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' BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT I OF PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

In 1994, the Wisconsin Supreme Court held that a law prohibiting "[a]ny person, other than the mother" from "[i]ntentionally destroy[ing] the life of an unborn quick child" was not an abortion statute. In the *Black* case, our supreme court applied principles courts must employ when addressing otherwise conflicting statutes and held that the law—Wis. Stat. § 940.04(2)(a)—prohibited the act of feticide only.

The Wisconsin Supreme Court's rationale in the *Black* case controls here. Wisconsin Stat. § 940.04(1)—which has been referred to as Wisconsin's 1800s abortion ban and is part of the same main statute addressed by the *Black* case—contains language that is nearly identical to the language that the supreme court held prohibited feticide only, not abortion.

As this Court has properly explained, the only difference between the law addressed in *Black* and the law at issue here is that the law in *Black* prohibits the intentional destruction of an "unborn *quick* child" (versus "unborn child" here) and, in turn, imposes a harsher penalty for an act committed later in the pregnancy.

The supreme court's decision in *Black* requires the conclusion that Wis. Stat. § 940.04 is a feticide statute only. Plaintiffs move this Court to enter a final judgment holding that Wis. Stat. § 940.04 cannot be enforced as applied to abortion.

BACKGROUND

Four days after the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overturning *Roe v. Wade*, 410 U.S. 113 (1973), Plaintiffs brought suit seeking a declaration that Wis. Stat. § 940.04 is unenforceable as applied to abortion.

Plaintiffs pled two separate, alternative counts. First, Plaintiffs alleged that Wis. Stat. § 940.04 is unenforceable as applied to abortion because subsequent statutes superseded that application (Count I). (Doc. 34 ¶¶ 30–54.) Plaintiffs explained that in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court held that a subsection of Wis. Stat. § 940.04 applies only to feticide—not abortion—and concluded that treating it as an abortion statute would be inconsistent with Wis. Stat. § 940.15, a modern statute that only prohibits post-viability abortion with exceptions for the pregnant woman's life and health. (Doc. 34 ¶¶ 41, 52 (citing *Black*, 188 Wis. 2d at 646).) Plaintiffs also asserted that treating Wis. Stat. § 940.04 as applying to abortion would conflict with multiple other, later-enacted Wisconsin statutes defining the parameters under which lawful abortions may be provided. (Doc. 34 ¶¶ 30–54.)

Second, Plaintiffs alleged that Wis. Stat. § 940.04 is unenforceable as applied to abortion because of the statute's long disuse and the public's reliance on *Roe*. (Count II). (Doc. 34 ¶¶ 55–63.)

Three physicians subsequently sought to intervene, also asserting that Wis. Stat. § 940.04 cannot be enforced as to abortion (Doc. 68; 75), and this Court granted that motion, (Doc. 80).

Plaintiffs and Intervenors named the district attorneys in three counties where abortion services had been provided prior to *Dobbs* as defendants in the case. (Doc. 34; 75.) Both Plaintiffs and Intervenors explained in their pleadings that one of those defendants, District Attorney Urmanski, had publicly stated that he would enforce Wis. Stat. § 940.04(1) against a physician who performs an abortion. (Doc. 34 ¶ 26; 75 ¶ 11.) In his answers to those pleadings, District Attorney Urmanski has continued to assert that he believes Wis. Stat. § 940.04(1) prohibits performing abortions from conception until birth unless necessary to save the pregnant woman's life and that he has a duty to enforce the law. (Doc. 152 ¶ 26.)

Before filing his answers to the complaints, District Attorney Urmanski moved to dismiss the case, and briefing and argument followed. (Doc. 88–90; 91; 98; 101; 107; 111.) This Court denied Urmanski's motions to dismiss on July 7. (Doc. 147.) This Court held that the Wisconsin Supreme Court's "unambiguous" interpretation of Wis. Stat. § 940.04(2)(a)—a "nearly-identical and closely related" subsection of Wis. Stat. § 940.04(1)—in the *Black* case "tells us what [Wis. Stat. § 940.04(1)] means. 'It is a feticide statute only.'" (Doc. 147:12 (quoting *Black*, 188 Wis. 2d at 647).) This Court explained that interpreting the two subsections inconsistently would "be unreasonable and produce an absurd result." (Doc. 147:11.) This Court also emphasized that the Legislature did not change the relevant statutory language following *Black*, a choice that indicated the Legislature's acquiescence to the supreme court's interpretation of the statute. (Doc. 147:12.)

With *Black* dispositive on the motions before it, this Court declined to address Plaintiffs' and Intervenors' other arguments. (Doc. 147:20–21.)[1]

All three Defendants have answered the pleadings. (Doc. 84–87 (Chisholm and Ozanne); 152–53 (Urmanski).)

Plaintiffs now seek judgment on the pleadings on Count I of their Amended Complaint.

LEGAL STANDARDS

"A judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents." *McNally v. Capital Cartage, Inc.*, 2018 WI 46, ¶ 23, 381 Wis. 2d 349, 912 N.W.2d 35. Courts "[d]etermine first whether the complaint has stated a claim." *Id.* If so, courts "next examine the responsive pleading to ascertain whether an issue of material fact exists." *Id.* "Judgment on the pleadings is proper only if there are no genuine issues of material fact." *Id.*

[1] This Court stated that Plaintiffs' implied repeal arguments were "dismissed" as they were premised on Wis. Stat. § 940.04 applying to abortion. (Doc. 147:20–21.) As can be seen from this Court's analysis, that was the equivalent of this Court holding that it need not reach the alternative arguments in light of the *Black* analysis. Both Plaintiffs' implied repeal arguments and the *Black* analysis pertain to the same claim—Count I of their Amended Complaint—and this Court denied Urmanski's motion to dismiss Count I. (*See generally* Doc. 147.)

