STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP79-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

WALTER L. JOHNSON,

Defendant-Respondent.

APPEAL FROM A PRETRIAL ORDER ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE JOHN D. HYLAND, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

Walter L. Johnson drove 130 miles per hour, went airborne into oncoming traffic, and killed a child. His blood sample tested positive for methamphetamine. He was charged, among other crimes, with homicide by vehicle with a restricted controlled substance in his blood and operating with a restricted controlled substance in the blood causing injury. "Methamphetamine" is a "restricted controlled substance" under the relevant Wisconsin statutes.

Johnson challenged the charges, arguing that "methamphetamine" means only the specific isomer[1] dextromethamphetamine (D-meth), as opposed to levomethamphetamine (L-meth). L-meth is exempt from certain types of regulation under a separate chapter, the Uniform Controlled Substances Act, because it can be sold over the counter in certain nasal inhalers. Johnson argued that this exemption changes the meaning of "methamphetamine," as used in the definition of a "restricted controlled substance," to refer only to the specific isomer D-meth. The test results of the now-destroyed blood sample did not state which isomer was present in Johnson's blood.

1. Is L-meth a restricted controlled substance under Wisconsin law?

The circuit court concluded that the statute was ambiguous, then examined legislative history and concluded that L-methamphetamine was not a restricted controlled substance.

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[1] "Isomers" are two or more chemical compounds that have the same chemical formula but different chemical structures. *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 611 n.3, 267 N.W.2d 285 (1978).

This Court should reverse. L-meth is unambiguously a restricted controlled substance within the meaning of Wis. Stat. § 340.01(50m).

2. Is the classification of L-meth as a restricted controlled substance unconstitutional as applied to Johnson under either the due process clause or the equal protection clause?

The circuit court did not reach this question.

If this Court reaches this issue, this Court should answer: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be appropriate because this case involves an unsettled issue of statewide importance.

Oral argument is not requested because the briefs should adequately set forth the parties' arguments.

INTRODUCTION

Johnson drove 130 miles per hour in Madison and went airborne into oncoming traffic, killing a child. His blood sample tested positive for methamphetamine. He was charged, among other crimes, with homicide by a motor vehicle with a detectable amount of a restricted controlled substance in his blood and operating with a restricted controlled substance in the blood causing injury.

Johnson sought dismissal of the charges based on the Wisconsin state laboratory's inability to distinguish between D-meth and L-meth. The relevant statutes define "methamphetamine" as a restricted controlled substance under the motor vehicle code, Wis Stat. § 340.01(50m), and the criminal code, Wis. Stat. § 967.055(1m)(b). L-meth and D-meth are both methamphetamine. However, Johnson pointed out that because L-meth can be sold over the counter

in certain nasal inhalers, it is exempt from certain regulation as a "controlled substance" under Wis. Stat. ch. 961, the Uniform Controlled Substances Act. He argued that this exemption changed the meaning of "methamphetamine," as a restricted controlled substance (in a different chapter of the statutes), to refer only to the specific isomer D-meth.

The circuit court agreed with Johnson that L-meth is not a restricted controlled substance. The court concluded that the word "methamphetamine," as used in the definition of a "restricted controlled substance," is ambiguous because there are two different isomers of methamphetamine. The court then consulted legislative history and concluded that L-meth is not a restricted controlled substance. While the court did not dismiss the case, it held that the State would be required to prove Johnson's blood sample (which has now been disposed of in the normal course of business) contained D-meth as opposed to L-meth. The court did not reach Johnson's alternative constitutional challenge.

This Court should reverse the circuit court's order. L-meth is a restricted controlled substance based on the unambiguous plain language of the statutes. The fact that L-meth can be lawfully sold in some nasal inhalers does not change the definition of "methamphetamine," which remains a restricted controlled substance in all its forms. Therefore, the State need not prove that Johnson's blood sample contained D-methamphetamine. Moreover, the classification of L-meth as a restricted controlled substance is not unconstitutional as applied to Johnson because it is rationally related to the legitimate government interest in promoting roadway safety.

STATEMENT OF THE CASE

According to the criminal complaint, Johnson drove approximately 130 miles per hour on Stoughton Road in Madison with his daughter, KRR, in the vehicle. (R. 2:3–5;

27:5.) Johnson lost control of the vehicle. (R. 2:3.) The vehicle flipped over, went "airborne across the median," smashed into an oncoming vehicle, went down a hill, and finally came to rest on a frontage road. (R. 2:2–3.) KRR was killed in the crash. (R. 2:4.) The driver of the vehicle Johnson hit was hospitalized. (R. 2:4.) Johnson's license was suspended at the time of the crash and had been suspended for more than one year leading up to the crash. (R. 2:5.)

