STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

JOSH KAUL, in his official capacity as Attorney General, Wisconsin Department of Justice, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD, and SHELDON A. WASSERMAN, M.D., in his official capacity as Chairperson of the Wisconsin Medical Examining Board,

Plaintiffs,

and

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

Intervenors,

v.

Case No. 2022-CV-1594
Declaratory Judgment: 30701

JOEL URMANSKI, in his official capacity as District Attorney for Sheboygan County, Wisconsin, ISMAEL R. OZANNE, in his official capacity as District Attorney for Dane County, Wisconsin, and JOHN T. CHISHOLM, in his official capacity as District Attorney for Milwaukee County, Wisconsin,

Defendants.

PLAINTIFFS' RESPONSE OPPOSING DISTRICT ATTORNEY URMANSKI'S MOTION TO DISMISS

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INTRODUCTION

If Wisconsin's mid-1800's ban is enforceable as to abortion, then Wisconsin statutes give directly conflicting answers to the conditions under which physicians can lawfully perform an abortion. Wisconsin law cannot render performance of the same abortions simultaneously lawful and a criminal felony. Under fundamental principles of statutory interpretation, Wisconsin's mid-1800's ban, listed as Wis. Stat. § 940.04(1), has been superseded and cannot be enforced as applied to abortion. And in these rare circumstances—over 100 years without any meaningful enforcement, followed by roughly 50 years of being unenforceable as a violation of a constitutionally-protected individual liberty—Wisconsin's archaic ban can no longer be considered actual, enforceable Wisconsin law.

To succeed on his motion to dismiss, District Attorney Urmanski must prove to a certainty that there is no way Plaintiffs' claims could succeed. He comes nowhere close. Instead, his arguments further (1) prove that Wis. Stat. § 940.04(1) and Wisconsin's many post-*Roe* abortion laws conflict if both apply to abortion and (2) show that Plaintiffs' disuse argument depends on consideration of historical fact, which cannot be decided at the motion-to-dismiss stage. His arguments simply illustrate why his motion must be denied and Plaintiffs' claims must proceed.

STATUTORY BACKGROUND

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

Wisconsin Stat. § 940.04 originated in 1849. It prohibited the administering of substances to, or use of instruments on, a woman pregnant with a "quick child" with

the intent to destroy the child unless "necessary to preserve the life of [the] mother." Wis. Stat. ch. 133, § 11 (1849).[1] The statute was revised in 1858 to remove "quick" and thereafter purported to prohibit any abortion after conception unless "necessary to preserve the life of [the] mother." *See* Wis. Stat. ch. 164, § 11 (1858). Also in 1858, the Wisconsin Legislature added a provision prohibiting the administering of substances or use of instruments on a pregnant woman with the intent to procure a miscarriage. Wis. Stat. ch. 169, § 58 (1858).

Other than minor amendments not relevant here, the mid-1800's ban remained largely unchanged until the 1950's. In 1955, as part of the creation of the modern criminal code, the Legislature renumbered the statute to Wis. Stat. § 940.04 and made some revisions, including adding criminal penalties for a pregnant woman having an abortion. Wis. Stat. § 940.04(3), (4) (1955); 1955 Wis. Act 696.[2]

Despite over 100 years of being "on the books" and open to enforcement pre-*Roe*, the total ban was rarely enforced. By the end of the nineteenth century, most

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[1] "Quickening" was historically understood to mean the time at which the pregnant woman first detected fetal movement, which typically occurs during the fourth or fifth month of pregnancy. Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774, 1780 n.25 (1991).

[2] Urmanski asserts that the 1950's revisions "broadened the therapeutic abortion exception to allow for abortions that were otherwise prohibited." (Doc. 91:9 (Urmanski Br. 6).) To the contrary, both before and after the criminal code creation, the mid-1800's ban only provided an exception when "necessary" to save the pregnant woman's life. *Compare* Wis. Stat. § 340.095 (1953) (providing an exception when "necessary to preserve the life of such mother"), *with* Wis. Stat. § 940.04(5) (providing an exception when "necessary[] to save the life of the mother"). Urmanski cites to Legislative Council comments about the separate procuring-a-miscarriage statute that contained an unintentional conflict, which was merged into Wis. Stat. § 940.04(1). (*See* Doc. 88:13 (Thome Aff. Ex. A).)

states, like Wisconsin, had criminal laws prohibiting any abortion unless necessary to save the pregnant woman's life. Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774, 1784–85 (1991). And yet, scholars estimate that between 1900 and 1970, for example, one out of every three to five pregnancies ended in abortion. Mark A. Graber, *Rethinking Abortion: Equal Choice, The Constitution, and Reproductive Politics* at 41–42 (1996). By the 1960's, the consensus of both proponents and opponents of these prohibitions was that they worked no better than the Eighteenth Amendment had "worked" at stopping alcohol consumption—it did not stop. *Id.* 43–44.

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

A few years before *Roe v. Wade*, in 1970, a federal district court declared Wis. Stat. § 940.04(1) unconstitutionally overbroad as it purported to criminalize pre-quickening abortions. *Babbitz v. McCann*, 310 F. Supp. 293, 302 (E.D. Wis. 1970). Then, in 1973, the U.S. Supreme Court declared that statutes broadly criminalizing abortion were unconstitutional. *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* specifically listed Wis. Stat. § 940.04 as unconstitutional. *Id.* at 118 n.2. Accordingly, since 1973, Wis. Stat. § 940.04(1) has been affirmatively unenforceable as a violation of an individual constitutional right.

Following *Roe*, the Wisconsin Legislature enacted a comprehensive legal framework dictating when abortion was illegal and providing specific parameters for how physicians may legally perform abortions. For example, Wis. Stat. § 940.15 makes it illegal—a Class I felony—only to perform an abortion "*after* the fetus or

unborn child reaches viability." Wis. Stat. § 940.15(2). It provides exceptions to that limited prohibition where an abortion is necessary to preserve either the life or health of the pregnant woman. Wis. Stat. § 940.15(3). Wisconsin Stat. § 940.13 prohibits any prosecution of a pregnant woman for obtaining an abortion. And Wis. Stat. § 940.15(5) prohibits the performance of abortion by anyone other than a physician.

Chapter 253 provides a detailed statutory framework for providing lawful abortions, including notice and logistical requirements. Wis. Stat. §§ 253.095, 253.10, 253.105, and 253.107. For example, Wis. Stat. § 253.095(2) requires a physician to have admitting privileges in a hospital within 30 miles of where an abortion will be performed. Wis. Stat. § 253.095(2), (3). And Wis. Stat. § 253.10 provides that an abortion may not be performed unless the woman has given "voluntary and informed consent," which includes requirements for providing certain information in advance and an ultrasound. Wis. Stat. § 253.10(3), (3g). Wisconsin Stat. § 253.107 provides that performing or inducing or attempting to perform an abortion is unlawful—a Class I felony—only after "the probable postfertilization age of the unborn child is 20 or more weeks" "unless the woman is undergoing a medical emergency." Wis. Stat § 253.107(3)(a), 4. And other laws regulate a variety of other matters related to lawful abortions, such as administering abortion-inducing drugs, funding, and judicial waivers for parental consent. *See* Wis. Stat. §§ 20.927, 20.9275, 48.375, 253.105, 809.105, 895.037.

While creating this comprehensive post-*Roe* legal framework, the Legislature did not directly repeal the then-unenforceable near-total ban listed in Wis. Stat.