ARGUMENT

This Court should grant Plaintiffs' motion for judgment on the pleadings on Count I of their Amended Complaint and issue a declaratory judgment that Wis. Stat. § 940.04 is unenforceable as applied to abortion. This Court has already concluded that Plaintiffs' Amended Complaint states a claim for declaratory relief. (Doc. 147:21.) And the question of whether Wis. Stat. § 940.04 is enforceable as to abortion as set forth in Count I of Plaintiffs' Amended Complaint is a purely legal question—there are no genuine issues of material fact.

As this Court correctly held in denying Urmanski's motions to dismiss, Wis. Stat. § 940.04 is unenforceable as to abortion because, under the Wisconsin Supreme Court's binding rationale in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), it is a feticide statute only—*not* an abortion statute. The same is true for purposes of this motion for judgment on the pleadings, and this Court should issue a final judgment that Wis. Stat. § 940.04 is unenforceable as applied to abortion.

Given this Court's holding in denying Urmanski's motions to dismiss—that Wis. Stat. § 940.04 is not an abortion statute—this Court concluded that it was unnecessary for it to consider Plaintiffs' arguments that if Wis. Stat. § 940.04 did apply to abortion, it has been impliedly repealed by Wisconsin's modern laws regulating lawful abortions. Plaintiffs restate their implied repeal arguments here simply to preserve them for appellate purposes, should a higher court disagree that *Black*'s rationale controls.

I. As this Court has recognized, Wis. Stat. § 940.04 is unenforceable as applied to abortion under *State v. Black* because it is a feticide statute only.

Under the rationale of the Wisconsin Supreme Court's holding in *Black*, Wis. Stat. § 940.04 is unenforceable as applied to abortion because it is a feticide statute only. The language of Wis. Stat. § 940.04(2)(a), at issue in *Black*, is materially identical to the language of Wis. Stat. § 940.04(1). The Legislature's inaction and actions following *Black* demonstrate its acquiescence to that decision.

A. In *Black*, the Wisconsin Supreme Court held that the aggravated conduct provision of the conduct prohibited by Wis. Stat. § 940.04(1) is not applicable to abortion.

In *Black*, the supreme court was confronted with the direct conflict between Wis. Stat. § 940.04 and a 1985 statute, Wis. Stat. § 940.15, that would exist if both statutes applied to abortion. The court found that no conflict existed for one dispositive reason: the subsection of Wis. Stat. § 940.04 at issue was "not an abortion statute. It makes no mention of an abortive type procedure. Rather, it proscribes the intentional criminal act of feticide." *Black*, 188 Wis. 2d at 646.

Black concerned subsection (2)(a) of Wis. Stat. § 940.04. That subsection prohibited—and still, as listed in the statutes today, prohibits—"any person, other than the mother," "[i]ntentionally destroy[ing] the life of an unborn quick child." *Black*, 188 Wis. 2d at 641; Wis. Stat. § 940.04(2)(a). The only "two textual differences" between Wis. Stat. § 940.04(2)(a) (at issue in *Black*) and 940.04(1) (at issue here) are that (1) Wis. Stat. § 940.04(1) prohibits the intentional destruction of an "unborn child" whereas Wis. Stat. § 940.04(2)(a) prohibits the intentional destruction of an

"unborn *quick* child," and (2) Wis. Stat. § 940.04(2)(a) in turn imposes a harsher punishment than Wis. Stat. § 940.04(1). (Doc. 147:11 (comparing Wis. Stat. § 940.04(1) and (2)(a)).)[2]

The defendant in *Black* was charged under Wis. Stat. § 940.04(2)(a) after he violently assaulted his pregnant wife five days before her due date. *Black*, 188 Wis. 2d at 641. He argued he could not be convicted on the theory that it was an "abortion" statute, as evidenced by "the title of the statute, 'abortion,'" and he asserted that the statute was "impliedly repealed when the legislature enacted sec. 940.15." *Id.* at 644–45.

The Wisconsin Supreme Court rejected these arguments because it held that Wis. Stat. § 940.04(2)(a) does not apply to abortion: "We conclude that the words of the statute could hardly be clearer. The statute plainly proscribes feticide." *Black*, 188 Wis. 2d at 642 (footnote omitted). Wisconsin Stat. § 940.04(2)(a) "*is not an abortion statute.*" *Id.* at 646 (emphasis added).

Unlike Wis. Stat. § 940.04(2)(a), the court explained, Wis. Stat. § 940.15—a newer statute also titled "Abortion"—"places restrictions . . . on consensual abortions: medical procedures, performed with the consent of the woman, which result in the termination of a pregnancy." *Black*, 188 Wis. 2d at 646. "Section 940.04(2)(a), on the

[2] *Black* was decided in 1994, before Wisconsin adopted Truth-in-Sentencing and the current felony classifications. But a heightened penalty for the aggravated offense (Wis. Stat. § 940.04(2)(a)) was present in 1994. At that time, Wis. Stat. § 940.04(1) was listed as having a maximum confinement penalty of 3 years' imprisonment and Wis. Stat. § 940.04(2)(a) as having a maximum penalty of 15 years' imprisonment. Wis. Stat. § 940.04(1), 940.04(2)(a) (1993–94).

other hand," "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.*

In so holding, the supreme court rejected the challenger's attempt to interpret the meaning of the statutory text based on the title of the statute or the legislative history. As to the title of Wis. Stat. § 940.04—"Abortion"—the court stressed that "[i]n the face of such plain and unambiguous language we must disregard the title of the statute." *Black*, 188 Wis. 2d at 645. Statutory titles "may be used only to resolve doubt" as to statutory meaning, not to create ambiguity or doubt in the statutory text. *Id.* at 645. So too, the court reasoned, as to the legislative history of Wis. Stat. § 940.04: "The legislative history. . . is a maze of past statutes, amendments, repeals and recreations leading us to conclude that it offers no clearer indication of the legislature's intent than that indicated by the statute's own text." *Id.* at 642 n.1.

