IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2023AP002362

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

CHRISTOPHER J. FORD, KRISTIN J. LYERLY, and JENNIFER J. MCINTOSH,
Intervenors-Respondents,

vs.

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

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

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

DEFENDANT-APPELLANT JOEL URMANSKI'S REPLY BRIEF

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INTRODUCTION

When the Legislature enacted § 940.04, it applied to consensual abortions. Even the Physician Intervenors ("Physicians") admit this. (Physicians' Br. 34.) Nor has § 940.04's applicability to abortion been repealed. In arguing otherwise, the State Plaintiffs and Physicians are asking this Court to read our State's post-*Roe* legislation as creating a statutory right to an abortion. Although after *Roe* our Legislature enacted various statutes that governed abortion within the parameters set by *Roe* and its progeny, those statutes do not independently authorize or declare "lawful" abortions that would otherwise be subject to § 940.04. Nor do they evidence a clear intent to repeal § 940.04's applicability to abortion. This Court cannot read into this State's post-*Roe* legislation protections that do not exist in the language of those statutes. *Wisconsin Justice Initiative, Inc. v. WEC*, 2023 WI 38, ¶ 20, 407 Wis. 2d 87, 990 N.W.2d 122.

Further, the State Plaintiffs' and Physicians' various vagueness and "disuse" claims reduce to an argument that the language of § 940.04 is "archaic" or does not reflect their perception of modern values. Such arguments are better addressed to policymakers and should not suffice to strike down or declare unenforceable statutory language that was enforced in one form or another for over a century before *Roe*. With the reversal of *Roe*, this Court should hold that § 940.04 can once again be enforced as to abortion.

ARGUMENT

I. Section 940.04 Prohibited Consensual Abortions When Enacted

A. *Black* Did Not Interpret § 940.04(1) and Should Be Overruled If Necessary

State v. Black did not interpret § 940.04(1). 188 Wis. 2d 639, 647 n.2 526 N.W.2d 132 (1994). This Court need not extend *Black's* discussion of § 940.04(2)(a) to § 940.04(1) and thus overrule this Court's prior precedents applying § 940.04(1) to consensual abortions. *See, e.g.*, *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968). Moreover, although certain respondents

dispute Urmanski's characterization of the relevant discussion in *Black* as *dicta*, addressing the applicability of § 940.04(2)(a) to abortion was not necessary to hold the statute applied to feticide.[1]

Regardless, Urmanski identified "special justifications" for overruling *Black*'s conclusion that § 940.04(2)(a) is a feticide statute only (if necessary to do so to apply § 940.04(1) to abortion). (Urmanski Br. 31-32.) Most fundamentally, that aspect of § 940.04(2)(a) was "unsound in principle." This Court has "considered a prior interpretation of a statute to be unsound in principle when the precedential case did not attempt to undertake a comprehensive examination of a statute and failed to consider a relevant subsection." *Waukesha Cty. v. M.A.C.*, 2024 WI 30, ¶ 33, 412 Wis. 2d 462, 8 N.W.3d 365 (internal quotation marks omitted). That is the circumstance here: *Black* interpreted § 940.04(2)(a) in isolation, without considering other relevant subsections in § 940.04 (like subsection (5), which demonstrates § 940.04 applies to abortions and would be rendered surplusage otherwise), and acknowledged it was not attempting a comprehensive examination of § 940.04. 188 Wis. 2d at 647 n.2. Its conclusion that applying § 940.04(2)(a) to post-viability abortions would conflict with § 940.15 also was flawed under the reasoning of *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. Urmanski's arguments for why § 940.04(1) applies to consensual abortions are simultaneously arguments for why *Black* was unsound in principle and objectively wrong and must be overruled.

B. A Proper Application of *Kalal* Demonstrates § 940.04(1) (and § 940.04(2)(a)) Applies to Consensual Abortions

Aside from invoking *Black*, none of the respondents explain how a statute imposing criminal liability on one "who intentionally destroys the life of an unborn child" does not apply to an abortion. Perhaps, that is because there is no response:

[1] Ozanne disputes whether this Court's decisions can contain *dicta*, but this is an open question when this Court (as opposed to the court of appeals) is applying its opinions. *See Wisconsin Justice Initiative, Inc.*, 2023 WI 38 at ¶¶ 137-150 (Hagedorn, J., concurring).

an abortion is the intentional destruction of the life of an unborn child (as defined in § 940.04(6)). *Black* was unsound in principle and objectively wrong to the extent it held otherwise regarding the similar language in § 940.04(2)(a).