§ 940.04(1), even though it recognized the conflict. 1985 Wis. Act 56, titled the "Abortion Prevention and Family Responsibility Act of 1985," made dramatic changes to Wisconsin abortion law, including creating Wis. Stat. § 940.15.[3] The Legislature contemplated including a provision that would have prohibited Wis. Stat. § 940.15 (listed in drafting originally as Wis. Stat. § 940.045) from repealing Wis. Stat. § 940.04: "NO IMPLIED REPEAL. The creation of section 940.045 of the statutes by this act may not be deemed to repeal section 940.04 of the statute." That language was struck from the bill that became law. (Pls.' App. 101–04).[4]

Since *Roe* and the 1985 enactment of Wis. Stat. § 940.15, the Legislature has made no amendments to Wis. Stat. § 940.04(1)'s language criminalizing abortion after conception unless necessary to save the pregnant woman's life.

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

On June 24, 2022—nearly 50 years after *Roe*—the U.S. Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* constituted "the first time in history" where the Supreme Court had "[r]escind[ed] an individual right in its entirety and confer[red] it on the State[s]." 142 S. Ct. at 2347 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

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[3] The statutory text is available online: 1985 Wis. Act 56, https://docs.legis.wisconsin.gov/1985/related/acts/56.

[4] For the court's convenience, cited portions of this publicly-available governmental record are included as an attachment to this brief. *See Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶ 81, 303 Wis. 2d 295, 735 N.W.2d 448 (at the motion-to-dismiss phase, "[j]udicial notice may also be taken of facts from the public records of government agencies").

MOTION TO DISMISS STANDARD

A motion to dismiss considers only the legal sufficiency of the complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. All facts pled and all reasonable inference to be drawn from those facts are treated as true. *Id.* To obtain dismissal, the movant must show "to a certainty" that no relief could be granted under any set of facts that the Plaintiffs could prove in support of their allegations. *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2015 WI App 40, ¶ 6, 362 Wis. 2d 524, 865 N.W.2d 215 (citation omitted).

ARGUMENT

I. Attorney General Kaul, the Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and Dr. Wasserman are proper plaintiffs, and a justiciable controversy exists.

A. Because Urmanski concedes Intervenors have standing, there is no reason to address standing further.

Plaintiffs have standing. But this Court need not address their standing at all. Urmanski concedes that the Intervenors have standing, (Doc. 91:13 (Urmanski Br. 10)), and courts recognize that standing is sufficient in a forward-looking action seeking a declaration or injunction where one plaintiff has standing.

The Wisconsin Supreme Court treats "federal case law as persuasive authority regarding standing questions." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855. If anything, Wisconsin's standing rules are more "permissive" than federal standing rules. *Teigen v. WEC*, 2022 WI 64, ¶ 14, 403 Wis. 2d 607, 976 N.W.2d 519. "Unlike in federal courts, . . . standing in Wisconsin is not a

matter of jurisdiction, but of sound judicial policy," considering "judicial efficiency." *McConkey*, 326 Wis. 2d 1, ¶¶ 15, 18.

Under federal standing rules, "[a]s long as there is 'at least one individual plaintiff who has demonstrated standing' . . . a court 'need not consider whether the other . . . plaintiffs have standing to maintain the suit.'" *Chi. Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 813 (7th Cir. 2018) (citing U.S. Supreme Court precedent). Urmanski does not argue that *no* plaintiff-side party has standing, but rather concedes that Intervenors do. That means this suit should continue forward with both Plaintiffs and Intervenors.[5]

B. If analyzed further, Plaintiffs have standing under Wisconsin's liberal standards.

Wisconsin courts construe standing requirements "liberally," not "narrowly or restrictively," and do so based on "policy," not constitutional prerequisites. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶¶ 38–40, 333 Wis. 2d 402, 797 N.W.2d 789. "Standing requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed" and that the courts are appraised of a decision's "consequences." *McConkey*, 326 Wis. 2d 1, ¶ 16.

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[5] Though conceding the case should proceed forward, Urmanski asserts that "[g]enerally, because an intervention is ancillary to the main cause of action, courts should refuse to consider an intervenor's claims after dismissing the original claims," and cites *Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983). (Doc. 91:13 (Urmanski Br. 10).) He misreads *Fox*. *Fox* concerned a party's failure to meet the chapter 227-specific filing deadlines. 112 Wis. 2d at 536–38. Looking to non-chapter 227 federal caselaw, the court specifically noted that an intervenor's claims can continue where the intervenor has a separate basis for jurisdiction. *Id.*

That is especially true of a declaratory judgment action like this one, which is "for resolving controversies as to the . . . proper construction and application of statutory provisions" "prior to the time that a wrong has been threatened or committed." *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 303, 307, 240 N.W.2d 610 (1976). A declaratory claim is proper to "remove an uncertainty" and a right to pursue it "is to be liberally construed." Wis. Stat. § 806.04(5), (12).

Wisconsin precedent reflects that government officers, including the Attorney General, may bring a declaratory judgment action to determine a statute's enforceability. For example, *In re State ex rel. Attorney General*, 220 Wis. 25, 264 N.W. 633 (1936), concerned a declaratory judgment action brought by the Attorney General about the enforceability of a chapter of the Wisconsin statutes. Like this case, that case was proper because it concerned an issue "of vital concern . . . to the entire public," addressed "uncertainty and doubt," and implicated "the conduct of [Wisconsin's] high officials" in carrying out the law. *Id.* at 634–35.

Similarly, in *State ex rel. Lynch v. Conta*, the court found the action justiciable where a district attorney brought a declaratory judgment action about whether certain meetings violated the open meetings law, even though the district attorney could have brought an open-meetings enforcement action instead. 71 Wis. 2d 662, 669–674, 239 N.W.2d 313 (1976). The court concluded that *Lynch* presented "unique issues of interest to this state and its citizens," that "[d]oubt will continue until a construction of the statute resolves its meaning," and that the officer's "overall dut[ies]" justified recognizing standing. *Id.* at 668, 673–674.

1. Attorney General Kaul is a proper plaintiff.

Attorney General Kaul is a proper plaintiff because the Department of Justice has statutory duties regarding prosecution, advice, and training that require an answer about which statutes are enforceable as applied to abortion.

DOJ advises prosecutors as requested in "all matters pertaining to the duties of their office." Wis. Stat. § 165.25(3). DOJ coordinates "all preparatory and recertification training activities in law enforcement in the state." Wis. Stat. § 165.86(2)(a). DOJ handles all criminal appeals arising out of felony criminal cases in the State. Wis. Stat. § 165.25(1).

As in *State ex rel. Attorney General* and *Lynch*, Attorney General Kaul's duties here satisfy and serve Wisconsin's policy-based standing considerations: he will carefully develop all relevant arguments and inform the court of the consequences of its decision.

2. The Department of Safety and Professional Services, the Medical Examining Board, and its Chair Dr. Wasserman are also proper plaintiffs.

The Department of Safety and Professional Services, the Medical Examining Board, and its Chair are also proper plaintiffs because DSPS investigates complaints made against physicians for violations of the law and MEB and its Chair make licensing decisions and impose discipline for such violations. To know if a law is violated, they must know what the law *is*.

DSPS conducts factual investigations of physicians for unprofessional conduct. *See* Wis. Stat. § 440.03(3m). This includes investigation of "a violation . . . of any laws

or rules of this state . . . substantially related to the practice of medicine and surgery." Wis. Admin. Code Med § 10.03(1)(a), (3)(i). Attached to DSPS is MEB, and MEB's duties include both licensing physicians to practice medicine and surgery and disciplining physicians based on investigations of unprofessional conduct. *See* Wis. Stat. §§ 448.02, 448.03; Wis. Admin. Code Med § 10.03(1)(a), (3)(i).

