislature never updated the text of section 940.04—perhaps because they never intended the section to spring back into force. The section still requires that "therapeutic abortions" (whatever that means) must be performed in a "licensed maternity hospital," unless an emergency prevents this. Because "licensed maternity hospitals" no longer exist in Wisconsin, it is impossible to provide a "therapeutic abortion" consistent with this section, absent an emergent situation.

Urmanski contends that because babies are born at a variety of places in Wisconsin, as evidenced by a list of Births by County, City and Facility of Occurrence, (R.88 at 46-50), these places must be "maternity hospitals" as that term was used in 1955, and therefore it is not impossible for physicians to meet the requirement that all abortions be provided in a

"maternity hospital." Urmanski's argument makes no legal or logical sense. The list includes midwives and birthing centers, which are not hospitals and would not have been considered "licensed maternity hospitals" in 1955. The mere fact that a baby has been born at a certain location does not mean that the location would qualify for a license as a maternity hospital—as that term was used in 1955. Regardless, they are not licensed as such today. Licensure of Wisconsin hospitals is governed under Wis. Stat. ch. 50, subch. II and Wis. Admin. Code ch. DHS 124. There is no license specifically for "maternity hospitals."

Urmanski next argues that if there are no facilities that meet the definition of "licensed maternity hospital" (and to be clear, there are not), then an "emergency" exists, and therapeutic abortions could be provided somewhere else. (Urmanski Br. at 49). This is an unusually broad definition of emergency, not grounded in the statute or in any typical understanding of the word—nobody is suggesting that the lack of licensed maternity hospitals is an emergency in any real, practical sense. Emergency is not defined under section 940.04. However, the term is defined in relation to abortions under section 253.10(2)(d):

> "Medical emergency" means a condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions.

There may be conditions where continuing a pregnancy to term would pose risks to the pregnant patient's life that do not constitute an emergency. Termination of the pregnancy may be necessary within days

or weeks—as opposed to within a 24-hour window. The impossibility of an essential condition is not something which can be ignored by applying a novel definition for "emergency."

D. Section 940.04 fails to provide an objective standard for enforcement.

Just as section 940.04 fails to provide notice of what conduct, exactly, it criminalizes, it fails to provide an objective standard for enforcement. A statute is vague when "a trier of fact must apply its own standards of culpability rather than those set out in the statute." *State v. Ruesch*, 214 Wis. 2d 548, 561 (Ct. App. 1997). The posture of this case alone demonstrates that the statute meets this standard: one District Attorney would prosecute doctors providing abortions under section 940.04, but two others would not. Examining the same elements of the statue analyzed above further illustrates the due process violations inherent in applying section 940.04 to consensual abortions.

1. There is no standard to determine whether an unborn child is "quick."

Because the statute does not define "quick child," and the term is divorced from modern science, local law enforcement, a prosecutor. or a judge could define the term however they please.

2. The undefined term "therapeutic abortion" lacks standards for enforcement.

In the absence of a clear, statutorily consistent definition of a "therapeutic abortion," law enforcement, prosecutors, juries, and judges can pass their own value judgments on when an abortion is warranted or

not under section 940.04(5). The statute tells physicians they must determine whether an abortion is necessary to save the life of the patient but does not give any kind of timeline or probability threshold for the danger. The statute tells physicians they must determine whether an abortion is necessary to save the life of the mother but does not give any kind of timeline or probability threshold for the danger. This creates unacceptable ambiguities where a physician may conclude an abortion is necessary to preserve the mother's health and avert disaster, but a local sheriff, district attorney, judge, or jury could have a different view of its necessity as a lifesaving measure.

3. There is no standard for determining whether a hospital should be considered a licensed maternity hospital.

The statute does not include standards for determining if a hospital or care facility should qualify as a licensed maternity hospital in 2024. Urmanski points to the 1955 definition of a licensed maternity hospital and suggests that any current hospital that meets those criteria would count as a licensed maternity hospital. (Urmanski Br. at 50.) But nothing in the statute makes this a foregone conclusion, and there is nothing to stop a judge from concluding that a certain hospital lacks the required licensure.