The respondents also do not engage with this Court's prior cases applying § 940.04(1) to abortions or dispute the language in § 940.04(1) was based on predecessor statutes that had been applied to abortions. (Urmanski Br. 24-26.) They just ignore these facts and ask this Court to follow *Black*, without really addressing Urmanski's arguments that demonstrate why *Black* was wrong.

There is also no substantive response to Urmanski's reliance on § 990.001(7). The comment that accompanied the revised criminal code—which stated the statutory language "penalizes the person who performs an abortion on another"—was not ordinary legislative history. It was a revisor's note that § 990.001(7) allows this Court to consider. The Physicians argue this is irrelevant to implied repeal, (Physicians Br. 34), but it is relevant to the original meaning of § 940.04(1) as an abortion statute.

Indeed, the Physicians admit "that in 1955, section 940.04 regulated abortion" and that § 940.04 was the product of a consolidation and renumbering of Wisconsin's abortion laws. (Physicians Br. 9, 34.) Although they argue "this is no longer the state of the law" because "in Black, the Supreme Court ruled that section 940.04 is a feticide statute," *Black* did not find that subsequent legislation had impliedly repealed § 940.04(2)(a)'s applicability to abortion. Since this Court lacks the authority to repeal or modify statutes, when *Black* stated § 940.04(2)(a) "is not an abortion statute" it was necessarily stating that § 940.04(2)(a) was never an abortion statute. But, as the Physicians implicitly acknowledge, that was not right. The real question in this case should be whether subsequent legislation impliedly repealed § 940.04's application to abortion (such that it is now only a feticide statute), not whether § 940.04 applied to abortion in the first place.

C. Legislative Acquiescence Does Not Apply

Given the express limitations on *Black*—that it was not construing sections of § 940.04 other than § 940.04(2)(a)—it would be unprecedented to conclude the Legislature acquiesced in an interpretation of § 940.04(1) that never existed. This is especially so given this Court's precedents applying § 940.04(1) to consensual abortions (which *Black* did not purport to overrule).

The Physicians note the Legislature's subsequent removal of subsections (3) and (4) from § 940.04, but it is likely the Legislature removed those subsections—which penalized the woman obtaining an abortion—because other subsections in § 940.04 continued to apply to abortions and it wanted to ensure a woman was not punished for obtaining an abortion. Or, the Legislature was expressly repealing those subsections because they already conflicted with § 940.13. Although the State Plaintiffs identify the Legislature's subsequent changes to criminal statutes in 1997 to criminalize feticide and other harms to unborn children, those changes reflect a belief by the Legislature that § 940.04 still had application to abortions. *See* 1997 Wis. Act 295, § 12; Wis. Stat. § 939.75(2)(b)1.

Finally, the bottom line remains that *Black* was objectively wrong when it stated § 940.04(2)(a) was only a feticide statute. Applying that statement to § 940.04(1) would also be objectively wrong. "If statutory interpretation by a court was objectively wrong when it was made, a strained theory of legislative countenance of that interpretation by inaction will not restrict this court from correcting that interpretative error." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 37, 274 Wis. 2d 220, 682 N.W.2d 405.

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

The various arguments for implied repeal of § 940.04(1) by subsequent legislation also fail. Section 940.04(1) remains in effect and applies to abortions.

A. Section 940.04(1) and § 940.15 Do Not Conflict

A person who complies with § 940.04(1) and does not perform an abortion except when allowed under § 940.04(5) will not violate § 940.15. As it is possible to comply with both statutes, they do not conflict. *Grandberry*, 2018 WI 29 at ¶¶ 21-31. The State Plaintiffs, Physicians, and other respondents make various arguments to avoid this dispositive point, but none are persuasive.

First, the State Plaintiffs and Physicians make a similar argument to the one the Arizona Supreme Court recently rejected in *Planned Parenthood Arizona, Inc. v. Mayes*, 545 P.3d 892 (Ariz. 2024). They read § 940.15 as creating a right to abortions outside its prohibitions (pre-viability abortions and post-viability abortions to preserve the health of the mother) or otherwise as a declaration of the "lawfulness" of such abortions. This is not correct. Section 940.15 is "merely [Wisconsin's] statutory mechanism for restricting and regulating *Roe*'s abortion right." *Planned Parenthood Arizona, Inc.*, 545 P.3d at 903. It did not create a statutory right to pre-viability abortions or declare such abortions lawful.