Performing medical procedures in "violation" of any "laws . . . of this state" is sanctionable as unprofessional conduct under Wisconsin's medical practice standards. Wis. Admin. Code Med § 10.03(1)(a), (d), (3)(i). However, MEB (with DSPS and MEB's Chair) does not interpret statutes as a court would do to discern the law. Rather, it is tasked with finding facts—what did a physician do?—and then looking to state law to see if it has been violated.

Likewise, MEB promulgates regulations that conform to the law. Currently, in compliance with post-*Roe* statutes, regulations include requirements for how to legally perform abortions during the first 12 weeks of gestation. Wis. Admin. Code Med § 11.04. If Wis. Stat. § 940.04(1) were enforceable as applied to abortion, such regulations and the consequences to MEB's duties would change. The question here directly impacts MEB's and its Chair's ability to carry out their duties related to enforcement and licensing and concern an issue in doubt of the utmost public importance.

3. Urmanski's arguments to the contrary fail.

Urmanski argues there is no controversy, but his own filings on the merits demonstrate that a bona fide controversy exists. At the motion-to-dismiss phase, this

Court must "accept as true all facts . . . in the complaint and the reasonable inferences therefrom." *Data Key Partners*, 356 Wis. 2d 665, ¶ 19. The pleadings and inferences here contend that uncertainty in the law affects Plaintiffs' carrying out of their duties. (Doc. 34:8–9, 15 (Amended Compl. ¶¶ 4–7, 29).) That must be accepted as true. Urmanski's contrary factual assertions are not relevant.

His specific contentions also are flawed. He emphasizes that typical plaintiffs in a declaratory judgment action regarding a criminal law are those who could be subject to prosecution, but he simultaneously admits that other parties may be proper plaintiffs in the right case. (Doc. 91:11 (Urmanski Br. 8).) Indeed, prosecution is not a prerequisite to a declaratory judgment action seeking statutory construction; rather "[w]hat is required is that the facts be sufficiently developed to allow a conclusive adjudication." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211. Urmanski primarily relies on *Lynch*, but that case *allowed* a district attorney to bring a declaratory judgment action about a statute's enforceability.

Urmanski also cites *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627 (1936), for the proposition that a mere "difference of opinion" by itself "is not enough to make a justiciable controversy," (Doc. 91:12 (citing *Dammann,* 264 N.W. at 629) (Urmanski Br. 9)), but that case is not on point. *Dammann* addressed a scenario where the Governor sued the Secretary of State about certain appointment powers, but the Secretary of State had no role to play in the act of appointment itself. 264 N.W. at 629. Here, in contrast, Plaintiffs have important statutory roles relating to the execution and enforcement of the law, and properly bring this action.

II. Wisconsin Stat. § 940.04(1) irreconcilably conflicts with later-enacted statutes if it is applied to abortion.

Wisconsin Stat. § 940.04(1) cannot be enforced as applied to abortion because it has been impliedly repealed by Wisconsin's later-enacted abortion statutes. To warrant dismissal of this claim, Urmanski must show "to a certainty" that no relief could be granted. *Cattau*, 362 Wis. 2d 524, ¶ 6. His arguments reveal the opposite conclusion: it is impossible for Wis. Stat. § 940.04(1) and Wisconsin's later-enacted statutes to both be enforceable as to abortion.

If Wis. Stat. § 940.04(1) applies to abortion, it has been superseded by later-enacted statutes. If this Court will not hold that Wis. Stat. § 940.04(1) has been impliedly repealed, the only way to harmonize the statutes would be to hold that Wis. Stat. § 940.04(1) does not apply to abortion but rather is only a feticide statute.

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

1. Earlier-enacted statutory language is impliedly repealed by a direct conflict with a later statute or where subsequent comprehensive legislation governs the field of how a practice is regulated.

Wisconsin law recognizes that an earlier statute has been impliedly repealed by a later statute or later statutes in two circumstances.

First, later law impliedly repeals an earlier law where an "irreconcilable" conflict exists between the earlier and later provisions; if so, the later-enacted statutory language controls. *E.g.*, *State v. Dairyland Power Co-Op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971). "The rule of law is harmed" whenever "a statute that directly

contradicts an earlier enactment is not held to repeal it." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 331 (2012).

Second, implied repeal occurs "by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with the subject." *Wisth v. Mitchell*, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971) (citation omitted); *see also Thom v. Sensenbrenner*, 211 Wis. 208, 247 N.W. 870, 871 (1933); *KW Holdings, LLC v. Town of Windsor*, 2003 WI App 9, ¶¶ 27–29, 259 Wis. 2d 357, 656 N.W.2d 752 (implied repeal applies where a later enactment omits a requirement in an earlier-enacted ordinance while still "comprehensively addressing the specific procedures"). A regulatory regime, by its nature, "authoriz[es] contrary or inconsistent conduct" when compared to a near-total ban. *Eichenseer v. Madison-Dane Cnty. Tavern League, Inc.*, 2008 WI 38, ¶ 66, 308 Wis. 2d 684, 748 N.W.2d 154 (citation omitted). To rule otherwise "would render large portions of [the statutory chapter] meaningless." *In re Commitment of Matthew A.B.*, 231 Wis. 2d 688, 709, 605 N.W.2d 598 (Ct. App. 1999) (stating this reasoning as to chapter 980).

2. Courts must be particularly prepared to apply implied repeal in the context of criminal penal laws.

Courts must be particularly strict in recognizing implied repeal when the conflict occurs between criminal penal statutes. In *State v. Christensen*, 110 Wis. 2d 538, 329 N.W.2d 382 (1983), the Wisconsin Supreme Court emphasized that while there is "strong public policy favoring the continuing validity of a statute except where the legislature has acted explicitly to repeal it . . . there is an even *stronger*

public policy in favor of the strict construction of penal statutes *where there is doubt as to the statutory scheme*." *Id.* at 546 (emphasis added). Courts must favor resolving a criminal-law statutory conflict because the People must have "notice as to what conduct is criminal." *Id.*

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

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

Numerous other jurisdictions have recognized both versions of implied repeal—(1) direct conflict between two statutes and (2) a conflict between an earlier statute and a subsequent conflicting comprehensive regulatory regime—to rule that an older abortion law was unenforceable.

As to direct conflict between two statutes, the Seventh Circuit concluded that a Wisconsin abortion law was impliedly repealed in *Karlin v. Foust*, 188 F.3d 446, 468–71 (7th Cir. 1999). The case addressed competing exceptions to a 24-hour waiting period otherwise applicable to performing an abortion on a minor: one turning on "reasonable medical judgment" about whether there was a "significant threat" to health, and the other on whether "to the best of [the physician's] medical judgment based on the facts of the case . . . a medical emergency exists." *Id.* at 468. Applying

Wisconsin's implied-repeal precedent, the court explained that the former was an "objective" test whereas the latter was a "subjective" one. *Id.* at 468–69. Because those conflicting tests concerned the same "circumstances" and under "the plain wording" were "manifestly inconsistent," the court ruled that the later-enacted law impliedly repealed the earlier one. *Id.* 469–471.

Similarly, in *State v. Buck*, 262 P.2d 495 (Or. 1953), the Oregon Supreme Court ruled that a newer "Medical Practice Act" containing a health exception impliedly repealed an older criminal abortion law that broadly banned abortion. *Id.* at 496–503. "It would be paradoxical, indeed, if the state were permitted to prosecute a doctor for a violation of the Criminal Abortion Act when, under the Medical Practice Act, he was permitted to do the very thing he was prosecuted for." *Id.* at 501.