E. Section 940.04 is facially unconstitutional.

The entirety of section 940.04 must fall because it is void for vagueness and violates physicians' due process rights. Urmanski is wrong to suggest that Physicians must demonstrate that section 940.04 "cannot be constitutionally enforced against abortions under any circumstances" in order to prevail on this claim. (Urmanski Br. at 42.) The United States

Supreme Court has explicitly rejected this notion, stating, "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602-03 (providing examples of prior decisions). The Wisconsin Supreme Court has taken the same approach to finding statutes unconstitutionally vague and overbroad. *State v. Starks*, 51 Wis. 2d 256, 259–64, 186 N.W.2d 245, 247–49 (1971) (loitering statute was unconstitutionally vague and overbroad because "[t]he situation described by [the statute] would be difficult for any person in a large community to avoid"). Urmanski's repeated argument that he is entitled to judgment on the vagueness claim rests on this flawed legal standard and must fail.

Urmanski's argument that section 940.04 is not unconstitutionally vague appears to be based on a total disregard of the numerous abortion statutes which have been enacted in the past half century and the confusion that has arisen with the suggestion that section 940.04 has sprung back to life. (Urmanski Br. at 42– 51.) Urmanski's argument also disregards *State v. Black*, the Wisconsin Supreme Court decision holding that section 940.04(2) applies only to feticide. Repeatedly, Urmanski argues in a vacuum—without regard to statutory enactments and case law of the past half century. He has not established that physicians have fair notice regarding what is prohibited or that there is an objective standard for enforcement, nor that physicians can comply with the impossible requirement to practice in "licensed maternity hospitals." To protect the Physicians' due process rights in 2024 and for the future, section 940.04 must be struck down.

IV. Section 940.04 is unenforceable in part because it has not been enforced for over 50 years.

The Physicians will leave the core advancement of the argument about whether section 940.04 is unenforceable due to disuse—the State Plaintiffs' "desuetude" argument—to the State Plaintiffs.

However, independently of whether this Court believes disuse alone can invalidate section 940.04, the disuse of the statute for 50 years heightens the Physicians' due process concerns articulated in Section III, above. In part because there is no modern case law interpreting the arcane statutory language of section 940.04, the Physicians have no way to interpret it in the context of the valid, modern abortion statutes they have always followed as practitioners. And it would be fundamentally unfair to suddenly begin enforcing a law that has been dead and buried for over 50 years.

V. The Physicians take no position on the question of the State Plaintiffs' standing.

The Physicians take no position on the standing of the State Plaintiffs to bring their Amended Complaint in the Circuit Court.

CONCLUSION

For the foregoing reasons, the Physicians respectfully request this Court affirm the decision of the Circuit Court, holding that section 940.04 is not enforceable against physicians who provide abortion care.

Respectfully submitted this 11th day of September, 2024.

PINES BACH LLP

Electronically signed by: Diane M. Welsh
Diane M. Welsh, SBN 1030940
Christa O. Westerberg, SBN 1040530
Will Kramer, SBN 1102671
Elizabeth M. Pierson, SBN 1115866
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: 608-251-0101
Facsimile: 608-251-2883
dwelsh@pinesbach.com
cwesterberg@pinesbach.com
wkramer@pinesbach.com
epierson@pinesbach.com

Attorney for Intervenors-Respondents

CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c), for a brief produced with a proportional serif font, as well as this Court's July 2, 2024 order setting a word limit of 15,400 words for a brief produced with a proportional serif font. The brief is set in 13-point Book Antiqua. The length of this brief is 11,077 words.

CERTIFICATE OF EFILING/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.

PINES BACH LLP

Electronically signed by: Diane M. Welsh

Diane M. Welsh, SBN 1030940
PINES BACH LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703
Telephone: 608-251-0101
Facsimile: 608-251-2883
dwelsh@pinesbach.com

Attorney for Intervenors-Respondents