In rejecting several other arguments, including that Wis. Stat. § 940.04 had already been held facially unconstitutional and that Wis. Stat. § 940.04 as a whole should be construed to be "limited to consensual abortions and was not intended for feticide," the court noted that it addressed "only sec. 940.04(2)(a) and make[s] no attempt to construe any other sections of sec. 940.04." *Black*, 188 Wis. 2d at 647 n.2. It is no surprise that the supreme court chose to address only the subsection of the statute before it: the defendant was charged only under Wis. Stat. § 940.04(2)(a)'s "unborn quick child" subsection, and, at the time, any attempt to apply Wis. Stat. § 940.04 "to a physician performing a consensual abortion prior to viability" would

have been "unconstitutional under *Roe v. Wade*." *Id.* at 641, 646. Moreover, as this Court recognized, the Wisconsin Supreme Court generally "decides cases on the narrowest grounds presented." (Doc. 147:13 (quoting *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶ 5 n.3, 303 Wis. 2d 514, 735 N.W.2d 477).)

In reaching its holding, the *Black* court stressed that the reason Wis. Stat. § 940.04(2)(a) could not be understood to apply to "a physician performing a consensual abortion after viability" was that such application "would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it." *Black*, 188 Wis. 2d at 646. Thus, "in order to construe secs. 940.04(2)(a) and 940.15, consistently," the court held that each statute had to have "a distinct role." *Id.*

Black thus held that the statutory subsection criminalizing "Any person, other than the mother, who . . . Intentionally destroys the life of an unborn quick child" "cannot be used to charge for a consensual abortive type procedure." *Black*, 188 Wis. 2d at 646; Wis. Stat. § 940.04(2)(a).

B. Under *Black*'s binding rationale, Wis. Stat. § 940.04 is a feticide statute only, not an abortion statute.

As this Court has already held, the Wisconsin Supreme Court's rationale in *Black* compels the holding that Wis. Stat. § 940.04 is unenforceable as to abortion. "Given the unambiguous interpretation of [the] nearly-identical and closely related" Wis. Stat. § 940.04(2)(a), "there is no need to look for other clues to find the meaning of [Wis. Stat. § 940.04(1)]. The *Black* court tells us what it means. 'It is a feticide statute only.'" (Doc. 147:11–12 (quoting *Black*, 188 Wis. 2d at 647).)

Wisconsin Stat. § 940.04(1) proscribes the same conduct as Wis. Stat. § 940.04(2)(a), except that Wis. Stat. § 940.04(2)(a) applies later in pregnancy ("quick child" versus "child") and, in turn, imposes a higher penalty (Class E felony versus a Class H felony):

- Wis. Stat. § 940.04(1): "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony."
- Wis. Stat. § 940.04(2)(a): "Any person, other than the mother, who . . . [i]ntentionally destroys the life of an unborn quick child . . . is guilty of a Class E felony."

(*See also* Doc. 147:11 (this Court providing a side-by-side table with the statutory subsections).)

The Wisconsin Criminal Jury Instructions also recognize that "[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–Crim. 1125 n.2 (2006). Thus, as this Court explained, "[t]he only reasonable interpretation" is that Wis. Stat. § 940.04(2)(a) provides a "higher penalty for the feticide of a viable fetus (Class E) versus a non-viable fetus (Class H)." (Doc. 147:12.)

Every component of *Black*'s statutory interpretation analysis applies with equal force to Wis. Stat. § 940.04(1). Just like Wis. Stat. § 940.04(2)(a), Wis. Stat. § 940.04(1) "makes no mention of an abortive type procedure." *Black*, 188 Wis. 2d at 646. Just as with Wis. Stat. § 940.04(2)(a), the language of Wis. Stat. § 940.04(1) "could hardly be clearer"—it "plainly proscribes feticide." *Id.* at 642. Just as with Wis.

Stat. § 940.04(2)(a), this Court cannot create ambiguity in Wis. Stat. § 940.04(1) through the statutory title but instead must "disregard the title of the statute" "[i]n the face of such plain and unambiguous language." *Id.* at 645. Just as with Wis. Stat. § 940.04(2)(a), this Court cannot consider the "maze" of "legislative history" to create doubt or ambiguity but instead must follow Wis. Stat. § 940.04(1)'s "own text." *Id.* at 642 n.1. And just as with Wis. Stat. § 940.04(2)(a), Wis. Stat. § 940.04(1) cannot be understood to apply to "a physician performing a consensual abortion" because that "would be inconsistent with the newer sec. 940.15." *Id.* at 646.