A sample of Johnson's blood was drawn after the crash. (R. 2:5.) The sample revealed that Johnson's blood contained 24 ng/mL of methamphetamine. (R. 2:5.) Johnson was charged with four counts as a result of the crash: (1) homicide by vehicle with a detectable amount of a restricted controlled substance in his blood; (2) operating a vehicle while suspended, causing death; (3) operating with a restricted controlled substance in his blood, causing injury; and (4) first-degree reckless homicide. (R. 27:1–2.)

Johnson filed a *Franks/Mann*[2] motion alleging that the State offered false or misleading information on counts one and three, both of which involved Johnson's positive methamphetamine blood test. (R. 47.) His argument was based on the Wisconsin State Laboratory of Hygiene's inability to distinguish between two different isomers of methamphetamine: dextromethamphetamine (known as D-meth), and levomethamphetamine (known as L-meth). (R. 41:3.) D-meth is the form of "street" methamphetamine commonly found in drugs like crystal methamphetamine. (R. 78:29–30; 103:7; 104:19.) It is a stimulant known to cause things like agitation, increased risk-taking, and difficulty concentrating. (R. 104:19.) L-meth could be found in some over-the-counter nasal inhalers. (R. 78:29; 111:15.) It is a vasoconstrictor and causes things like increased blood

[2] *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

pressure. (R. 104:20–21.) The Wisconsin State Laboratory of Hygiene does not have the equipment needed to distinguish between L-meth and D-meth in the bloodstream. (R. 78:33; 104:44.)

Johnson argued that since L-meth can be lawfully obtained over the counter, it could not be a restricted controlled substance. (R. 47:2–3.) The circuit court denied the motion without a hearing, holding that "[t]he statutes simply do not differentiate between the two isomers [of methamphetamine] when it comes to the offense charged." (R. 55:5.) Johnson then filed pretrial motions including a motion to dismiss counts 1 and 3, both of which relied upon the test results showing methamphetamine in his blood. (R. 41:1.)

Johnson pointed out that under chapter 961, the Uniform Controlled Substances Act, L-meth is not a "controlled substance" because it may be lawfully sold without a prescription. Wis. Stat. § 961.11(6)(a); (R. 101:10). He argued that since L-meth is not a controlled substance under this chapter, it also must not be a "restricted controlled substance" under the motor vehicle code and chapter 967. (R. 101:9–13.) He advanced several studies that he claimed proved it was possible to have a positive methamphetamine blood test result solely from using lawful over-the-counter products containing L-meth. (R. 101:1–3.)

Johnson also raised two constitutional arguments. First, he argued that his right to due process was violated because the laboratory destroyed his blood sample. (R. 101:8–11.) Second, he argued that if the court were to conclude L-meth was a restricted controlled substance, then the statutes would be unconstitutional as applied to him because there would be no rational basis for imposing criminal liability on him for operating a motor vehicle with a detectable amount of L-meth in his blood stream. (R. 101:18–19.) The State argued that the blood sample was merely destroyed in the normal course of business after Johnson had passed up

his opportunity to request preservation, and that in any event L-meth was a restricted controlled substance.

The circuit court held evidentiary hearings on Johnson's motions. The defense called forensic toxicologist and drug identification consultant James Oehldrich, who discussed studies relating to L-meth. (R. 78:58–62.) Oehldrich explained that one such study showed of a sample of 13 adults dosed with Vicks VapoInhalers, two participants tested positive for small amounts of methamphetamine. (R. 67:1; 78:67.) He also pointed to an article showing that selegiline, a medication sometimes prescribed to Parkinson's patients, can produce a detectable amount of L-meth in the blood (R. 78:70–72), along with a case study showing L-meth in the system of a deceased 77-year-old man who was a regular Vicks VapoInhaler user (R. 78:73–74).

Analyst Michael Knutsen, who conducted Johnson's blood test, acknowledged that L-meth and D-meth are different, with L-meth generally having a milder effect. (R. 88:53–54.) He also acknowledged the existence of studies showing that some amount of L-meth has been detected in some individuals' blood plasma samples after the administration of Vicks VapoInhalers and other medication. (R. 88:60–74.)

Amy Miles, the Director of Forensic Toxicology for the Wisconsin State Laboratory of Hygiene, confirmed that L-meth has milder effects than D-meth and can be found in Vicks VapoInhalers. (R. 78:29–30.) She addressed several studies advanced by the defense as showing that L-meth can be detected in blood from nasal inhalers and explained why she did not think those studies proved that proposition. For example, she pointed out that the detection level used in the Mendelson study, in which 12 participants dosed with Vicks VapoInhalers up to four times the recommended dose, was only 5 ng/mL. (R. 100:40.) The hygiene laboratory's detection threshold, in contrast, is 10 ng/mL. (R. 100:41.) Despite that,

even those participants dosed with four times the recommended dose were "often below the limit of quantification" of L-meth. (R. 63:4.) Therefore, it cannot be said that this study shows L-meth from nasal inhalers can be detected in the blood, because the study's threshold is lower than that used by the laboratory. (R. 100:42.)