Reading it to do so violates the principle that this Court must construe statutes to avoid conflict when possible. *State v. Szulczewski*, 216 Wis. 2d 495, 503, 574 N.W.2d 660 (1998). The State Plaintiffs' and Physicians' proposed interpretation of § 940.15 creates conflict with § 940.04(1); Urmanski's interpretation—that § 940.15 is just one of several partially overlapping prohibitions on abortion but was not intended to create a statutory right to abortion or repeal § 940.04(1)—does not. Urmanski's interpretation of § 940.04 is also consistent with the history of § 940.15, which shows the Legislature considered, but rejected, a repeal of § 940.04. This Court should not do what the Legislature chose not to do.

Second, the State Plaintiffs misapply the principle that "Wisconsin law cannot treat the same act as both lawful and a felony." (State Pls.' Br. 53.) Section 940.15 does not declare "lawful" abortions that are outside its scope; it just does not prohibit them. It is the lack of express authorization language in § 940.15 that distinguishes this case from *Westra v. State Farm Mut. Auto. Ins. Co.*, 2013 WI

App 93, 349 Wis. 2d 409, 835 N.W.2d 280. In *Westra*, statutes were irreconcilable when one statute prohibited anti-stacking provisions but the other expressly allowed them. 2013 WI App 93, ¶¶ 11-13. Here, there is no similar language in § 940.15 expressly authorizing physicians to perform pre-viability abortions or post-viability abortions to preserve a mother's health. Such abortions are outside the scope of the prohibition in § 940.15(2), but can remain subject to regulation elsewhere.

The import of State Plaintiffs' argument is that if a statute criminalizes a broad category of conduct (e.g., fraud), and the Legislature subsequently passes a separate statute that creates a separate crime for a subset of that category (e.g., credit card fraud), then anything outside that subset has been declared "lawful" and an implied repeal has occurred. This is obviously not correct. That one law leaves certain conduct outside its scope does not mean that conduct is necessarily legal or that a conflict is created with other laws that do prohibit that conduct. Multiple statutes can govern a defendant's conduct and a defendant can comply with one statute while simultaneously violating another. Partially overlapping prohibitions are commonplace in criminal law, and there are several partially overlapping prohibitions that may apply to an abortion depending on the circumstances.

Consider Wisconsin's partial-birth abortion ban, § 940.16. That ban post-dated § 940.15's ban on post-viability abortions and only prohibits partial-birth abortions. Does that mean the partial-birth abortion ban declared "lawful" all abortions other than partial-birth abortions, and thus repealed § 940.15's broader ban? Of course not, but that is the implication of the State Plaintiffs' argument.

Third, there is no merit to the argument that Urmanski's position "obliterates § 940.15," effectively repeals that statute or others, or renders § 940.15 and other abortion statutes surplusage. Both § 940.04(1) and § 940.15 create distinct crimes with their own elements and penalties. While it may be true that conduct that would violate § 940.15 would also violate § 940.04(1), that does not mean § 940.15 has been repealed or is meaningless surplusage. A prosecutor could still exercise

discretion in deciding whether to charge the conduct under § 940.15 or § 940.04(1) or both. *See* Wis. Stat. § 939.65.

Fourth, Urmanski is not converting § 940.04 into a "trigger ban." Trigger bans are laws that post-dated *Roe* and imposed restrictions that would not go into effect unless *Roe* was overturned. Section 940.04 pre-dates *Roe*. There was no need for the Legislature to amend the statute so it would come back into effect if *Roe* were reversed. As discussed in Urmanski's opening brief, a law held unconstitutional automatically comes back into effect when the decision holding the law unconstitutional is subsequently overruled. None of the respondents dispute this principle.

Fifth, the absence of any conflict between § 940.04(1) and § 940.15 means resort to the rule of lenity fails. (State Plaintiffs' Br. 41) (arguing that rule of lenity favors implied repeal where criminal statutes conflict)). For the reasons stated in Urmanski's opening brief, reliance on *State v. Christensen*, 110 Wis. 2d 538, 329 N.W.2d 382 (1983), is misplaced in this dispute. (Urmanski Br. 29.)