As this Court concluded in denying Urmanski's motions to dismiss, there is no way to distinguish *Black*'s analysis of Wis. Stat. § 940.04(2)(a) from an analysis of Wis. Stat. § 940.04(1). Rather, "[i]t would be unreasonable and produce an absurd result to define these two subsections differently when their language and context is nearly identical." (Doc. 147:11.) It is not possible under *Black*'s rationale to "view Subsection (1) as an abortion statute and Subsection (2)(a)—containing almost the same language—as a feticide statute." (Doc. 147:11.)[3]

[3] Though plain based on the statutory language, it bears noting that the same analysis and result are also compelled for Wis. Stat. § 940.04(2)(b). That subsection of Wis. Stat. § 940.04 prohibits "[a]ny person, other than the mother" from "[c]aus[ing] the death of the mother by an act done *with intent to destroy the life of an unborn child*." The plain language of Wis. Stat. § 940.04(2)(b), just like Wis. Stat. § 940.04(1), proscribes an act committed to intentionally destroy an "unborn child." There is no separate mens rea for Wis. Stat. § 940.04(2)(b) not present in Wis. Stat. § 940.04(2)(a) or 940.04(1); rather, Wis. Stat. § 940.04(2)(a)—held to be a feticide statute only in *Black*—addresses when an "unborn quick child" is destroyed via feticide and Wis. Stat. § 940.04(2)(b) addresses when the pregnant woman is killed via intended feticide.

Moreover, as this Court has also already recognized, it cannot "'withdraw language from a previous supreme court case' or 'dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum.'" (Doc. 147:14 (quoting *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 51, 58, 324 Wis. 2d 325, 782 N.W.2d 682).) Rather, *Black* compels the conclusion that Wis. Stat. § 940.04(1) "is not an abortion statute" but rather "proscribes the intentional criminal act of feticide." *Black*, 188 Wis. 2d at 646.

This Court has correctly held that Wis. Stat. § 940.04 is unenforceable as to abortion under *Black*. (Doc. 147.) It should reaffirm that holding here and enter judgment accordingly.

C. Although the Legislature has enacted other laws prohibiting acts against an "unborn child" since *Black*, it has not amended the conduct prohibited by Wis. Stat. § 940.04(1) and (2)(a).

After *Black*, the Legislature made no changes to the conduct prohibited by Wis. Stat. § 940.04(1) or (2)(a), but it passed numerous laws prohibiting acts committed against an "unborn child." That combination of inaction on Wis. Stat. § 940.04(1) and (2)(a) and action on other laws further confirms that *Black* is binding here.

1. The Legislature's lack of response to the Wisconsin Supreme Court's construction of a statute indicates its acquiescence to that construction.

"[L]egislative inaction in the wake of judicial construction of a statute indicates legislative acquiescence." *Estate of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759. The "refusal to pass a measure that would defeat the courts' construction is not an equivocal act." *Zimmerman v. Wis. Elec. Power Co.*, 38 Wis. 2d

626, 633–34, 157 N.W.2d 648 (1968). Rather, "we presume that the legislature is aware that absent some kind of response [the supreme court's] interpretation of [a] statute remains in effect." *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993). Thus, when the Legislature does not "change the law" after a Wisconsin Supreme Court decision interpreting it, the Legislature "has acknowledged that the courts' interpretation . . . is correct," and future courts are "constrained not to alter their construction." *Zimmerman*, 38 Wis. 2d at 633–34.

Consideration of such legislative acquiescence is part of statutory history—"a statute's background in the form of actually enacted and repealed provisions"—which, unlike extrinsic legislative history, is part of a plain-language contextual statutory interpretation analysis. *In re Custody of A.J.S.*, 2018 WI App 30, ¶¶ 13–15, 382 Wis. 2d 180, 913 N.W.2d 189 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 52 n.9, 271 Wis. 2d 633, 681 N.W.2d 110).

Importantly, the principles of legislative acquiescence apply with particular force where the Legislature takes relevant action on the subject matter but does not change the language interpreted by the court. *Estate of Miller*, 378 Wis. 2d 358, ¶ 51; *Olson*, 175 Wis. 2d at 651–52; *see also State v. Rector*, 2023 WI 41, ¶ 25 n.7, 407 Wis. 2d 321, 990 N.W.2d 213.

For example, in *Olson*, the Wisconsin Supreme Court considered the effect of a change in the penalties for an offense on how the court had previously interpreted the elements of that offense. The court had previously interpreted Wisconsin's first-offense operating-after-revocation statute as requiring proof that the defendant acted

knowingly as an element of the offense. *Olson*, 175 Wis. 2d at 634. After that decision, the Legislature amended the *penalty* for first-offense operating-after-revocation multiple times, but it did not change the relevant text of the offense itself. *Id.* at 640–42.

The *Olson* court rejected the argument that the Legislature had statutorily overruled the prior court decision—even though the statutory changes removed part of the court's rationale for its statutory interpretation in that prior decision—because the Legislature did not change the language that the court actually interpreted. *Olson*, 175 Wis. 2d at 640–42. Explaining that "[l]egislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions," the court stressed that the Legislature's "repeated revisions" of the penalty for the offense "without expressly overturning [the prior supreme court decision] suggests legislative acquiescence with the holding" of the prior decision. *Id.* at 641–42.

2. In the years following *Black*, the Legislature created numerous additional criminal prohibitions for acts committed against an "unborn child" but made no changes to the conduct prohibited by Wis. Stat. § 940.04(1) or (2)(a).

The principles in *Olson* and other cases show that the Legislature here acquiesced to the supreme court's holding in *Black*. Following *Black*, the Legislature did not change the conduct prohibited by Wis. Stat. § 940.04(1) or 940.04(2)(a). Instead, it amended different criminal homicide, injury, and battery statutes to penalize particular enumerated crimes committed against an "unborn child." Not only did those changes to other statutes not statutorily overrule *Black*, they confirm the Legislature's acquiescence to the ruling.