Miles testified that she knows of only one laboratory in the country, a private laboratory, that performs chiral[3] analysis for methamphetamine. (R. 88:28.) Miles further explained that even this laboratory "hardly ever" conducts a chiral analysis to distinguish between L-meth and D-meth, and when they do it is generally for workplace drug testing. (R. 88:28.) She also explained that in her experience, other states do not tend to differentiate between L-meth and D-meth. (R. 88:44.)

Miles explained that the research shows that individuals dosed with L-meth generally do not also have detectable amounts of amphetamines in their systems, whereas the samples tested by the laboratory generally do contain detectable amounts of amphetamines along with methamphetamine. (R. 100:43.)

Regarding the destruction of the blood sample, Miles explained that the laboratory's policy is to retain blood samples for six months after a final report is generated regarding the test results. (R. 100:11.) This is because the laboratory tests over 20,000 samples per year and does not have space to retain them all, and because the usefulness of the samples degrades over time. (R. 100:13.) However, if defendants or the court request that the sample be retained for longer than that, then the sample is retained for longer than that. (R. 100:27–28.)

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[3] A chiral analysis uses specialized equipment to separate isomers of a drug. (R. 88:38.)

Miles explained that in Johnson's case, the final report was generated on May 18, 2021. (R. 100:16.) Johnson's attorney was provided with the information from the final report, including the blood test results, but did not request that anyone retain the blood sample. (R. 100:21–22.) The sample was eventually destroyed on March 16, 2022, in accordance with the laboratory's routine procedure. (R. 100:22.) Finally, in June 2022, Johnson's attorney inquired into the status of the blood sample. (R. 100:23–24.)

The circuit court first addressed and rejected Johnson's due process claim, holding that Johnson failed to prove that the blood sample was even potentially exculpatory or that the district attorney's office and/or the laboratory acted in bad faith. (R. 111:6–8.) However, the circuit court concluded that L-meth is not a restricted controlled substance under the motor vehicle code or chapter 967. (R. 111:12.) The court concluded that because there are two different isomers of methamphetamine, and because L-meth is not a controlled substance within the meaning of chapter 961, the word "methamphetamine" as used in the motor vehicle code and chapter 967 is ambiguous. (R. 111:15–17.) The court explained that, while L-meth can create impairment in excess, Wis. Stat. § 346.63(1)(a) already prohibits operating a vehicle under the influence of any drug to a degree that renders a person incapable of driving safely. (R. 111:16.) The court also concluded that it would be "illogical and confusing" if L-meth were a restricted controlled substance but not a controlled substance. (R. 111:17–18.)

The court then examined legislative history, primarily drafting notes from legislators, and concluded that L-meth is not a restricted controlled substance. (R. 111:18–20.) Having concluded that L-meth was not a restricted controlled substance, the circuit court did not reach Johnson's alternative argument that making L-meth a restricted

controlled substance was unconstitutional as applied to him. (R. 111:20.)

The circuit court concluded that it would be premature to dismiss counts 1 and 3 at this stage because the State could theoretically prove through "corroborative and/or circumstantial evidence" that Johnson's blood contained D-meth. (R. 111:21.) However, the court held that to prove counts 1 and 3, the State would need to prove beyond a reasonable doubt that Johnson's blood contained D-meth as opposed to L-meth. (R. 111:20.)

The State filed a petition for leave to appeal the circuit court's order holding that on counts 1 and 3, the State would bear the burden of proving Johnson's blood contained D-meth as opposed to L-meth. (R. 116.) This Court granted the petition. (R. 121.) This interlocutory appeal follows.

STANDARD OF REVIEW

Statutory Interpretation

This Court reviews questions of statutory interpretation de novo. *State v. Patterson*, 2010 WI 130, ¶ 45, 329 Wis. 2d. 599, 790 N.W.2d 909.

As-applied Constitutional Challenge

This Court determines de novo whether a defendant has satisfied her burden to prove a statute unconstitutional beyond a reasonable doubt. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

ARGUMENT

I. L-methamphetamine is unambiguously a restricted controlled substance under the plain meaning of the statutes.

Whether L-meth is a "restricted controlled substance" under Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b)[4] is a question of statutory interpretation. When interpreting a statute, the plain meaning of a statute controls. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*

A statute "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." *Kalal*, 271 Wis. 2d 633, ¶ 46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656).