Sixth, the Physicians suggest § 940.04(5)'s requirement that an excepted abortion be performed in a "licensed maternity hospital" unless an emergency exists conflicts with § 940.15(4)'s requirement that an excepted abortion be performed "in a hospital on an inpatient basis." Even if there is a conflict, any "repeal" is limited to the extent of the conflict. *McLoughlin v. Malnar*, 237 Wis. 492, 297 N.W. 370, 372 (1941). A conflict regarding the location an abortion can be performed does not mean there is an irreconcilable conflict regarding when an abortion can be performed (i.e., at what stage in the pregnancy and under what circumstances).

Seventh, *Black* did not identify a conflict between § 940.04(2)(a) and § 940.15 regarding pre-viability abortions. 188 Wis. 2d at 646. Even under *Black*, the only obstacle to applying § 940.04(1) to pre-viability abortions was *Roe*, which has been overruled.

Finally, Ozanne argues applying § 940.04(1) to abortions would create absurd results because § 940.04(1) imposes a more serious penalty for pre-viability

abortions than other statutes impose for post-viability abortions. Ozanne's argument presents the question of whether § 940.04(1)'s penalty is rational, not whether § 940.04 should apply to consensual abortions. *Cf. State v. Asfoor*, 75 Wis. 2d 411, 440, 249 N.W.2d 529 (1977). None of the parties brief whether a rational basis exists for the penalty provision in § 940.04(1), so Urmanski will not either. Urmanski notes, however, that if the penalty provision in § 940.04(1) were struck down, it is severable, the statute would still ban consensual abortions, and the penalty would be as set forth in § 939.61. *Asfoor*, 75 Wis. 2d at 441-42.

B. Wis. Stat. § 940.04(1) Is Not Fundamentally Incompatible with a Comprehensive Regulatory Framework for Lawful Abortion

The State Plaintiffs argue the regulatory framework in chapter 253 "establishes that physicians act lawfully when they comply with the extensive regulatory provisions for their medical practice" and thus conflicts with § 940.04(1). (State Pls.' Br. 45.) This is an attempt to accomplish what the plain language of several of these statutes prohibits. Wis. Stat. §§ 253.10, 253.105 and 253.107 each provide that "[n]othing in this section may be construed as … making lawful an abortion that is otherwise unlawful." § 253.10(8); § 253.105(6); § 253.107(7).

State Plaintiffs downplay the effect of this limiting language, but this Court should reject their efforts. Statutory language that "nothing in this section may be construed as … making lawful an abortion that is otherwise unlawful" establishes that, in a conflict between that statute and a criminal prohibition making abortion unlawful, the criminal prohibition prevails. The presence of this limiting language in Wisconsin's post-*Roe* regulatory regime for abortions further distinguishes this case from the various cases Plaintiffs cite from other jurisdictions involving the implied repeal of abortion regulations. (State Pls. Br. 45-48.) This case is more like *Planned Parenthood Arizona, Inc.* 545 P.3d at 900. State Plaintiffs' implied repeal argument, which interprets these provisions as establishing the legality of abortions, directly conflicts with this limiting statutory language and must be rejected.

Finally, although some of the subsequent statutes do not include this limiting language, those statutes—§§ 20.927, 48.257, 48.375, and 253.095(2)—would each still have an effect even in a situation in which the only legal abortions are those which comply with § 940.04(5), i.e., abortions necessary to save the life of the mother. *Cf. Planned Parenthood of Arizona*, 545 P.3d at 904 (explaining that abortion licensing requirements, reporting requirements, and emergency consent requirements may apply to abortions necessary to save a woman's life).

C. Subsequent Abortion Statutes Do Not Clearly Indicate a Legislative Intent to Repeal § 940.04

Finally, any argument that § 940.15 and other statutes encompass the whole subject matter of abortion and are a substitute for § 940.04 must fail. As discussed, many contain limiting language showing they were not intended to replace or repeal an otherwise applicable ban on abortion and those that do not hardly encompass the whole subject of abortion.