In 1997, the Legislature made numerous changes to criminal statutes to address harm to an "unborn child." *See* 1997 Wis. Act 295, § 15 (amending Wis. Stat. § 940.01, first-degree intentional homicide statute, to include a provision making it a Class A felony to cause the death of an unborn child with intent to kill that unborn child, the pregnant woman, or another), § 16 (amending Wis. Stat. § 940.02, first-degree reckless homicide statute, to include a Class B felony for recklessly causing the death of an unborn child under circumstances that show utter disregard), § 18 (amending Wis. Stat. § 940.05, second-degree intentional homicide), § 21 (amending Wis. Stat. § 940.06, second-degree reckless homicide), § 23 (amending Wis. Stat. § 940.08, homicide by negligent handling of weapon), § 24 (amending Wis. Stat. § 940.09, homicide by intoxicated-use of vehicle or firearm), § 31 (amending Wis. Stat. § 940.10, homicide by negligent operation of vehicle), § 32 (creating Wis. Stat. § 940.195 criminalizing battery, substantial battery, and aggravated battery to unborn child), § 34 (amending Wis. Stat. § 940.23(1), first-degree reckless injury), § 36 (amending Wis. Stat. § 940.23(2), second-degree reckless injury), § 38 (amending Wis. Stat. § 940.24, injury by negligent handling of dangerous weapon), and § 39 (amending Wis. Stat. § 940.25, injury by intoxicated use of vehicle).

The Legislature's choice to make these many amendments, but not to amend the conduct prohibited by Wis. Stat. § 940.04(2)(a), reflects its acquiescence to the *Black* court's construction of Wis. Stat. § 940.04(2)(a).

Indeed, since the supreme court decided *Black* in 1994 and the Legislature created new crimes against an "unborn child" in 1997, nothing in the text of either

Wis. Stat. § 940.04(2)(a) or 940.04(1) as to what is criminally prohibited—the intentional destruction of a "quick child"/"child"—has changed. To the contrary, both the prohibited conduct and the lesser/aggravated structure of the two subsections are just as they were when the court decided *Black*: Wis. Stat. § 940.04(1) applying earlier in pregnancy ("unborn child") with a lesser punishment and Wis. Stat. § 940.04(2)(a) applying to feticide later in pregnancy ("unborn quick child") with a higher punishment.

As this Court has recognized, the fact that the Legislature "never amended Subsections (1) and (2)(a) in the wake of *Black*" to change the proscribed behavior "confirms our supreme court's analysis because 'we presume that the legislature is aware that absent some kind of response [the supreme court's] interpretation of the statute remains in effect.'" (Doc. 147:12 (quoting *Olson*, 175 Wis. 2d at 641).) And this principle applies with even greater force where, as here, the Legislature *did* take up the issue of crimes against an "unborn child"—including feticide—but did not amend Wis. Stat. § 940.04(1) or (2)(a) to change the prohibited conduct. *Olson*, 175 Wis. 2d at 640–42; *Estate of Miller*, 378 Wis. 2d 358, ¶ 51; *Rector*, 407 Wis. 2d 321, ¶ 25 n.7.

The Legislature's creation of an exception to those *new* statutes for acts "committed during an induced abortion," and statement that the provision "does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16 to an induced abortion," 1997 Wis. Act 295, § 12; Wis. Stat. § 939.75(2)(b)1., does not change the analysis. Neither component of that exception changed the text of Wis. Stat. § 940.04. A new

law's lack of effect on an existing statute alters nothing about the judicial construction of that existing law. The conduct prohibited by Wis. Stat. § 940.04 has not changed since *Black*. Legislative acquiescence principles therefore further confirm that *Black*'s rationale controls.

* * *

As this Court has already recognized, the rationale in *Black* means that Wis. Stat. § 940.04 is unenforceable as to abortion because it is a feticide statute only. This Court should issue a declaratory judgment that Wis. Stat. § 940.04 is unenforceable as applied to abortion.

Further, this Court should also grant a permanent injunction. Intervenors have requested an injunction and Plaintiffs have sought "[a]ny such other relief as the Court may deem just and proper" in addition to a declaratory judgment. (Doc. 75:15, 34:5.) "Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective." *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957); *see also Lewis v. Young*, 162 Wis. 2d 574, 581, 470 N.W.2d 328 (Ct. App. 1991). This case presents "unique issues of interest to this state," (Doc. 147:7 (quoting *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976))), reflecting the importance of complete clarity for all Wisconsinites. This Court should issue a permanent injunction in aid of the declaratory judgment to ensure that there are no prosecutions of abortion under Wis. Stat. § 940.04 in Wisconsin.

II. If Wis. Stat. § 940.04 applied to abortion, it would be unenforceable because it has been impliedly repealed by Wisconsin's modern abortion statutes in multiple ways.

Black makes clear that Wis. Stat. § 940.04 is not an abortion statute but instead a feticide statute only. That resolves this case, and this Court should enter declaratory judgment and an injunction in favor of Plaintiffs. With that final ruling, it would be unnecessary for this Court to further address statutory conflict arguments that would exist if Wis. Stat. § 940.04 did apply to abortion.

Plaintiffs reiterate their implied repeal arguments here simply to preserve those arguments for appeal as additional support for the relief Plaintiffs seek, should a higher court disagree that *Black*'s rationale controls.

A. Wisconsin law recognizes two forms of implied repeal and requires courts to so hold when not doing so would leave doubt as to what conduct is subject to criminal punishment.