Here, Johnson and the circuit court manufacture ambiguity where none exists. L-meth is unambiguously a restricted controlled substance under Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b) because L-meth is methamphetamine.

As a starting point, both Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b) simply list "methamphetamine" as a restricted controlled substance. There is no suggestion in

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[4] These two definitions are identical except that Wis. Stat. § 340.01(50m) lists one additional substance, 6-monoacetylmorphine, which is not relevant here.

either of these statutes that "methamphetamine" means only some specific isomer of methamphetamine. And there is no dispute that both L-meth and D-meth are, in fact, isomers of methamphetamine. (R. 101:8, 10.)

Methamphetamine is not further defined in Wis. Stat. §§ 340.01(50m) or 967.055(1m)(b). It is, however, defined in the Uniform Controlled Substances Act, Wis. Stat. ch. 961. Schedule II of the Controlled Substances Act includes:

"Any material, compound, mixture, or preparation which contains any quantity of any of the following substances having a stimulant effect on the central nervous system, including any of their salts, isomers and salts of isomers that are theoretically possible within the specific chemical designation:

(a) Amphetamine.

(b) Methamphetamine."

Wis. Stat. § 961.16(5)(a)–(b). Therefore, the definition of "methamphetamine" as used in the Uniform Controlled Substances Act unambiguously includes both L-meth and D-meth.

Johnson is correct that L-meth cannot be regulated as a "controlled substance" under chapter 961. But that has nothing to do with the definition of methamphetamine in chapter 340 or chapter 967. Rather, it is because the legislature created an exception for L-meth under chapter 961. Wisconsin Stat. § 961.11(6)(a) states that "[t]he controlled substances board shall not have authority to control a nonnarcotic substance if the substance may, under the federal food, drug and cosmetic act and the laws of this state, be lawfully sold over the counter without a prescription." This exception applies to L-meth, which can be lawfully sold over the counter as an ingredient in a nasal inhaler.

This exception applicable to chapter 961 has nothing to do with the definition of methamphetamine in the Restricted Controlled Substances statutes. Wis. Stat. § 961.16(5)(b). L-meth is still methamphetamine. Section 961.11(6)(a)'s exception for over-the-counter products does not suggest otherwise. It merely says that this specific isomer of methamphetamine, L-meth, cannot be regulated by the controlled substances board *under chapter 961*. This does not suggest that L-meth cannot be regulated as a restricted controlled substance under other statutory sections. Alcohol, for example, is a nonnarcotic that can be lawfully sold over the counter (and therefore cannot be regulated under chapter 961), but it of course can be regulated in a whole host of other ways.

While there is no case directly on point, other jurisdictions addressing similar situations tend to rely on plain text and avoid reading words into statutes. In *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023), for example, the question was whether a New York law prohibiting the sale of "cocaine" was broader than its federal counterpart. *Id.* at 407. The federal law limited its prohibition to only "optical and geometric isomers" of cocaine.[5] *Id.* at 408. New York's law, in contrast, simply referred to "isomers" of cocaine, without limitation. *Id.* at 410. Because New York's law contained no language limiting it to certain isomers, the Second Circuit held that the plain language of the statute covered all isomers. *Id.* at 410–11. The court refused to read in a limitation on the word "isomer" where none existed.

Likewise, in *People v. Hanna*, 693 N.E.2d 470 (Ill. App. Ct. 1998), a defendant charged with possession of methamphetamine argued that the evidence was insufficient

[5] Optical and geometric isomers are two types of isomers, but there are also other types of isomers as well. *United States v. Minter*, 80 F.4th 406, 410 (2d Cir. 2023).

because there was no evidence that the methamphetamine in question was D-meth as opposed to L-meth. *Id.* at 471, 474. Illinois's controlled substances law did not distinguish between different isomers of methamphetamine—it simply made "methamphetamine" a controlled substance. *Id.* at 474. However, Illinois law excluded from all schedules "those substances excluded from the schedules of the federal Controlled Substances Act." *Id.* The federal act excluded Vicks VapoInhalers from all schedules. *Id.* Therefore, the defendant argued that L-meth, which was contained in Vicks VapoInhalers, must be excluded from the controlled substances schedule. *Id.*

The Illinois Court of Appeals rejected this argument based on the plain language of the statute. *Hanna*, 693 N.E.2d at 474. The regulation in question excluded only the Vicks VapoInhaler from the schedule, not L-meth in general. *Id.* Because the legislature did not specifically exclude all L-meth from the controlled substances act, but only the Vicks VapoInhaler, L-meth was still a controlled substance. The language used by the legislature controlled, and the court refused to create ambiguity where none existed. *Id.*; *see also, e.g.*, *People v. Cromwell*, 140 P.3d 593 (Wash. 2006) (en banc) (concluding that a Washington statute prohibiting the possession, manufacture, or delivery of "methamphetamine" encompassed both the salt form and the base (liquid) form of methamphetamine because the statute did not explicitly exclude one or the other); *State v. Casady*, 597 N.W.2d 801, 808 (Iowa 1999) ("[B]oth [D-meth and L-meth] are methamphetamine, and the Iowa statute makes no distinction between the d and l forms." (citation omitted)).

