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**SUPREME COURT**

STATE OF WISCONSIN  
IN SUPREME COURT

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No. 2024AP79-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

WALTER L. JOHNSON,

Defendant-Respondent-Petitioner.

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**RESPONSE IN OPPOSITION TO  
PETITION FOR REVIEW**

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## INTRODUCTION

The State of Wisconsin opposes Walter L. Johnson's petition for review of the Wisconsin Court of Appeals' opinion, *State v. Johnson*, 2025 WI App 20 (Kloppenburger, P.J.), (Pet-App. 3–29). Johnson drove over 120 miles per hour, crashed his vehicle, and killed a child, all with 24 ng/mL of methamphetamine in his blood. He was charged with several crimes, including homicide by vehicle with a detectable amount of a restricted controlled substance in his blood and operating with a restricted amount of a controlled substance in his blood causing injury. Johnson moved to dismiss these two counts on the basis that the State failed to prove his blood sample contained D-meth (the isomer of methamphetamine most commonly seen in criminal law) versus L-meth (a different isomer of methamphetamine, sometimes found in very small amounts in certain nasal inhalers). The State argued that the statutes in question unambiguously define “methamphetamine,” and not just one specific isomer of methamphetamine, as a restricted controlled substance.

The circuit court agreed with Johnson. However, the Wisconsin Court of Appeals reversed in a published opinion. The court of appeals held that “methamphetamine,” including L-meth, is unambiguously a restricted controlled substance. The court also rejected Johnson's alternative argument that making L-meth a restricted controlled substance is unconstitutional. Johnson seeks this Court's review.

Review is not warranted. The court of appeals' decision will be the first published Wisconsin case to answer this question. However, a petitioner must still show “special and important reasons” for granting review. Wis. Stat. § (Rule) 809.62(1r). None exist here. The court of appeals correctly interpreted the statute, and its decision is well-reasoned. There is no need for this Court to repeat the court of appeals' correct analysis.

## BACKGROUND

According to the complaint, Johnson drove more than 120 miles per hour on Stoughton Road in Madison. *Johnson*, 2025 WI App 20, ¶ 6. He flipped the car, crashed into an oncoming vehicle, went down an embankment, and eventually came to rest on a frontage road. *Id.* His passenger died. *Id.* The driver of the vehicle he struck was injured. *Id.* A subsequent test of Johnson's blood sample showed that his blood contained 24 ng/mL of methamphetamine at the time of the crash. *Id.* ¶ 7. Johnson was charged with several crimes, including homicide by vehicle with a detectable amount of a restricted controlled substance in his blood (Count 1) and operating with a detectable amount of a restricted controlled substance in the blood, causing injury (Count 3). *Id.* ¶ 5.

In March 2022, approximately one and one-half years after the crash, Johnson's blood sample was discarded, consistent with the Wisconsin State Laboratory of Hygiene's retention policy. *Id.* ¶ 7. Then, in July 2022, Johnson moved to dismiss Counts 1 and 3 on the basis that the State could not prove his blood contained a restricted controlled substance. *Id.* ¶ 8. He argued that L-meth is not a "restricted controlled substance" under Wis. Stat. §§ 340.01(50m), 939.22(33), and 967.055(1m)(b). *Johnson*, 2025 WI App 20, ¶ 9.

The circuit court held evidentiary hearings on Johnson's motion. *Id.* ¶ 10. The testimony established, among other things, that the Hygiene Laboratory does not possess the necessary equipment to distinguish between D-meth and L-meth in the blood. *Id.* It also established that the impairing effects of L-meth are generally milder than those of the same quantity of D-meth, although L-meth can still cause impairment in quantities exceeding the recommended dose. *Id.* ¶¶ 10–11. Johnson argued that L-meth is not a "controlled substance" under Wis. Stat. ch.

961 because it can be lawfully sold over the counter. *Johnson*, 2025 WI App 20, ¶¶ 27–28. Based on this claim, he argued that the statutory definitions of methamphetamine as a “restricted controlled substance” are ambiguous, and he urged the court to interpret “methamphetamine” as meaning only the specific isomer D-meth. *Id.* Alternatively, he argued that making L-meth a restricted controlled substance would violate due process and equal protection. *Id.* ¶ 39.

The circuit court agreed with Johnson that “methamphetamine,” as used in the restricted controlled substances statutes, refers only to the specific isomer D-meth. *Id.* ¶ 11. The circuit court concluded that L-meth is not a “controlled substance” because it cannot be regulated under chapter 961, which renders the word “methamphetamine” ambiguous in the definition of a “restricted controlled substance.” (Pet-App. 46.) The court then used legislative history to resolve the ambiguity and concluded that “methamphetamine” actually means only the specific isomer D-meth. (Pet-App. 49.) The court did not reach Johnson’s alternative constitutional arguments. (Pet-App. 49.) The circuit court did not dismiss the complaint, but it clarified that the State would need to prove Johnson’s blood contained D-meth as opposed to L-meth. (Pet-App. 50.)