As to the second type of implied repeal, courts have applied the doctrine to abortion statutes where there is a subsequent, comprehensive regulatory scheme that is incompatible with a blanket ban. This occurred in the Fifth Circuit's analysis of Texas abortion laws paralleling Wisconsin's laws. *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004). Texas had a pre-*Roe* law that criminalized abortion and a post-*Roe* statutory regime that regulated lawful abortions: "Currently, Texas regulates abortion in a number of ways. . . . Texas also regulates the practices and procedures of abortion clinics through its Public Health and Safety Code." *Id.* at 849. The court held that the later regime impliedly repealed the pre-*Roe* law: the "regulatory provisions cannot be harmonized with provisions that purport to criminalize abortion. *There is no way to enforce both sets of laws*; the current regulations are intended to

form a comprehensive scheme—not an addendum to the criminal statutes struck down in *Roe*." *Id.* (emphasis added).

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

In some cases, both types of implied repeal apply. In *Weeks v. Connick*, 733 F. Supp. 1036, 1038–39 (E.D. La. 1990), a federal court held that a post-*Roe* Louisiana law restricting "post-viability abortions" and extensive post-*Roe* regulations impliedly repealed an older, blanket abortion ban both because the newer statute conflicted and because the regulations meant that "abortions are permissible if set guidelines are followed." As these and other cases show, courts across the country have considered competing state criminal abortion laws and repeatedly concluded that earlier broad bans were impliedly repealed by later statutes.

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

If applied to abortion, Wis. Stat. § 940.04(1) has been impliedly repealed under both forms of the doctrine: it directly conflicts with another statute and is fundamentally inconsistent with the comprehensive scheme for regulating lawful abortions. And recognizing implied repeal here is particularly critical because the conflict exists in the context of criminal penal laws.

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

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

Wisconsin Stat. § 940.04(1), in contrast, would purport to criminalize the very abortions specifically *recognized as lawful* by Wis. Stat. § 940.15. Wisconsin Stat. § 940.04(1) provides that "[a]ny person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." It applies to "a human being from the time of conception." Wis. Stat. § 940.04(6). The only exception is to "to save the life of the mother." Wis. Stat. § 940.04(5).

The two statutes directly conflict: (1) Wis. Stat. § 940.15 prohibits abortion only "after the fetus or unborn child reaches viability," while Wis. Stat. § 940.04(1) would prohibit any abortion "from the time of conception;" and (2) Wis. Stat. § 940.15 recognizes exceptions where an abortion is necessary to preserve the life *or health of* the pregnant woman, while Wis. Stat. § 940.04(1) makes an exception only when necessary to save the pregnant woman's life.

As with the statutes at issue in *Karlin* and *Buck*, these statutes tell physicians two directly conflicting things. That direct conflict compels the conclusion that the

earlier statute is impliedly repealed. Wisconsin law cannot make the very same acts of providing abortions simultaneously lawful and a felony.

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

Wisconsin Stat. § 940.04(1) also irreconcilably conflicts with the broad comprehensive regulatory scheme regulating the performance of legal abortions. Wisconsin has established a comprehensive framework for regulating abortion—addressing the who, what, when, where, how, and funding of lawful abortions—that is fundamentally at odds with Wis. Stat. § 940.04(1).

Wisconsin Stat. § 253.10(3) provides that an abortion may not be performed "unless the woman" has given "voluntary and informed consent." That "voluntary and informed consent" has several components, including advising the woman at least 24 hours in advance of risks of abortion and the "characteristics of the . . . unborn child." Wis. Stat. § 253.10(3)(c). Except in a medical emergency or under other special circumstances, the physician who is to perform or induce the abortion must perform an ultrasound and display the images. Wis. Stat. § 253.10(3g). For medication-inducing drugs, the prescribing physician must both perform a physical examination of the woman and be physically present in the room when the drug is given. Wis. Stat. § 253.105(2), (3). Wisconsin Stat. § 253.107(3)(a) makes it a Class I felony to perform or induce an abortion "if the probable postfertilization age of the unborn child is 20 or more weeks" "unless the woman is undergoing a medical emergency." And Wis.

Stat. § 253.095(2) imposes a 30-mile hospital-proximity requirement on physicians performing abortions.

The chapter 253 framework establishes that physicians act *lawfully* when they comply with the extensive regulatory provisions for their medical practice. As with the laws at issue in *McCorvey*, *Bentley*, and *Weeks*, that also means the earlier ban was impliedly repealed. As *Weeks* recognized, "it is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another to provide that abortions are criminally prohibited." 733 F. Supp. at 1038.

Even beyond the specific requirements in chapter 253, Wis. Stat. §§ 48.257 and 48.375 contain provisions for parental consent for a minor and how to waive it, which includes exceptions for sexual assault, incest, or abuse by a caregiver. And Wis. Stat. § 20.927 generally prohibits governmental subsidy of abortion but contains exceptions for cases of rape or incest or to treat a prior-existing medical condition when that condition may cause serious damage to the woman's health. *None* of this regulatory framework serves a purpose if abortion is illegal in Wisconsin unless necessary to save the pregnant woman's life.

3. Application of implied repeal is particularly critical here, where criminal statutes conflict.

The implied repeal doctrine holds particular force here because these are criminal statutes. Under *Christensen*, this Court must favor implied repeal because

these conflicts create doubt as to what conduct is and is not criminal. 110 Wis. 2d at 546.[6]

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

Urmanski's arguments both prove Plaintiffs' position that these statutes irreconcilably conflict if Wis. Stat. § 940.04(1) applies to abortion and misunderstand notice requirements for criminal statutes.

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

Urmanski offers no way for this Court to interpret Wis. Stat. § 940.04(1) as applied to abortion in a way that doesn't repeal later-enacted statutes, including Wis. Stat. § 940.15 and Wisconsin's statutory regime for regulating lawful abortions. He argues that Wis. Stat. §§ 940.04(1) and 940.15 can be harmonized, but his only proposal is to interpret Wis. Stat. § 940.04(1) as completely swallowing Wis. Stat. § 940.15. (Doc. 91:18–20, 26 (Urmanski Br. 15–17, 23).) That does not *harmonize* the statutes. *See, e.g., Matthew A.B.*, 231 Wis. 2d at 709 ("Construing one statute to void others would make no sense and would lead to unreasonable and absurd results" (citation omitted)).

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[6] In addition to implied repeal, a separate statutory-construction principle also mandates the conclusion that Wis. Stat. § 940.04(1) has been superseded: "where two conflicting statutes apply to the same subject, the more specific statute controls." *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686 (citation omitted). Thus, a more detailed and "targeted" statute will trump a conflicting general statute with greater "breadth." *Id.* ¶ 21. Wisconsin Stat. § 940.15 and the detailed, comprehensive regulatory statutes "control[ ]" as applied to abortion over the general ban in Wis. Stat. § 940.04(1).

Urmanski argues that Wis. Stat. § 940.15 "does not cover the whole subject of abortion" and "says nothing one way or the other about the legality of abortions." (Doc. 91:18, 20–21 (Urmanski Br. 15, 17–18).) That's incorrect. First, under his arguments, Wis. Stat. § 940.15 would be rendered completely superfluous—i.e., effectively repealed as Wisconsin law. Further, Wis. Stat. § 940.15 *does* cover the whole subject of criminalizing abortion: it (1) provides the point after which abortion is illegal, which necessarily means it is legal before that point, Wis. Stat. § 940.15(2); (2) contains an exception for the health of the pregnant woman, which explicitly makes it legal to perform an abortion at any stage if "necessary to preserve the life or health of the woman," Wis. Stat. § 940.15(3); and (3) instructs physicians on the "method of abortion," Wis. Stat. § 940.15(6). Those provisions make clear that a physician acts legally if he or she complies with those requirements. Urmanski has no answer to this.