Similar reasoning applies in this case. The legislature had already clarified that the controlled substances board cannot regulate L-meth as a "controlled substance" under chapter 961, because products containing L-meth can be lawfully sold over the counter without a prescription.

Wis. Stat. § 961.11(6)(a). The legislature knows how to exclude the substance from a statute's reach when it wants to. If the legislature had meant to also state that L-meth is not a "restricted controlled substance" under sections 340.01(50m) or 967.055(1m)(b), it could have included a similar qualifier in either statute. But it didn't. The word "methamphetamine" in the restricted controlled substances definition contains no such qualifier, and therefore, it unambiguously includes both isomers of methamphetamine.

The circuit court concluded that it would be "illogical" for L-meth to be a "restricted controlled substance" without being able to be regulated as a "controlled substance" under chapter 961. (R. 111:17–18.) But it is not illogical—the two definitions just serve different purposes. "Controlled substances" are substances whose manufacture, distribution, possession, etc., are prohibited or regulated for health and safety reasons due to their potential for harm and abuse. Wis. Stat. § 961.001. This protects the health and general welfare of the public. § 961.001(1m).

A "restricted controlled substance," on the other hand, has to do with the specific issue of operating a motor vehicle. The purpose of this definition is to "encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant. . . ." Wis. Stat. § 967.055(1)(a); see also § 346.63. This definition exists not just to promote health and public welfare in general, but for the specific purpose of keeping the roads safe. There is therefore nothing illogical or inconsistent about any substance being a "restricted controlled substance" under sections 340.01(50m) and 967.055(1m)(b), but not regulable as a "controlled substance" under chapter 961. The different definitions simply serve different purposes. And by way of analogy, the legislature has reasonably concluded that, while it is lawful to consume alcohol, it is unlawful to drive after having consumed a specific amount. § 346.63(1)(b).

The plain language interpretation of L-meth as a restricted controlled substance also comports with the legislature's stated purpose in defining a restricted controlled substance—to "encourage the vigorous prosecution of offenses concerning the operation of motor vehicles by persons under the influence of an intoxicant . . . ." Wis. Stat. § 967.055(1)(a). Given the aforementioned difficulties in testing for D-meth vs. L-meth, a contrary interpretation would make it extremely difficult to charge either type of methamphetamine as a restricted controlled substance, thwarting the statute's purpose.

The circuit court also considered it significant that Wis. Stat. § 346.63(1)(a) already prohibits operating while under the influence of any drug to a degree that renders a person incapable of safely driving. (R. 111:16–17.) While this is true, it does not follow from this premise that L-meth is any less likely to be a restricted controlled substance as used in section 346.63(1)(am). The subsection cited by the circuit court (Wis. Stat. § 346.63(1)(a)) applies equally to D-meth and to many other drugs that are also restricted controlled substances. This tells us nothing about whether the substance is also a restricted controlled substance, subject to section 346.63(1)(am).

Finally, the circuit court speculated that because L-meth is called levomethamphetamine, sometimes called "levmetamfetamine" this could mean that "perhaps *l*-methamphetamine is unambiguously not methamphetamine as the word is spelled and used in ch. 340." (R. 111:17.) This is not correct. As explained above, both L-meth (called levomethamphetamine) and D-meth (called dextromethamphetamine) are isomers of methamphetamine. There is no principled reason to think that the prefix "levo" would somehow exclude L-meth from the definition of methamphetamine, while the prefix "dextro" would not do the same for D-meth. L-meth is an isomer of methamphetamine,

so it is unambiguously "methamphetamine." *See* Wis. Stat. § 961.16(5)(b).

L-meth is a restricted controlled substance. *See Kalal*, 271 Wis. 2d 633, ¶ 45. The circuit court erred in finding otherwise, and this Court should reverse its ruling regarding the State's burden of proof at trial.

II. Johnson's as-applied constitutional challenge fails because he relies only on hypotheticals and fails to show his constitutional rights were actually violated.

A. An as-applied challenge requires the defendant to prove the enforcement of a statute violates his constitutional rights under the particular facts of the case.