Any reliance on § 940.15 must fail because its legislative history demonstrates it was not intended as a substitute for § 940.04. Various respondents make arguments to avoid the implication of the Legislature's decision not to repeal § 940.04 when it enacted § 940.15, but their arguments are unpersuasive. It is true the Legislature also considered a provision stating "NO IMPLIED REPEAL" but ultimately did not include that language. On its own this fact cannot overcome the strong presumption against implied repeal. This is especially so in a circumstance where the Legislature considered but rejected an express repeal of § 940.04. (Urmanski Br. 17-18.) As discussed, the statutes on which respondents rely were the Legislature's efforts to regulate abortions under the constitutional constraints imposed by *Roe*, but they do not reflect an intent to repeal or replace Wisconsin's broader, pre-*Roe* abortion restrictions.

III. The Physicians' Due Process Claims Lack Merit

A. The Physicians Do Not Establish a Facial Challenge

Other than accusing Urmanski of "brush[ing] off" the stakes for women and physicians, the Physicians provide no substantive response to Urmanski's argument that the vagueness issues they raise are not implicated by most abortions. They cite *Johnson v. United States*, 576 U.S. 591, 595 (2015), but the existence of clear-cut cases constituting a core of prohibited conduct still renders a statute immune from a pre-enforcement facial challenge. *See Planned Parenthood of Ind. & Ky. v. Marion Cty. Prosecutor*, 7 F.4th 594, 604-05 (7th Cir. 2021). Section 940.04(1) has a core of prohibited conduct (elective abortions by otherwise healthy mothers early in gestation) that does not present any of the vagueness issues Physicians raise. And, while the Physicians rely on *State v. Starks*, 51 Wis.2d 256, 186 N.W.2d 245 (1971), the overbreadth doctrine is not available outside a claim of first amendment infringement. *State v. Konrath*, 218 Wis. 2d 290, 305, 577 N.W.2d 601 (1998). And, this Court still requires a party raising a facial challenge demonstrate the law cannot be constitutionally enforced under any circumstances. *Gabler v. Crime Victim Rights Board*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384.

B. Physicians Cannot Create Vagueness Concerns Through Reference to Other Statutes

Prior cases have upheld both § 940.04 and similar laws against vagueness challenges. (Urmanski Br. 47.) The Physicians brush this caselaw aside and argue the terms in § 940.04 are now vague due to other Wisconsin statutes that regulate the subject of abortion. Again, the answer to these concerns is "elegant in its simplicity": read § 940.04. *See Grandberry*, 2018 WI 29 at ¶ 35. The relevant question is whether § 940.04 is itself sufficiently clear, regardless of whether Physicians believe their conduct would comply with other statutes.

C. The Term "Quick Child" Is Irrelevant and Not Unconstitutionally Vague

Regarding "quick child," this term is irrelevant to this case. Section 940.04(1) prohibits abortions from conception until birth without regard to whether the child has "quickened." Any lack of fair notice presented by the term "quick child" in Wis. Stat. § 940.04(2)(a) does not establish Wis. Stat. § 940.04(1) is unconstitutionally vague.

Further, the Physicians provide no support for their suggestion that people of ordinary intelligence today would be unable to understand the term, given this Court's prior constructions of the term. It does not matter that these cases are old. They establish a quick child "has developed so that it moves within the mother's womb," *State v. Timm*, 244 Wis. 508, 511, 12 N.W.2d 670 (1944), which "does not occur till four or five months of pregnancy have elapsed." *Foster v. State*, 182 Wis. 298, 196 N.W. 233, 234 (1923). Medical experts might use different terminology today, but this definition provides sufficient warning to persons wishing to obey the law of when their conduct comes near the proscribed area. *State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). And, requiring the child be developed so that it moves in the womb is an objective standard—it does not require a factfinder to create or apply their own standards to determine liability. *Id.*

D. Section 940.04(5) Is Not Unconstitutionally Vague

The Physicians' argument that § 940.04(5) is unconstitutionally vague is largely a rehash of their claim that the exception for abortions necessary to save the life of a mother in § 940.04(5) is "inconsistent" with other abortion statutes. This argument fails for the same reasons as Physicians' implied repeal argument and for the same reasons discussed above—what matters is whether § 940.04(5) itself provides fair notice, not how it compares to other statutes. *Grandberry*, 2018 WI 29 at ¶ 35. As explained in Urmanski's opening brief, and as previously held in *Babbitz v. McCann*, 310 F. Supp. 293, 297 (E.D. Wis. 1970), the language in § 940.04(5) is not impermissibly vague. It is capable of a practical construction that provides fair

notice of an objective standard: an abortion is necessary to save the life of the mother when it is reasonably certain the continued pregnancy would result in her death. (Urmanski Br. 47.) Section 940.04(5) creates an exception for an abortion if either (1) two other physicians advise that threshold has been met or (2) the threshold is, in fact, met. Although there will of course be close cases, the statute provides enough notice so that doctors should know when they are approaching prohibited conduct. And, it creates an objective standard against which to measure liability.