Further, Urmanski cannot show that the many statutory regulatory provisions do not conflict with Wis. Stat. § 940.04(1). Instead, he pivots to savings language in some (but not all) of chapter 253's provisions saying that nothing in the statute "may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." (Doc. 91:22–23 (Urmanski Br. 19–20).) That language does not help him.

First, several of Wisconsin's abortion regulations have no such savings language, including Wis. Stat. §§ 253.095, 48.257, 48.375, and 20.927. Second, even where it does exist, statutory history shows that the savings language refers not to

Wis. Stat. § 940.04(1) but to Wis. Stat. § 940.15, which was enacted at the same time or before the regulations containing that language. *See Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581 (explaining that courts may refer to statutory history when construing statutes). That is, several of the abortion provisions in chapter 253 were enacted in 1985 together with Wis. Stat. § 940.15. Others were enacted later. None of these savings clause provisions were enacted when the near-total ban in Wis. Stat. § 940.04(1) could have been enforced, but rather came at the time, or after, that Wis. Stat. § 940.15 was enacted in 1985 Wis. Act 56. These provisions therefore only make sense when construed in light of the narrower limits of Wis. Stat. § 940.15—where abortions may occur in more circumstances and, thus, are amenable to the regulations concerning those broader circumstances.

And more fundamentally, Urmanski offers no support for the concept that the Legislature can avoid the massive statutory conflict simply by providing that a few regulations didn't create a "right to abortion." The question is not whether any regulations created a right, but rather whether the existence of dueling statutes and regulatory scheme leave the public in an untenable "quandary" about which laws apply. *Karlin*, 188 F.3d at 468.

Urmanski tries to pretend that the Legislature wrote something it didn't: that all these laws were conditional laws that existed only if the U.S. Supreme Court never

overturned *Roe*. Over a dozen state legislatures created such trigger laws (*see, e.g.,* Idaho Code Ann. § 18-622; Mo. Ann. Stat. § 188.017), but Wisconsin did not.[7]

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

Urmanski also asserts that Wis. Stat. § 940.04(1) and Wis. Stat. § 940.15 overlap, so there is no direct conflict. He misunderstands the cases finding statutory overlap and the law on notice requirements for criminal prohibitions.

As a general rule, the same factual act may be illegal under multiple criminal statutes. Where conduct is always unlawful, an individual has notice of that unlawfulness; it is simply the type of punishment that may vary. These are the types of statutes found in the cases Urmanski relies on, like *State v. Villamil*, where the same act was criminal under two statutes but punishable as either a misdemeanor or felony. 2017 WI 74, 377 Wis. 2d 1, 898 N.W.2d 482. *Villamil* and *Edwards v. United States*, 814 F.2d 486 (7th Cir. 1987), the other criminal "overlap" case to which Urmanski also incorrectly points, (*see* Doc. 91:18 (Urmanski Br. 15)), rely on *Batchelder*. The U.S. Supreme Court in *Batchelder* rejected a due process challenge to criminal statutes that both made an act illegal, but offered different punishments for it: "[W]hen an act *violates more than one criminal statute*, the Government may

[7] For example, *Planned Parenthood Arizona, Inc. v. Brnovich*, __ P.3d __, 2022 WL 18015858 (Ariz. Ct. App. Dec. 30, 2022), held that Arizona's pre-*Roe* near-total ban could not be applied to physicians who perform abortions in accordance with that state's post-*Roe* statutes. The Arizona court of appeals emphasized that the state legislature "conspicuously avoided statutory language stating that [the archaic ban] should govern irrespective of other law should *Roe* be overturned." *Id.* at *5.

prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (emphasis added).

That is not the case when the same factual act is lawful under one state statute and illegal under another: an individual cannot know whether conduct is lawful or not when two state statutes say directly opposite things. Indeed, *Batchelder* recognized that the circumstances there were different from circumstances involving "positive repugnancy between the provisions," where implied repeal *would* apply. *Id.* at 122 (citation omitted).[8] And the Wisconsin Supreme Court has made clear when implied repeal *must* apply: when the Legislature fails to "creat[e] legislation which will eliminate any doubts as to *what conduct is subject to penal sanctions*." *Christensen*, 110 Wis. 2d at 547 (emphasis added). This conflict violates the very foundation of our rule of law: a government with unpredictable and arbitrary laws "poisons the blessings of liberty itself." *Federalist* No. 62 (James Madison) (Clinton Rossiter ed., 1961).

Urmanski incorrectly describes *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214, as holding that "a conflict between laws does not exist simply because the same conduct would violate one statute but not the other." (Doc. 91:18 (Urmanski Br. 15).) It did not so hold. The court *rejected* the argument that the same

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

conduct would violate one statute but not the other, and therefore held that no conflict existed. *Grandberry,* 380 Wis. 2d 541, ¶¶ 21–23. It held that the two statutes served different purposes and imposed distinct *additional* prohibitions that the other did not; therefore, "compliance with both statutes is not only possible, it is required." *Id.* ¶ 21. Here, in contrast, a physician *cannot* perform an abortion unnecessary to save the pregnant woman's life that is both in compliance with Wis. Stat. § 940.15 and does not violate Wis. Stat. § 940.04(1).

Urmanski makes the absurd argument that this direct conflict is of no matter because Wis. Stat. § 940.15 "does not *require* a physician to perform" any abortions. (Doc. 91:18 (Urmanski Br. 15).) Under Urmanski's logic, a drunk-driving (OWI) law says nothing about when it *is* legal to drive with alcohol in one's system (i.e. generally below a 0.08% BAC) because the criminal law does not *require* anyone to drive. That is not how penal laws work. *See Buck*, 262 P.2d at 501 ("[I]f one is told that he will be chastised for doing a certain thing unless he does it in a certain way, it is equivalent to telling him that if he does it in the prescribed way he will not be punished."). And Urmanski's argument is even more problematic because Wis. Stat. § 940.15 *specifically exempts* abortions that would be illegal under Wis. Stat. § 940.04(1).

Urmanski's strawman rule-of-lenity argument further reveals he has *zero* answer to the statutory conflict. He argues that no notice problems exist if Wisconsinites read Wis. Stat. § 940.04(1) in isolation. (*See* Doc. 91:25 (Urmanski Br. 22).) That, of course, ignores the whole implied repeal analysis: whether two laws, considered together, conflict.

This Court need not take Plaintiffs' word for it that the conflict between Wis. Stat. §§ 940.04 and 940.15 is irreconcilable if both statutes apply to abortion—the Wisconsin Supreme Court has already reached that conclusion. *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994). *Black* concerned Wis. Stat. § 940.04(2)(a), also a subsection of 940.04, titled "Abortion." Wisconsin Stat. § 940.04(2)(a) provides that "[a]ny person, other than the mother, who . . . [i]ntentionally destroys the life of an unborn quick child" is "guilty of a Class E felony." *Black*, 188 Wis. 2d at 644 (citing Wis. Stat. § 940.04(2)(a)). The only textual differences between Wis. Stat. § 940.04(2)(a) (addressed in *Black*) and 940.04(1) (at issue here) are that 940.04(2)(a) applies to an "unborn quick child" while 940.04(1) applies to an "unborn child," and 940.04(2)(a) constitutes a Class E felony while 940.04(1) constitutes a Class H felony.

The challenger in *Black* argued that Wis. Stat. § 940.04(2)(a) had been "impliedly repealed when the legislature enacted sec. 940.15 in response to *Roe v. Wade*." 188 Wis. 2d at 644–45. The Wisconsin Supreme Court held that Wis. Stat. § 940.04(2)(a) could *not* be construed as applying to a physician performing a consensual abortion because of "the newer sec. 940.15." *Id.* at 646.