Johnson argued in the alternative that if Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b) prohibit driving with a detectable amount of L-meth in the blood, then the statute is unconstitutional as applied to him. The circuit court did not reach this question, but if this Court does,[6] it should conclude that the classification of L-meth as a restricted controlled substance easily passes rational basis review.

A defendant challenging the constitutionality of a statute faces a heavy burden. "Every legislative enactment is presumed constitutional . . . 'and if any doubt exists about a statute's constitutionality, [this Court] must resolve that doubt in favor of constitutionality.'" *State v. Ninham*, 2011 WI 33, ¶ 44, 333 Wis. 2d 335, 797 N.W.2d 451 (citation omitted). The presumption of constitutionality can be overcome only if

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[6] This Court need not address this issue but may choose to do so. *See, e.g.*, *Sands v. Menard, Inc.*, 2013 WI App 47, ¶ 3, 347 Wis. 2d 446, 831 N.W.2d 805 (addressing, "in the interest of judicial efficiency," issues that were not strictly necessary to decide the appeal).

the challenging party establishes that the statute is unconstitutional beyond a reasonable doubt. *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 37, 328 Wis. 2d 469, 787 N.W.2d 22.

There are two main types of constitutional challenges: facial and as-applied. A party making a facial challenge must prove that the statute cannot constitutionally "be enforced 'under any circumstances.'" *Wood*, 323 Wis. 2d 321, ¶ 13 (citation omitted). A successful facial challenge renders a law "void 'from its beginning to the end.'" *Id.* (citation omitted).

An as-applied challenge, in contrast, questions only the constitutionality of a statute "on the facts of a particular case or [as applied] to a particular party." *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 56, 383 Wis. 2d 1, 914 N.W.2d 678 (alteration in original) (citation omitted). For this reason, an as-applied challenge requires this Court to "assess the merits of the challenge by considering the facts of the particular case in front of [this Court], 'not hypothetical facts in other situations.'" *Wood*, 323 Wis. 2d 321, ¶ 13 (citation omitted).

Johnson raises substantive due process and equal protection challenges to the prohibition on driving with a detectable amount of L-meth in the blood. "Due process 'bars certain arbitrary, wrongful government actions'" by "forbid[ding] a government from exercising power without any reasonable justification in the service of a legitimate governmental objective." *State v. Smith*, 2010 WI 16, ¶ 14, 323 Wis. 2d 377, 780 N.W.2d 90 (citations omitted). "The equal protection clause, on the other hand, 'is designed to assure that those who are similarly situated will be treated similarly.'" *Id.* ¶ 15 (citation omitted). The rights under the Wisconsin Constitution "are the substantial equivalents of their respective clauses in the federal constitution." *Id.* ¶ 12 (citation omitted).

"Whether reviewing substantive due process or equal protection, the threshold question is whether a fundamental right is implicated or whether a suspect class is disadvantaged by the challenged legislation." *Id.* If so, "the challenged legislation must survive strict scrutiny." *Id.* Here, however, Johnson raises no argument that this case involves a fundamental right or protected class, nor can he. Driving is not a fundamental right, *see State v. Smet*, 2005 WI App 263, ¶ 8, 288 Wis. 2d 525, 709 N.W.2d 474, nor are L-meth users a protected class. Therefore, Johnson's constitutional challenge is subject only to rational basis review. *Smith*, 323 Wis. 2d 377, ¶ 12.

Under rational basis review, "the legislative enactment 'must be sustained unless it is "patently arbitrary" and bears no rational relationship to a legitimate government interest.'" *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989) (citation omitted). Rational basis analysis "requires [this Court] to search for any facts upon which the legislation reasonably could be applied to [Johnson]." *Smith*, 323 Wis. 2d 377, ¶ 12. The legislation will survive rational basis review if its classification is reasonable and practical in relation to a legitimate government interest. *State v. Hezzie R.*, 219 Wis. 2d 848, 894, 580 N.W.2d 660 (1998). And any doubts must be resolved in favor of the reasonableness of the classification. *Id.*

The rational basis need not be expressly articulated in the law. Rather, the statute passes muster if this Court "can conceive of facts on which the legislation could reasonably be based." *State v. Quintana*, 2008 WI 33, ¶ 77, 308 Wis. 2d 615, 748 N.W.2d 447.

B. The classification of L-meth as a restricted controlled substance survives rational basis scrutiny as applied to Johnson.

As a starting point, Johnson raised only an as-applied challenge to classification of L-meth as a restricted controlled substance. (R. 89.) However, Johnson has presented no evidence that he actually used any product containing L-meth. (R. 89:5–8.) The State pointed this out in a response brief in the circuit court. (R. 109:5.) In reply, Johnson did not address this issue. (R. 110.) He instead continued to rely only on the argument that a hypothetical defendant could theoretically test positive for methamphetamine after using a product that contains L-meth. (R. 110:1–3.)