Later statutes impliedly repeal an earlier statute two circumstances. First, a later-enacted law impliedly repeals an earlier law where an "irreconcilable" conflict exists between the two laws—where the later-enacted statute "contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force." *State v. Dairyland Power Co-Op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971) (citation omitted). Second, an earlier law is impliedly repealed "by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with the subject" of the earlier law. *Wisth v. Mitchell*, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971) (citation omitted); *see also Westra v. State Farm Mut. Aut. Ins.*

Co., 2013 WI App 93, ¶ 10, 349 Wis. 2d 409, 835 N.W.2d 280 ("[I]f conflicting statutes on the same subject matter cannot be reconciled, the more specific statute controls. '[T]his is especially true where the specific statute is enacted after the general statute.'" (alteration in original) (citations omitted)).

The Wisconsin Supreme Court has emphasized that a court's duty to remove "doubt[] as to what conduct is subject to penal sanctions" must supersede any disfavoring of the implied repeal doctrine. *State v. Christensen*, 110 Wis. 2d 538, 546–48, 329 N.W.2d 382 (1983). Courts must favor resolving a criminal-law statutory conflict over disfavoring implied repeal because individuals must have "notice as to what conduct is criminal." *Id.* at 546.

B. If it applied to abortion, Wis. Stat. § 940.04 has been impliedly repealed.

1. Wisconsin Stat. §§ 940.04 and 940.15 would directly conflict if both applied to abortion.

If Wis. Stat. § 940.04 applied to abortion, it would be impliedly repealed due to the irreconcilable conflict between Wis. Stat. § 940.04 and the later-enacted Wis. Stat. § 940.15.

Wisconsin Stat. § 940.04(1), in a statute titled "Abortion," makes it a Class H felony for "[a]ny person, other than the mother" to "intentionally destroy the life of an unborn child." "[U]nborn child" "means a human being from the time of conception until it is born alive." Wis. Stat. § 940.04(6). The criminal prohibition after conception does not apply to a "therapeutic abortion" that is "necessary. . . to save the life of the mother." Wis. Stat. § 940.04(5). This prohibition, against the intentional destruction

of an unborn child unless necessary to save the pregnant woman's life, has been listed in the Wisconsin statutes since 1858, when the Legislature removed the word "quick" from "quick child" to revise the 1849 statute. Wis. Stat. ch. 164, § 11 (1858); Wis. Stat. ch. 133, § 11 (1849).

Wisconsin Stat. § 940.15, enacted in 1985, is also titled "Abortion." 1985 Wis. Act 56, § 35. It makes abortion a Class I felony 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). The prohibition on abortion after viability does not apply "if the abortion is necessary to preserve the life or health of the woman." Wis. Stat. § 940.15(3).

If Wis. Stat. § 940.04 applied to abortion, then Wis. Stat. §§ 940.04(1) and 940.15(2) would be "so contrary to or irreconcilable" with each other that "only one of the two statutes [could] stand in force." *Dairyland Power*, 52 Wis. 2d at 51 (citation omitted). The statutes would both address when abortion is and is not illegal in Wisconsin based on (1) stage of pregnancy and (2) medical risks for the pregnant woman but *would provide directly opposing answers on both fronts*.

First, Wis. Stat. § 940.15(2) prohibits abortion only "after the fetus or unborn child reaches viability," while Wis. Stat. § 940.04 would prohibit any abortion "from the time of conception." Second, Wis. Stat. § 940.15 recognizes exceptions to the prohibition where an abortion is necessary to preserve the life *or health* of the pregnant woman, while Wis. Stat. § 940.04 would recognize an exception only when the abortion is necessary to save the pregnant woman's *life*. This direct conflict about

when abortion is and is not lawful would demand the conclusion that the earlier law (Wis. Stat. § 940.04) was impliedly repealed by the later (Wis. Stat. § 940.15).

And, critically, nothing in Wis. Stat. § 940.15 makes it narrower in scope than Wis. Stat. § 940.04. To the contrary, both statutes would draw a line as to when providing an abortion is illegal and make exceptions to the respective line based on particular medical circumstances. *Compare* Wis. Stat. § 940.04(1), (5), *with* Wis. Stat. § 940.15(2), (3). Notably, Wis. Stat. § 940.15 also makes it a felony for anyone "who is not a physician" to perform an abortion, full stop—*not* limited to any particular timeframe of pregnancy. Wis. Stat. § 940.15(5). The statutes cover the same ground but provide directly conflicting answers, and the later therefore impliedly repealed the earlier.

It would be no answer that Wis. Stat. § 940.15(2) does not affirmatively grant physicians a "right" to provide abortions, and so the statutes do not "conflict" as long as a physician complies with the near-total ban. At a very basic level, that's not how criminal law works. Criminal law does not tell us what is *legal*; it tells us what is *illegal* and then delineates the scope of and exceptions to the prohibition. *See, e.g.*, Wis. Stat. § 939.48(1) (providing the self-defense privilege to criminal liability and explaining that an "actor may not intentionally use force which is intended or likely to cause death or great bodily harm *unless* the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself"); Wis. Stat. § 948.23 (criminalizing failure to report the death of a child in certain circumstances "*unless* a report conflicts with religious tenets or practices"). This is

why, for criminal prohibitions, "if 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." *State v. Buck*, 262 P.2d 495, 501 (Or. 1953).