Urmanski attempts to sidestep *Black* by asserting that its statements concerning the conflict with Wis. Stat. § 940.15 were "not essential to the court's holding." (Doc. 91:21 (Urmanski Br. 18).) But the court had to construe a subsection within Wis. Stat § 940.04, titled "Abortion," as *not* applying to consensual abortions (and instead only feticide) *because* of the conflict that would otherwise exist with Wis. Stat. § 940.15. *Black*, 188 Wis. 2d at 646. Even if that were not the case, courts "may

not dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682.

3. Urmanski's resort to legislative and statutory history does not help him.

Urmanski announces that this case presents a question of "legislative intent" and then proceeds to advance non-statutory assertions of what he believes the Legislature had in mind with these two statutes. (Doc. 91:17–20 (Urmanski Br. 14–17).) But "[i]t is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The case Urmanski himself cites so holds: it addresses implied repeal by analyzing the statutory text, not external sources. *See KW Holdings,* 259 Wis. 2d 357, ¶¶ 27–29.[9]

And Urmanski's arguments about the Legislature's consideration of *expressly* repealing Wis. Stat. § 940.04 fail for three reasons. (Doc. 91:20 (Urmanski Br. 17).)

First, post-*Roe*, the Legislature had no good reason to expressly repeal Wis. Stat. § 940.04 because it had been rendered a nullity by *Roe* and *Black*. A court presumes that "the legislature acts with full knowledge of existing statutes and how the courts have interpreted these statutes." *State v. Victory Fireworks, Inc.*, 230 Wis. 2d 721, 727, 602 N.W.2d 128 (Ct. App. 1999).

[9] Urmanski cites *Gilkey v. Cook*, 60 Wis. 133, 18 NW. 639, 641 (1884), a case only slightly younger than the mid-1800's ban that is contrary to *Kalal* and modern statutory interpretation.

Second, Urmanski conflates express and implied repeal. The latter comes up only when the Legislature did *not* expressly repeal. The question presented by the implied repeal doctrine is whether two statutes, on their faces, irreconcilably conflict. Implied repeal does not turn on whether the Legislature did or did not do something; it is a principle of construction requiring *courts* to step in when the statutes conflict.

Third, even if the legislative history were considered, it would not help Urmanski. It contains evidence that the Legislature *did* understand that implied repeal was in play: that it considered stating "NO IMPLIED REPEAL" but decided *against* including that language. (Pls.' App. 101–04.)

Urmanski contends that it matters that the Legislature made changes to Wis. Stat. § 940.04 in 2001 and 2011 but did not repeal it. But those amendments addressed provisions of Wis. Stat. § 940.04 not in conflict here: changing the penalty as part of truth-in-sentencing legislation, and removing language providing for the prosecution of the pregnant woman. 2001 Wis. Act 109, § 586; 2011 Wis. Act 217, § 11. The statute was not comprehensively rewritten, and neither change related to the near-total ban.

D. If this Court will not hold that Wis. Stat. § 940.04(1) was impliedly repealed, the only possible way to harmonize the statutes would be to construe Wis. Stat. § 940.01(1) as applying only to *non-consensual* pregnancy terminations.

Wisconsin Stat. § 940.04(1) cannot co-exist as applied to abortion with Wis. Stat. § 940.15 and the many other modern abortion statutes. If this Court does not hold at summary judgment that Wis. Stat. § 940.04(1) was impliedly repealed, the only possible way to harmonize otherwise irreconcilable statutes would be to construe

Wis. Stat. § 940.04(1) as applying only to the intentional termination of a pregnancy without the pregnant woman's consent. This is the statutory construction the *Black* court reached when confronted with the direct conflict between Wis. Stat. §§ 940.04(2)(a) and 940.15.

After holding that Wis. Stat. § 940.04(2)(a) could *not* be construed to apply to "to a physician performing a consensual abortion," both because of then-existing *Roe v. Wade* and because of "the newer sec. 940.15," *Black* construed the two statutes as each having "a distinct role." *Black*, 188 Wis. 2d at 646. It concluded that Wis. Stat. § 940.15 "places restrictions" on "consensual abortions: medical procedures, performed with the consent of the woman, which result in the termination of a pregnancy by expulsion of the fetus from the woman's uterus." It further concluded that unlike Wis. Stat. § 940.15, Wis. Stat. § 940.04(2)(a) "*is not an abortion statute*. It makes no mention of an abortive type procedure. Rather, it proscribes the *intentional criminal act of feticide:* the intentional destruction of an unborn quick child presumably without the consent of the mother." *Id.* (emphasis added). The Court "disregard[ed] the title of the statute," "Abortion," "[i]n the face of such plain and unambiguous language." *Id.* at 645.

That analysis could apply equally to Wis. Stat. § 940.04(1). Wisconsin Stat. § 940.04(1), like Wis. Stat. § 940.04(2)(a), is in a statute labeled "Abortion" but "makes no mention of an abortive type procedure." Like Wis. Stat. § 940.04(2)(a), Wis. Stat. § 940.04(1) imposes liability for any person "other than the mother." And Wis. Stat. §

940.04's statutory exception to "save the life of the mother" applies to both subsections (1) and (2)(a) under the statutory text. Wis. Stat. § 940.04(5).

Black's approach could serve to harmonize otherwise irreconcilable statutes. Holding, as in *Black*, that Wis. Stat. § 940.04(1) "is not an abortion statute" but instead proscribes "the intentional destruction" of an "unborn child" "without the consent of the mother," 188 Wis. 2d at 646, would mean that both Wis. Stat. § 940.04(1) and 940.04(2)(a) would penalize intentional destruction of an unborn child without the pregnant woman's consent. Wisconsin Stat. § 940.04(1) would apply to non-consensual terminations of earlier-stage pregnancies and carry a lesser penalty than Wis. Stat. § 940.04(2) (Class H versus Class E felony).[10] And no tension would exist with Wis. Stat. § 940.15 or any other modern statute regulating consensual abortions because Wis. Stat. § 940.04(1) could not be used to "charge for a consensual abortive type of procedure." *Black*, 188 Wis. 2d at 646.

The Wisconsin Jury Instructions are consistent, setting forth an instruction for the crime of feticide—not abortion—under Wis. Stat. § 940.04(1) and explaining in a comment that while "*Black* addressed a charge under subsec. (2)(a) of § 940.04," "[t]he only difference between the two subsections is that sub. (2)(a) applies a more serious penalty where the defendant destroys the life of an unborn "quick' child." Wis. JI–Criminal 1125, n.2 (2006).

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[10] The 1953 Wisconsin Legislative Council Judiciary Committee Report, to which Urmanski cites extensively, reflects that the Legislature understood Wis. Stat. § 940.04(2) to be the aggravated version of Wis. Stat. § 940.04(1): "Subsection (2) increases the maximum penalty to 15 years if the fetus has quickened (about the fourth month of pregnancy) or if the mother dies." (Doc. 88:12 (Thome Aff. Ex. A).)

Further, this construction could harmonize Wis. Stat. § 940.04(1) with Wisconsin law's emphasis on the importance of the pregnant woman's informed consent. Wisconsin Stat. § 253.10(3) provides specific procedures to ensure that a pregnant woman has given consent that is both *voluntary* and *informed*. Those procedures are superfluous if the only circumstance in which a woman may obtain an abortion in Wisconsin is if it is necessary to save her life. *See, e.g.,* Wis. Stat. § 253.10(3)(c) (informed consent procedures that are required "*[e]xcept* if a medical emergency exists").[11]

Ultimately, if this Court declined to hold that Wis. Stat. § 940.04(1) has been impliedly repealed, the only way to avoid declaring some Wisconsin statute or statutes effectively repealed would be to construe Wis. Stat. § 940.04(1) as the Wisconsin Supreme Court already construed Wis. Stat. § 940.04(2)(a): it does not apply to any "consensual abortions" but is, instead, a "feticide statute only." *Black,* 188 Wis. 2d at 646–47.