The Wisconsin Court of Appeals reversed this decision in an opinion recommended for publication, *State v. Johnson*, 2025 WI App 20 (Kloppenburger, P.J.), (Pet-App. 3–29). The court of appeals first explained that contrary to Johnson’s assertion, L-meth itself is a controlled substance. *Id.* ¶ 33. The exceptions to regulation under chapter 961 apply only to certain specific over-the-counter products containing specified amounts of L-meth in combination with other ingredients. *Johnson*, 2025 WI App 20, ¶ 34. The court then concluded that the unqualified word “methamphetamine,” as used in the restricted controlled substance statutes, refers to all isomers of methamphetamine, not just the specific isomer D-meth.

*Id.* ¶¶ 34–38. The court also rejected Johnson’s alternative argument that the statutes in question are unconstitutional insofar as they define L-meth as a restricted controlled substance. *Id.* ¶¶ 39–53.

Johnson now asks this Court to accept review.

### **JOHNSON’S PETITION DOES NOT WARRANT REVIEW**

This Court should decline to review this case because there is no reason for this Court to repeat the lower court’s proper analysis. *State v. Lee*, 2022 WI 32, ¶ 2, 401 Wis. 2d 593, 973 N.W.2d 764, (Rebecca Grassl Bradley, J., concurring) (“There are much better uses of this court’s time than repeating work already done correctly by a lower court.”). The court of appeals’ decision was correct, its reasoning was thorough and sound, and the lower courts now have all the guidance they need on this issue.

All three statutes involved in this case, Wis. Stat. §§ 340.01(50m), 939.22(33), and 967.055(1m)(b), contain identical language defining a “restricted controlled substance” to include, without qualification, “[m]ethamphetamine.” There is no dispute that L-meth is, in fact, methamphetamine. *Johnson*, 2025 WI App 20, ¶ 1. As the court of appeals correctly explained, “The statutes do not contain any language that limits ‘methamphetamine’ to only one isomer of methamphetamine or that excludes from ‘methamphetamine’ one isomer of methamphetamine.” *Id.* ¶ 25. For this reason, L-meth is unambiguously included in the definition of a restricted controlled substance. *Id.*

Faced with this unambiguous plain language, Johnson attempted to manufacture ambiguity by arguing that L-meth is not a “controlled substance” under chapter 961. *Johnson*, 2025 WI App 20, ¶ 27. Chapter 961 states even more directly that methamphetamine “including any of [its] isomers” is a controlled substance. Wis. Stat. § 961.16(5)(b). But section

961.11(6)(a) states, “The 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 tracks title 21 U.S.C. § 811(g)(1), which excludes any such substance from the federal drug schedules. *Johnson*, 2025 WI App 20, ¶ 30. And the federal food, drug, and cosmetic act specifically excludes two brands of nasal inhaler containing L-meth—Vicks VapoInhaler and a similar product called Rynal Spray. *Id.*

Due to this exclusion, *Johnson* reasoned that L-meth itself must not be a controlled substance. According to *Johnson*, this makes the word “methamphetamine” ambiguous as used in the definition of a restricted controlled substance. *Id.* ¶¶ 27–29, 38.

The court of appeals correctly rejected this argument and held that L-meth itself is both a controlled substance and a restricted controlled substance. The federal food, drug, and cosmetic act does not exclude L-meth itself from the drug schedule. *Id.* ¶ 28. Instead, it excludes only the specific listed products containing L-meth. As the court correctly explained, “If L-meth itself were excluded from all schedules, there would be no need to list two different products containing L-meth; instead, the table would simply list L-meth.” *Id.* ¶ 31.

In support of this common-sense plain reading of the statute, the court of appeals further explained that all four federal circuit courts to have considered this question have agreed with it. The food, drug, and cosmetic act “excludes only the specific products containing methamphetamine in a specified quantity, without suggesting that methamphetamine itself is not a controlled substance.” *Id.* ¶ 32; *United States v. Youngblood*, 949 F.2d 1065, 1066 (10th Cir. 1991) (“[O]ther uses or combinations of methamphetamine[ ] or its isomers [beyond the Vicks and other inhalers specifically excepted by 21 C.F.R. § 1308.22]

remain controlled substances under Schedule II . . . .”); *accord. United States v. Walker*, 960 F.2d 409, 414 (5th Cir. 1992); *United States v. Durham*, 941 F.2d 886, 889–90 (9th Cir. 1991); *United States v. Roark*, 924 F.2d 1426, 1428 n.2 (8th Cir. 1991).