It is therefore no surprise that other courts have struck down older state abortion laws as impliedly repealed by newer laws that offer "conflicting standards." *See, e.g., Karlin v. Foust*, 188 F.3d 446, 468–71 (7th Cir. 1999) (striking down an older Wisconsin abortion law as impliedly repealed by a newer Wisconsin abortion law); *Buck*, 262 P.2d at 496–503 (holding that the newer "Medical Practice Act" prohibiting physicians from performing abortions "unless" done to protect the woman's health impliedly repealed an older criminal law broadly banning abortion). If Wis. Stat. § 940.04 applied to abortion, the enactment of Wis. Stat. § 940.15 would compel the same conclusion here.

2. If it applied to abortion, Wis. Stat. § 940.04 would be fundamentally incompatible with Wisconsin's comprehensive regulatory framework for the provision of lawful abortions.

If it applied to abortion, Wis. Stat. § 940.04 also would conflict with Wisconsin's modern comprehensive and detailed statutory scheme regulating the performance of lawful abortions. This form of the implied repeal doctrine is akin to implied field preemption of state law by Congress. "Congress can impliedly preempt state law if 'federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Miezin v. Midwest Exp. Airlines, Inc.*, 2005 WI App 120, ¶ 10, 284 Wis. 2d 428, 701 N.W.2d 626

(citation omitted). And, indeed, a "regulatory scheme," by its nature, "authoriz[es]. . . conduct" that is "contrary or inconsistent" to a near-total ban of that same regulated conduct. *Eichenseer v. Madison-Dane Cnty. Tavern League, Inc.*, 2008 WI 38, ¶ 66, 308 Wis. 2d 684, 748 N.W.2d 154 (citation omitted).

This is precisely why multiple federal courts have held that older criminal abortion bans were impliedly repealed by modern statutory schemes regulating physicians providing lawful abortions. "[I]t is clearly inconsistent to provide in one statute that abortions are permissible if set guidelines are followed and in another provide that abortions are criminally prohibited." *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) (citation omitted); *see also, e.g., Smith v. Bentley*, 493 F. Supp. 916, 923–24 (E.D. Ark. 1980); *Weeks v. Connick*, 733 F. Supp. 1036, 1038–39 (E.D. La. 1990). Federal courts have repeatedly so recognized even in the face of a "presumption against implied repeal." *See, e.g., Weeks*, 733 F. Supp. at 1038; *Smith*, 493 F. Supp. at 923. Moreover, the federal court in *Weeks* specifically rejected an argument that the state legislature's "expression of intent" not to create a conflict with the older criminal bans eliminated the conflict that in fact existed. *Weeks*, 733 F. Supp. at 1038–39.

These rationales would apply here too if Wis. Stat. § 940.04 applied to abortion. Wisconsin's modern regulatory scheme requires that an abortion be performed by a physician, Wis. Stat. § 940.15(5); imposes hospital-proximity restrictions on physicians performing abortions, Wis. Stat. § 253.095(2); regulates post-viability abortions, Wis. Stat. §§ 940.15(2), 253.107; restricts partial-birth abortions, Wis. Stat.

§ 940.16; imposes requirements on how medication abortions may be provided, Wis. Stat. § 253.105; mandates voluntary and informed consent with numerous requirements to ensure such consent, Wis. Stat. § 253.10; requires parental consent for a minor to be provided with an abortion and addresses how that requirement may be waived by a court, Wis. Stat. §§ 48.257, 48.375, 809.105, 895.037; requires facilities providing abortions to file an annual report with details about the abortions provided, Wis. Stat. § 69.186; and generally prohibits governmental subsidy of abortions with exceptions including for cases of rape or incest, Wis. Stat. § 20.927.

As was true in *McCorvey*, *Bentley*, and *Weeks*, Wisconsin's "comprehensive scheme" for the regulation of lawful abortions "cannot be harmonized" with an archaic near-total ban. *McCorvey*, 385 F.3d at 849; *see also Bentley*, 493 F. Supp. at 923–24; *Weeks*, 733 F. Supp. at 1038–39.

The construction language regarding a "right to abortion" in some, but not all, of chapter 253's regulatory provisions does not change that result. That language simply provides that nothing in the respective section "may be construed as creating or recognizing a right to abortion or as making lawful an abortion that is otherwise unlawful." *See, e.g.,* Wis. Stat. § 253.10(8). To start, nothing in that construction language expresses an intent to enforce a near-total ban. Further, none of the statutes containing the provisions was enacted at a time when Wis. Stat. § 940.04 could have been enforced as to abortion. Instead, they were enacted at the same time or after Wis. Stat. § 940.15, and thus make sense only when viewed in conjunction with Wis. Stat. § 940.15. For example, if a physician performed a *post*-viability abortion

unnecessary to protect the health of the pregnant woman in violation of Wis. Stat. § 940.15, the physician's compliance with the many requirements of the voluntary-and-informed consent statute for lawful abortions, Wis. Stat. § 253.10(3), would not make that post-viability abortion lawful under Wis. Stat. § 940.15.

But even if it were otherwise, a "bald statement" from the Legislature stating that it would prefer no conflict to exist does nothing to alleviate the conflict or change the implied repeal analysis. *Weeks*, 733 F. Supp. at 1039. Such language does not create a "consistent body of law." *Id.* (citation omitted).