* * *

Plaintiffs are confident that, on summary judgment, this Court will hold that, if Wis. Stat. § 940.04(1) applies to abortion, it irreconcilably conflicts with Wis. Stat. § 940.15 and Wisconsin's comprehensive statutory scheme for the regulation of lawful abortions. Wisconsin Stat. § 940.04(1) has been impliedly repealed; if not, then Wis.

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[11] The Arizona court of appeals reached a similar conclusion to the Wisconsin Supreme Court in *Black* when confronted with a parallel post-*Dobbs* abortion law conflict. *Planned Parenthood*, __ P.3d __, 2022 WL 18015858, at *3–6 (harmonizing statutes by holding that an archaic ban cannot be enforced against "physicians who perform abortions" given post-*Roe* statutes).

Stat. § 940.04(1) must only be a feticide statute, as the *Black* court held regarding Wis. Stat. § 940.04(2)(a).

III. Plaintiffs will prove that in this rare combination of circumstances, Wis. Stat. § 940.04(1) is also unenforceable due to disuse.

Wisconsin Stat. § 940.04(1) is unenforceable as applied to abortion for a second reason: under principles grounded in notice and reliance, the lack of meaningful enforcement of this near-total ban—for both the over 100 years that it could have been enforced and the roughly 50 years that it was unenforceable as a violation of a constitutionally protected right—has rendered it unenforceable. Urmanski's factual disputes show this claim cannot be resolved at the motion-to-dismiss stage.

A. In rare circumstances, criminal prohibitions that have long and openly gone unenforced in any meaningful way may become unenforceable through desuetude.

The doctrine of desuetude—the principle that laws may, in rare circumstances, become unenforceable through a long period of disuse—has been an important equitable rule since Roman Law. "[S]tatutes may be repealed not only by vote of the legislature but also by the silent agreement of everyone expressed through desuetude." *Pryor v. Gainer*, 351 S.E.2d 404, 411 n.9 (W. Va. 1986) (quoting Book One of *The Digest of Justinian*).

Akin to fair-notice requirements and vagueness prohibitions, the desuetude doctrine is grounded in the tenet that law must be based on the consent of the governed and on not the whims of particular individuals: "a law prohibiting some act that has not given rise to a real prosecution in 20 years is unfair to the one person selectively prosecuted under it." *Comm. on Legal Ethics of the W. Va. State Bar v.*

Printz, 416 S.E.2d 720, 724 (W. Va. 1992). Put differently, a statute that has long gone unenforced "is not, in the normal way, a continuing reflection of the balance of political pressures. When it is resurrected and enforced, it represents the *ad hoc* decision of the prosecutor, unrelated to anything that may realistically be taken as present legislative policy." Alexander M. Bickel, *The Supreme Court, 1960 Term-Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 63 (1961). In those circumstances, desuetude prohibits enforcement of such laws.

In *Poe v. Ullman*, 367 U.S. 497 (1961), the U.S. Supreme Court applied a desuetude rationale in the context of a long-unenforced reproductive healthcare prohibition. The Court declined to decide a declaratory judgment action concerning the constitutionality of a Connecticut criminal ban on contraception on desuetude principles, noting that the contraception prohibition law had been "on the State's books" for "more than three-quarters of a century" but had almost never been enforced, despite the common sale of contraceptives. *Id.* at 501–02.

Rather, the long period without any meaningful enforcement showed that "'[d]eeply embedded traditional ways of carrying out state policy'—*or not carrying it out*—'are often tougher and truer law than the dead words of the written text.'" *Id.* at 502 (emphasis added) (citation omitted). The Court concluded that Connecticut's longstanding lack of enforcement of this prohibition rendered it not an actual prohibition and, because it was not an actual prohibition, federal abstention prohibited it addressing its constitutionality: "This Court cannot be umpire to debates concerning harmless, empty shadows." *Id.* at 508.

The West Virginia Supreme Court has declared multiple penal statutes unenforceable under the desuetude doctrine. In *Committee*, the court declared void a penal statute prohibiting a victim or victim's agent from seeking restitution in lieu of criminal prosecution. 416 S.E.2d at 725–27. And in *State ex rel. Canterbury v. Blake*, 584 S.E.2d 512 (W. Va. 2003), the court declared void a penal statute requiring record-keeping for purchases of precious gems and metals.

The West Virginia court cautioned that desuetude is *not* "a judicial repeal provision that abrogates any criminal statute that has not been used in X years," *Committee*, 416 S.E.2d at 726, but instead applies only where three criteria are present: (1) the prohibited behavior must be *malum prohibitum*, not *malum in se*—meaning an act that is not necessarily immoral, but a crime because law prohibits it; (2) "there must be an open, notorious, and pervasive violation of the statute for a long period;" and (3) there must have been "a conspicuous policy of nonenforcement" of the statute. *Id.* In both *Committee* and *Canterbury*, the Court held that 20 years of no real enforcement rendered each respective statute void due to desuetude. *Committee*, 416 S.E.2d at 727; *Canterbury*, 584 S.E.2d at 516–17.

The Wisconsin Supreme Court has acknowledged that statutes can fall into desuetude. In *Williams v. Travelers' Insurance Co.*, 168 Wis. 456, 169 N.W. 609, 611 (1918), the court interpreted a statute as requiring insurance policies to comply with standard provisions, to "preserve these salutary provisions from lapsing into a state of innocuous desuetude."

B. The desuetude doctrine applies with particular force here.

Of the rare laws that may fall into desuetude rests an even narrower, rarer category: laws that remain listed "on the books" though they are affirmatively unenforceable because they have been declared unconstitutional.

There is generally no reason to "fear . . . continued enforcement of [such] zombie law[s]," for the obvious reason: the law is unconstitutional. *Pool v. City of Houston*, 978 F.3d 307, 313 (5th Cir. 2020). Direct legislative repeal of any unused penal law is already rare, but when such a law is declared unconstitutional, almost zero motivation for repeal remains: "Political actors have a finite set of resources that they can deploy to influence legislative (and other processes). . . . In reliance on the invalidating decision, political actors are likely not to seek repeal or not to seek it vigorously." William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902, 1917 (1993).

That everyone understands that unconstitutional laws are unenforceable magnifies the notice and arbitrary-enforcement concerns underlying desuetude. "People generally assume that a judicial decision is final or unlikely to be reversed and act accordingly." *Id.* Legislators generally do the same, and judicial declarations that a law is unconstitutional and thus will never be enforceable "can have a transformative effect on majoritarian decision-making." *Id.* at 1917–18.

Put simply, when a criminal law has been declared unconstitutional as a violation of a constitutionally protected civil liberty, no one would have any legitimate reason to believe that unconstitutional criminal law could ever again be enforced. Before *Dobbs*, the U.S. Supreme Court had *never before in American history* held that

an established civil liberty that it directly recognized as guaranteed by the Constitution is actually entirely nonexistent in the Constitution. *See Dobbs*, 142 S. Ct. at 2347 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

And, importantly, for a court to apply the doctrine in such narrow, unprecedented circumstances does not prohibit the Legislature from proscribing the conduct moving forward—it just means that the Legislature *of today* must enact it as law. Such a court declaration "does not hold that the legislature may not *do* whatever it is that is complained of, but rather asks that the *legislature* do it, if it is to be done at all." Bickel, *The Supreme Court*, 75 Harv. L. Rev. at 63 (emphasis in original).