That is not sufficient. An as-applied challenge must be based on the facts of a particular case, not on hypothetical facts from other situations. *Wood*, 323 Wis. 2d 321, ¶ 13. Johnson's failure to even state that he was a user of a specific product containing L-meth is fatal to his as-applied constitutional challenge. *Id.*

Regardless of Johnson's failure to sufficiently plead his as-applied constitutional challenge, the classification of L-meth as a restricted controlled substance easily clears the low bar of having a rational relationship to a legitimate government interest. *See Quintana*, 308 Wis. 2d 615, ¶ 77. The government has a legitimate interest in roadway safety and in protecting the roads from impaired drivers. *See, e.g.*, *State v. VanderGalien*, 2024 WI App 4, ¶ 27, 410 Wis. 2d 517, 2 N.W.3d 774.

The definition of L-meth as a restricted controlled substance promotes this objective in at least two ways. First, L-meth can be impairing in its own right when taken in excess (R. 111:16), so a prohibition on driving with a detectable amount of L-meth in one's blood is rationally related to the government interest in protecting the roadways from

impaired drivers. *See VanderGalien*, 410 Wis. 2d 517, ¶ 27. Second, classifying L-meth as a restricted controlled substance is rational due to the extreme danger caused by driving after consuming D-meth, combined with the difficulty in distinguishing between D-meth and L-meth. Therefore, a general prohibition on driving with methamphetamine in the blood serves the legitimate government objective of preventing and effectively prosecuting driving with the highly impairing substance D-meth in one's blood.

First, as the circuit court correctly pointed out, L-meth has the capacity to create impairment when taken in excess. (R. 111:16.) Studies have confirmed this. In addition to physical effects like increased heart rate and respiration rate, research participants dosed with L-meth experienced "global intoxication" and several other subjective drug effects. Heather M. Barkholtz, et al., *Pharmacology of R-(-)-Methamphetamine in Humans: A Systematic Review of the Literature*, 6 ACS Pharmacol. Transl. Sci. 2023, 914–24, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10353062/ (last visited Aug. 6, 2024). L-meth has even produced similar peak subjective effects to D-meth, although L-meth's effects did not last as long. *Id.* L-meth's potential to cause intoxication means there is a rational basis to withhold the privilege of driving on public highways from those with a detectable amount of L-meth in their bloodstreams. *See, e.g.*, *VanderGalien*, 410 Wis. 2d 517, ¶ 27 (explaining that the State has a legitimate interest in highway safety and protecting the roadways from impaired drivers).

Second, classifying L-meth as a restricted controlled substance is rational due to the extreme danger caused by driving after consuming D-meth, combined with the difficulty in distinguishing between D-meth and L-meth. It is undisputed that the Wisconsin State Laboratory of Hygiene does not have the necessary equipment to distinguish L-meth from D-meth when testing an individual's blood sample—all

the laboratory can say with certainty is that the sample contains methamphetamine. (R. 101:8.)

It is also undisputed that operating a vehicle after consuming D-meth is extraordinarily dangerous to both the driver and the public. D-meth is a strong stimulant that causes things like agitation, increased risk-taking (such as speeding or running stoplights), body tremors, and difficulty concentrating. (R. 104:19.) Common driving behaviors after consuming methamphetamine include speeding, failing to stop, weaving in lanes, errors in judgment, and crashing. Ian R. McGrane, et al., *Effects of 3,4-methylenedioxymethamphetamine and Methamphetamine on Motor Vehicle Driving Performance: A Systematic Review of Experimental and Observational Studies*, 68 J. Forensic Sci. 2023, 22–34, https://doi/org/10.1111/1556-4029.15179 (last visited Aug. 6, 2024).

D-meth poses an extreme risk to roadway safety, but it cannot easily be distinguished from L-meth under Wisconsin's present blood testing scheme. Therefore, in service of the legitimate government interest in roadway safety, *see VanderGalien*, 410 Wis. 2d 517, ¶ 27, it is reasonable to temporarily withhold the privilege of driving on public highways from those with a detectable amount of L-meth in their blood. Otherwise, it would be extremely difficult to prosecute and deter driving with D-meth in one's system. *See* § 967.055(1)(a) (explaining that the statute's purpose is to encourage vigorous prosecution of such offenses).

Johnson might argue that by including L-meth as a restricted controlled substance, the law is broader than is strictly necessary because it covers some individuals who have consumed L-meth but are not necessarily intoxicated. However, rational basis review does not require a statute to be narrowly tailored to serve the government objective in question. *See, e.g.*, *In re Commitment of Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346. It is true that if the

goal is to prevent driving while under the influence of D-meth, then Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b) may not be narrowly tailored to meet that goal. But there is nothing constitutionally wrong with that.