Nor could Wis. Stat. § 940.04 be "harmonized" with Wisconsin's myriad modern statutes regulating lawful abortions by rendering those many modern statutes meaningless—which they would be if Wis. Stat. § 940.04 applied to abortion. For example, a statute requiring a physician to take numerous steps to obtain a woman's "voluntary and informed consent" before providing an abortion absent a medical emergency is meaningless if the only circumstance in which an abortion could be provided is when necessary to save the woman's life. *See* Wis. Stat. § 253.10. Rendering Wisconsin's many modern statutes meaningless does not harmonize them with an earlier conflicting law. "[H]armonizing" requires that both sets of statutes still have force—i.e., that both sets of laws are still doing work as law. *In re Commitment of Matthew A.B.*, 231 Wis. 2d 688, 709, 605 N.W.2d 598 (Ct. App. 1999) ("Construing one statute to void others would make no sense and would lead to unreasonable and absurd results." (citation omitted)); *see also McCorvey*, 385 F.3d at 849 (explaining that there was "no way to enforce both sets of [abortion] laws" in

holding that an archaic abortion ban had been impliedly repealed by modern statutes).

If Wis. Stat. § 940.04 applied to abortion, the enactment of Wisconsin's modern comprehensive statutory scheme regulating physicians providing lawful abortions impliedly repealed Wis. Stat. § 940.04 as to abortion.

3. Courts must prioritize providing clarity on what conduct is and is not criminal as to abortion; directly conflicting laws on abortion would not be permissible "overlapping" criminal laws.

If Wis. Stat. § 940.04 applied to abortion, it is evident that Wis. Stat. § 940.04 has been impliedly repealed both by the directly conflicting Wis. Stat. § 940.15 and by Wisconsin's comprehensive statutory scheme regulating lawful abortions. Further, any lingering concerns would have to fall to courts' responsibility to ensure clarity about what is and is not subject to criminal sanction. *Christensen*, 110 Wis. 2d at 546.

Nor are the facts of *Christensen* distinct in a way that makes a difference as to application of this important principle. To the contrary, if anything, the conflict that would exist if both Wis. Stat. §§ 940.04 and 940.15 applied to abortion would be far more problematic than the statutory doubt at issue in *Christensen*. There, the statute criminalizing abuse by an employee of a "residential care institution" was too unclear for criminal penal purposes because of the lack of a specific definition of a "residential care institution." *Christensen*, 110 Wis. 2d at 543–48. Put differently, in *Christensen*, the precise boundaries of *who* could be prosecuted were unclear. The state relied on courts' general disfavoring of implied repeal and argued that the court should look at a related statute for an appropriate definition to avoid applying that doctrine. *Id.* at

543–44, 546–47. The court disagreed, concluding that, because the statute carried criminal penalties, the uncertainty created by legislative changes required treating the criminal prohibition as "effectively repealed." *Id.* at 546–47.

Here, a person looking to the Wisconsin statutes to determine whether particular abortions are lawful would find one statute that says "lawful" and another that says "felony" as to the *exact same factual acts*. Such dramatic doubt about the application of a penal law would prohibit enforcement of Wis. Stat. § 940.04 as to abortion.

And Wis. Stat. §§ 940.04(1) and 940.15(2) could not in any way be treated as complementary, "overlapping" criminal prohibitions. That argument reflects a fundamental misunderstanding of notice and the rule of law. 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. *See, e.g., State v. Villamil*, 2017 WI 74, 377 Wis. 2d 1, 898 N.W.2d 482; *Edwards v. United States*, 814 F.2d 486 (7th Cir. 1987). That creates no notice problem because the people are on notice that the act is illegal. Therefore, "when an act *violates more than one criminal statute*, the Government may 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 statute but illegal under another: an individual cannot know whether conduct is lawful when two statutes say directly opposite things. *Batchelder*—the cornerstone case on

"overlapping" criminal prohibitions—specifically recognized that "overlapping" criminal prohibitions are different from circumstances involving "positive repugnancy between the provisions," where implied repeal *would* apply. *Batchelder*, 442 U.S. at 122 (citation omitted).

The Wisconsin Supreme Court said nothing to the contrary in *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. The court there held that no conflict existed between two statutes because it rejected the argument that the same conduct would violate one statute but not the other. *Id.* ¶¶ 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, if both Wis. Stat. §§ 940.04 and 940.15 applied to abortion, a Wisconsin physician *could not* 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.

* * *

Black's binding rationale means that Wis. Stat. § 940.04 does not apply to abortion. If a court ever disagreed with the impact of *Black* on Wis. Stat. § 940.04, that statute would have been impliedly repealed by Wisconsin's later laws regulating lawful abortions. Under either rationale, one conclusion is unavoidable: Wis. Stat. § 940.04 cannot be enforced as to abortion.

CONCLUSION

This Court should grant Plaintiffs' motion for judgment on the pleadings on Count I of Plaintiffs' Amended Complaint. It should declare that Wis. Stat. § 940.04 is unenforceable as to abortion and enjoin enforcement of Wis. Stat. § 940.04 as applied to abortion.[4]

Dated this 7th day of August 2023.

Respectfully submitted,

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[4] Should this Court grant Plaintiffs' motion for judgment on the pleadings on Count I of Plaintiffs' Amended Complaint, that judgment will be a final order for purposes of appeal because it grants the total relief sought in this case. Pursuant to Wis. Stat. § 808.03, a "final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties" and entered with the clerk of courts. Wis. Stat. § 808.03(1)(a). Through the two counts of their Amended Complaint, Plaintiffs present two distinct grounds to achieve the same result. Thus, granting judgment to Plaintiffs on either claim would "dispose[] of the entire matter in litigation" between Plaintiffs and Defendants. This means that this Court's judgment on the pleadings would be appealable "as a matter of right." Wis. Stat. § 808.03.

In the event that an appellate court were to conclude that Plaintiffs are not entitled to judgment on the pleadings on Count I, Plaintiffs would at that time pursue Count II of their Amended Complaint before this Court.

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