E. The Arguments Regarding Impossibility of Compliance Do Not Support a Facial Challenge

Finally, the requirement in § 940.04(5) that, absent an emergency, a therapeutic abortion be performed in a licensed maternity hospital does not provide a basis for a broad-based declaration the statute cannot be applied to abortions. As Urmanski has explained, the statute allows life-saving abortions to be performed elsewhere in an emergency. The Physicians attempt to rely on the definition of the term "medical emergency" in Wis. Stat. § 253.10(2)(d) to limit the scope of the reference to "emergency" in § 940.04(5)(c), but the word "emergency" in § 940.04 is not modified by "medical." There is no basis to claim a physician would violate § 940.04(1) and (5) by performing a life-saving abortion in a location other than a licensed maternity hospital if no such hospitals exist.

Regardless, as Urmanski has explained, this argument only applies to those abortions that otherwise meet the criteria of § 940.04(5) and can be raised via an as-applied challenge. This argument does not provide a basis to declare that § 940.04 on its face cannot apply to abortions, when there is a core of conduct prohibited by § 940.04(1) that does not present this issue.

IV. The State Plaintiffs Lack Standing to Pursue their Disuse Argument and It Fails as a Matter of Law

The State Plaintiffs cite *In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W. 633 (1936), to defend their standing. In that case, government officers initiated the suit against the subjects to which the act would apply. This is not a case in that style;

Urmanski and the other district attorneys are not subjects to which the State Plaintiffs seek to apply § 940.04. Rather, this case presents a difference of opinion between state officers regarding the interpretation of a state statute, which is not a justiciable controversy. *See State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627 (1936). Further, the DSPS and the MEB and its chair essentially ask this Court to tell them what the law is so that they can perform their duties—a clear request for an advisory opinion.

The State Plaintiffs also argue this Court should, if it holds § 940.04(1) would otherwise apply to abortion, remand because consideration of their disuse argument would depend on "historical factual development." Remand is unnecessary. Whether the doctrines of "disuse" or "desuetude" exist under Wisconsin law as bars to the enforceability of a statute is a legal question that does not require factual development. Although the State Plaintiffs describe this question as "novel," they provide no response to Urmanski's argument that the doctrines of "disuse" or "desuetude" are incompatible with this Court's caselaw. (Urmanski Br. 51.) Instead, they rely on a West Virginia case which, as Urmanski has already argued, is an outlier. (Urmanski Br. 52.) Urmanski is aware of no other state that recognizes the doctrines on which State Plaintiffs rely, and others have expressly rejected them. (*Id.*) Remand is not necessary for this Court to reaffirm the principle, inherent in this Court's caselaw and nearly universally acknowledged, that a statute is not repealed by disuse or desuetude. *See* Urmanski Br. 51 (citing cases and treatises).

Finally, even if Wisconsin law did recognize the doctrines of "disuse" or "desuetude," factual development is not necessary. It is undisputed there were prosecutions under § 940.04 in the years leading up to *Roe*. (Urmanski Br. 53.) The statute was subject to enforcement, until *Roe* rendered it unenforceable. And, as Urmanski has previously explained—again with no substantive response from State Plaintiffs—that prosecutors could not enforce the statute under *Roe* reflects prosecutorial paralysis, not a social consensus to nullify the statute. (*Id.*) Abortion, and how much it should be regulated, remains a deeply contested political issue.

CONCLUSION

This Court should reverse the circuit court and conclude § 940.04(1) can be applied to prosecute the performance of consensual abortions.

Dated this 30th day of September, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c), for a brief produced with a proportional serif font, as well as this Court's July 2, 2024 order setting a word limit of 4,400 words. The length of this brief is 4,395 words. Word processing software (Microsoft Word) was used to determine the length of this brief. The word count above is inclusive of all words in this brief's Introduction, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 30th day of September, 2024.

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