C. Plaintiffs will show that Wis. Stat. § 940.04(1) is unenforceable as applied to abortion until and unless re-enacted into law.

No Wisconsin court has ever been confronted with this situation: a criminal law that (1) had not been meaningfully enforced for over a century that then (2) is rendered affirmatively unenforceable for another half-a-century as an unconstitutional violation of an individual liberty, only to have (3) the Supreme Court reverse course. In this rare combination of circumstances, Wis. Stat. § 940.04(1) cannot be enforced until and unless the Legislature of today enacts it as law.

First, Plaintiffs will show that Wis. Stat. § 940.04(1) had fallen into desuetude long before *Roe*. Pre-quickening abortion is plainly *malum prohibitum*, not *malum in se*. The very first iteration of Wis. Stat. § 940.04(1) did not criminalize pre-quickening abortion. Wis. Stat. ch. 133, § 11 (1849). At common law, pre-quickening abortion was not a crime. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. at 1780.

In 1858, the Wisconsin Legislature, in lockstep with other states, amended the law to criminalize abortion at any stage. Wis. Stat. ch. 164, § 11 (1858); Wis. Stat. ch. 169, § 58 (1858); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 282–87 (1992); Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1788–89. But from the outset, the understanding appears to have been that this prohibition would not be meaningfully enforced. Even the physician believed to be the primary supporter of Wisconsin's 1858 law, Dr. William Henry Brisbane, recognized this: "it is not probable that any law could be enforced in such cases; but the fact of the existence of a law making [abortion] criminal, would probably have a moral influence." Cynthia Kickham Rock, *The History of Abortion in Nineteenth-Century Wisconsin*," 20–21, University of Wisconsin-Madison Masters Thesis (1992) (quoting an 1857 letter).

Second, Plaintiffs will be able to show that, even before *Roe*, there was a period of "open, notorious, and pervasion violation of the statute for a long period." *Committee*, 416 S.E.2d at 726. Research shows that laws like Wisconsin's ban were rarely enforced. Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1789–91; Graber, *Rethinking* at 42–53. Though almost every state had laws criminalizing abortion at every stage of pregnancy, abortions occurred in an estimated one of every three to five pregnancies between 1900 and 1970. Graber, *Rethinking* at 41–42.

Wisconsin was no exception. Total births in Wisconsin among women of childbearing years dropped roughly 22% between 1860 and 1890, which both historians and the State Medical Society have understood to be the result of rates of

abortion "increasing to an alarming extent." Rock, *History of Abortion*, at 33 (citation omitted). For example, following an 1888 *Chicago Times* report listing 48 physicians who, when approached by an unwed woman seeking an abortion, agreed to help her either by performing it themselves or by referring her to a physician who would perform it, "[t]he paper's readers informed the *Times* that abortion thrived elsewhere in the Midwest, including Wisconsin." Leslie J. Reagan, *When Abortion was a Crime: Women, Medicine, and Law in the United States, 1867–1973*, at 54, 61 (2022 edition).

Indeed, in 1900, an anti-abortion Wisconsin physician estimated that if abortions occurred in "every twelve to fourteen pregnancies" "[a] decade ago," by that time, "the best authorities [indicated] that one out of every five pregnancies terminates in abortion." Rock, *History of Abortion*, at 33 (citation omitted). Even if such estimates were "somewhat inflated, these physicians accurately perceived that the incidence of abortion had risen dramatically"—despite a law purporting to criminalize it. *Id.* And, as was true with regard to the openly marketed contraceptives discussed in *Poe*, in Wisconsin, "abortifacient[s]"—medicines sold to induce miscarriage—were available in "local apothecaries" and were openly marketed "through newspaper advertisements." Rock, *History of Abortion*, at 43.

And third, there was a "conspicuous policy of nonenforcement." *Committee*, 416 S.E.2d at 726. Scholars estimate that each year during the 1950's and 1960's, for example, approximately one million abortions occurred nationally in violations of listed criminal statutes like Wisconsin's. Graber, *Rethinking* at 42; Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1789. Outside of situations in which the pregnant woman died,

Wisconsin's ban was hardly ever enforced: despite over *100* years of enforceability pre-*Roe*, Wisconsin appellate court records reflect as few as eight cases of Wisconsin prosecutions (not convictions, prosecutions) under either the complete ban or the miscarriage-procurement statutes.[12]

Even in those extraordinarily rare circumstances, the prosecution focused on the physical harm to the pregnant woman. For example, *Mac Gresens*—to which Defendant Urmanski repeatedly points, (Doc. 91:4, 16, 31, 38 (Urmanski Br. 1, 13, 28, 35))—involved a postal worker, not a physician, being paid for inserting a tube and wire into a pregnant woman's womb, resulting in her hospitalization. *State v. Mac Gresens*, 40 Wis. 2d 179, 182–83, 161 N.W.2d 245 (1968).

The lack of any meaningful Wisconsin enforcement absent the pregnant woman's death aligned with society's overwhelming tolerance of pre-quickening abortion absent the woman's death. "[M]any police officers and prosecutors 'shared the widespread belief that the abortionist [was] in fact performing a useful service' and preferred spending their scarce resources preventing what they and their communities regarded as real crimes." Graber*, Rethinking Abortion*, at 45 (citation omitted). And the "few prosecutors" who tried to enforce them "faced jurors unwilling to convict abortionists and judges unwilling to impose severe sentences." *Id.*

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[12] *Klock v. State*, 60 Wis. 574, 19 N.W. 543 (1884); *Rodermund v. State*, 167 Wis. 577, 168 N.W. 390 (1918); *Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923); *Hunter v. State*, 181 Wis. 167, 192 N.W. 984 (1923); *State v. Henderson*, 226 Wis. 154, 274 N.W. 266 (1937); *State v. Cohen*, 31 Wis. 2d 97, 142 N.W.2d 161 (1966); *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968); *State v. Harling*, 44 Wis. 2d 266, 170 N.W.2d 720 (1969) (prosecution under Wis. Stat. § 940.04(2), later held to not apply to abortion).

During the over 100 years that this ban could have been enforced, it was openly disregarded and hardly ever enforced. Then it became affirmatively unenforceable for roughly 50 years as a violation of a constitutional right, and the Wisconsin public—and Legislature—understood that Wis. Stat. § 940.04(1) was no longer Wisconsin law. With that historical evidence established, Wis. Stat. § 940.04(1) cannot today be said to have the consent of the governed and is unenforceable as applied to abortion.

D. Urmanski's arguments show why his motion to dismiss must be denied.

Urmanski argues that Wisconsin courts have not before held a statute unenforceable through disuse and he disputes Plaintiffs' factual assertions. Both arguments fail. Urmanski's argument that Wisconsin courts have not yet invalidated a law based on disuse ignores that Wisconsin courts have indicated that a law *could* fall into desuetude. It is no surprise that they have not had to do so before now—this combination of circumstances is essentially unprecedented in Wisconsin history.

And his disputes about Plaintiffs' assertions of historical facts, where he asserts facts of his own, (Doc. 91:37–40 (Urmanski Br. 34–37)), ignores the procedural posture: this Court must accept all facts and reasonable inferences from them in the Amended Complaint as true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19. Urmanski cannot prevail at the motion-to-dismiss stage by disputing Plaintiffs' assertions of historical facts and presenting his own. His disputes instead demonstrate that his motion must be denied and Plaintiffs' disuse claim must proceed.

CONCLUSION

This Court should deny the motion to dismiss.

Dated this 17th day of January 2023.

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