The court of appeals also correctly noted that supplementary information published in the Federal Register when the table is amended “consistently makes clear that L-meth is a controlled substance under the federal Controlled Substances Act and that only a specific product containing not more than a specified concentration of L-meth is excluded from the schedules.” *Johnson*, 2025 WI App 20, ¶ 33; *see, e.g.*, Schedules of Controlled Substances: Table of Excluded Nonnarcotic Products: Nasal Decongestant Inhalers Manufactured by Classic Pharmaceuticals LLC, 74 Fed. Reg. 44281, 44282–83 (Aug. 28, 2009) (“Note that this exclusion only applies to the finished drug product in the form of an inhaler . . . , which is lawfully sold under the Federal Food, Drug, and Cosmetic Act. The extraction or removal of the active ingredient (Levmetamfetamine [L-meth]) from the inhaler shall negate this exclusion and result in the possession of a schedule II controlled substance.”).

Finally, the court of appeals correctly rejected Johnson’s alternative due process and equal protection challenges to the inclusion of L-meth as a restricted controlled substance. Johnson made a substantive due process argument that there would be no rational basis to criminalize driving with a detectable amount of L-meth, which he calls a “perfectly legal substance,” in the blood. *Johnson*, 2025 WI App 20, ¶ 46. The court of appeals correctly explained that L-meth can indeed be impairing at high doses. *Id.* The court further explained that the fact that testing cannot distinguish between L-meth and D-meth (combined with the obvious dangers of driving with D-meth in one’s system) is itself a

rational basis to make L-meth a restricted controlled substance. *Id.* ¶ 47.

Johnson's equal protection argument was that there is no rational basis to classify L-meth as a restricted controlled substance, but not dextromethorphan (a cough medicine ingredient that can cause impairment in large doses). *Id.* ¶ 51. The court of appeals correctly rejected this challenge for two reasons: (1) Johnson made no attempt to show that the impairment caused by dextromethorphan was similar to the impairment caused by L-meth, and (2) the Hygiene Laboratory's testing cannot distinguish L-meth from the highly dangerous D-meth, whereas no similar testing issue exists with dextromethorphan. *Id.* ¶ 52.

In short, the law is clear that L-meth is both a controlled substance and a restricted controlled substance. And there is now a published statewide decision, binding on Wisconsin courts, that says so. There is no need for this Court to merely repeat the work already done by the court of appeals.

Johnson's petition primarily attacks the supposed consequences of this decision, but he both misunderstands the science and makes no attempt to actually prove his claimed consequences have occurred. He makes a hyperbolic assertion that after the court of appeals' decision, "a person who drives after using an over-the-counter nasal spray containing L-meth is just as criminally liable as a person who drives after using the street drug containing D-meth." (Pet. 11.) Completely absent from this misleading argument is any attempt to actually prove what he is claiming—that anyone who lawfully uses an over-the-counter inhaler containing L-meth will necessarily have a "detectable amount" of methamphetamine in his or her blood.

As was already explained in detail in the State's court of appeals brief, Johnson's parade of horrors is based on a

misunderstanding of how testing works. The Hygiene Laboratory does not detect methamphetamine—meaning the driver does not have a “detectable” amount of methamphetamine in his blood—unless the blood sample contains more than 10 nanograms per milliliter of methamphetamine. (R-App. 3.) Johnson has not pointed to a single study suggesting that anyone’s use of the recommended dose of an over-the-counter nasal inhaler has led to anything approaching 10 nanograms per milliliter of methamphetamine in the blood.

This is likely because studies (including some that were used as exhibits in this case) suggest the opposite. *See, e.g.,* Marilyn A. Huestis et al., *Plasma and Oral Fluid l-Methamphetamine Concentrations After Controlled Vicks VapoInhaler Administration*, 2014 Proc. Am. Acad. Forensic Sci. K44; (R-App. 4–5). This Court therefore should not be fooled by Johnson’s completely unfounded claim that a great many Wisconsinites unknowingly drive each day with a detectable amount of a restricted controlled substance in their systems.

Finally, Johnson claims the court of appeals lacked jurisdiction to address the constitutional challenge he raised below, since the circuit court did not reach it. (Pet. 12.) Johnson’s argument misunderstands the posture of this case. Johnson argued in his brief that the court of appeals could affirm the circuit court’s decision on the basis that making L-meth a restricted controlled substance would be unconstitutional. There was no issue with making this alternative argument, as “A respondent may advance on appeal, and [the court of appeals] may consider, any basis for sustaining the trial court’s order or judgment.” *Doe v. General Motors Acceptance Corp.*, 2001 WI App 199, ¶ 7, 247 Wis. 2d 564, 635 N.W.2d 7. The court of appeals addressed this alternative argument, as it should have, and correctly

rejected it. *Johnson*, 2025 WI App 20, ¶¶ 39–53. There was nothing improper or unusual about this procedure.

### CONCLUSION

This Court should deny Johnson's petition for review.

Dated this 28th day of April 2025.

Respectfully submitted,

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Electronically signed by:

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### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,397 words.

Dated this 28th day of April 2025.

Electronically signed by:

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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 28th day of April 2025.

Electronically signed by:

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