Johnson has also argued that classifying L-meth as a restricted controlled substance violates the equal protection clause because dextromethorphan, an ingredient in some cough suppressants, is also potentially impairing when abused but is not a restricted controlled substance. (R. 101:20.) He argues that because both dextromethorphan and L-meth can be obtained lawfully but can cause impairment when taken in excess, L-meth users and dextromethorphan users are "similarly situated" and cannot be treated differently. (R. 101:20.) This argument fails.

First, as discussed above, L-meth is different from dextromethorphan because L-meth is indistinguishable from D-meth, a highly dangerous and intoxicating substance, in Wisconsin's blood tests. (R. 101:8.) Johnson has not shown the same issue exists for dextromethorphan. This alone means that L-meth users are not similarly situated to dextromethorphan users.

Johnson has also not shown that impairment by L-meth and impairment by dextromethorphan are sufficiently comparable that users of the two substances could be considered similarly situated. Again, Johnson is challenging the constitutionality of a statute, so the burden is squarely on him to prove an equal protection violation beyond a reasonable doubt. *Wood*, 323 Wis. 2d 321, ¶ 15. Johnson has not come close to meeting this burden. All he has shown is that both substances can cause "impairment" generally. (R. 101:20–21.)

Most importantly, however, it does not matter that there may be some substances with the capacity to cause impairment that are not restricted controlled substances.

This case involves only rational basis review, which does not require narrow tailoring. *See Smith*, 323 Wis. 2d 377, ¶ 12. There are likely many substances that, while not listed as restricted controlled substances, have the potential to be at least as impairing as some of the substances which are restricted controlled substances. It cannot be that the legislature's inability to list every impairing substance in existence somehow invalidates Wis. Stat. §§ 340.01(50m) and 967.055(1m)(b) regarding a substance that concededly can cause impairment. (R. 101:20; 111:16.)

Finally, while it is not determinative on this appeal, Johnson overstates the degree to which his cited studies suggest the possibility of testing positive for methamphetamine after consuming the recommended dose of an inhaler containing L-meth.

Johnson's mistake is his failure to appreciate what is meant by ". . . a *detectable* amount of a restricted controlled substance . . . ." Wis. Stat. § 346.63(1)(am). Director Amy Miles explained that the Wisconsin State Laboratory of Hygiene's detection limit is 10 ng/mL of methamphetamine in the blood. (R. 100:41.) Anything below that amount is below the laboratory's detection limit and is therefore not considered "detectable." (R. 100:41.)

The studies upon which Johnson relies do not use this same threshold for detection. For example, Johnson points to a 2008 study in which 12 participants were given up to four times the recommended dose of an inhaler containing L-meth. (R. 63:101–02.) He points out that these participants' blood samples were "often," but not always, below the study's level of detection for methamphetamine. (R. 101:2.) But the study used just 5 ng/mL as its level of detection (as opposed to the Wisconsin State Laboratory of Hygiene's much higher 10 ng/mL limit), and it did not report exact numbers. (R. 63:4; 100:41–42.) Therefore, it cannot be said that this study

showed inhaler users can reach methamphetamine blood levels that Wisconsin's laboratory can detect.

Likewise, Johnson relies heavily on a case study regarding a deceased 77-year-old man known to be a regular Vicks VapoInhaler user. (R. 101:1.) But aside from the fact that this man's use of the inhaler and dosage prior to his admission to the hospital could not be observed, his L-meth concentration is his blood was only 5.2 ng/mL. (R. 65:3.) This is far below the Wisconsin State Laboratory of Hygiene's detection limit. (R. 65:3; 100:41.) Johnson also relies on a 2014 study in which 13 healthy adults were given doses of L-meth and two of the participants produced "positive" L-meth results in blood tests. (R. 101:2.) But the authors of the study explicitly clarified that the maximum concentrations in these participants never exceeded 10 ng/mL (R. 67:1), Wisconsin's threshold for a "detectable" amount of methamphetamine.

For all these reasons, Johnson cannot meet his burden of proving that the inclusion of L-meth as a restricted controlled substance is unconstitutional as applied to him. *Wood*, 323 Wis. 2d 321, ¶ 13.

CONCLUSION

This Court should reverse the circuit court's order requiring the State to prove that Johnson had a detectable amount of D-methamphetamine in his blood.

Dated this 7th day of August 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 6,315 words.

Dated this 7th day of August 2024.

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 7th day of August 2024.

Electronically signed by:

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APPENDIX CERTIFICATION

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

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

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

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