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' REPLY BRIEF TO DISTRICT ATTORNEY URMANSKI'S AND OZANNE'S RESPONSE BRIEFS TO MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT I OF PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

The Wisconsin Supreme Court's decision in *Black* controls the question here: Wis. Stat. § 940.04 applies only to feticide, not abortion. District Attorney Urmanski offers no way this Court either could or should distinguish *Black*, and his arguments about legislative acquiescence are belied by caselaw and the Legislature's actions and inaction following *Black*.

This Court should deny Urmanski's motion to reconsider, which makes the same arguments this Court already rejected. And it should enter a declaratory judgment that Wis. Stat. § 940.04 is unenforceable as to abortion. This declaration will accomplish the very purpose of Wisconsin's Declaratory Judgment Act: to provide relief from uncertainty on a question of statutory construction.

ARGUMENT

I. This Court should reject Urmanski's reconsideration motion outright.

To start, this Court should reject Urmanski's attempt to relitigate arguments this Court has already rejected. It should reject his motion for reconsideration without further consideration or litigation. As Urmanski recognizes, "a reconsideration movant must either present 'newly discovered evidence or establish a manifest error of law or fact.'" (Doc. 169:2 (quoting *Bauer v. Wis. Energy Corp.*, 2022 WI 11, ¶ 13, 400 Wis. 2d 592, 970 N.W.2d 243 (citation omitted)).) He makes no attempt to prove the former and cannot come close to proving the latter. A manifest error must show "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Bauer*, 400 Wis. 2d 592, ¶ 14 (citation omitted).

This Court following *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), is the opposite of disregarding, misapplying, or failing to recognize controlling precedent. And Urmanski's assertion that this Court should reconsider its decision because of how it characterized his concession about *Black* is belied by this Court's decision. (*See* Doc. 147:14 ("Urmanski concedes that *Black's* interpretation must apply to Subsection (2)(a)").)

II. Wisconsin Stat. § 940.04 is unenforceable as applied to abortion under *Black*.

This Court should confirm what it has already recognized: Wis. Stat. § 940.04 is unenforceable as applied to abortion because it is solely a feticide statute under *Black*. Urmanski offers this Court nothing from which it should hold otherwise.

A. *Black*'s rationale controls here.

The Wisconsin Supreme Court's decision in *Black* interprets language in Wis. Stat. § 940.04 that is nearly identical to Wis. Stat. § 940.04(1) as prohibiting feticide, *not* abortion. Urmanski's arguments that this Court can ignore this supreme court precedent are unpersuasive. And his attempts to advance statutory interpretation arguments about Wis. Stat. § 940.04 if *Black* did not apply would ask this Court, improperly, to consider Wis. Stat. § 940.04 in a vacuum.

Urmanski argues that *Black* applies only to Wis. Stat. § 940.04(2)(a) because the supreme court said it was not interpreting other subsections of Wis. Stat. § 940.04. (Doc. 170:16–17.) This Court has recognized why this is a non-starter:

First, the supreme court generally "decides cases on the narrowest grounds presented." *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶ 5 n.3, 303 Wis. 2d 514,

735 N.W.2d 477; (Doc. 147:13). There was no reason for the supreme court to address how its rationale applied to another statutory subsection. But that does not give lower courts the authority to disregard that rationale. Otherwise, the supreme court would have to address every legal or factual scenario to create precedent.

To the contrary, as even the Eleventh Circuit decision Urmanski cites reflects, if the supreme court wants to "discredit" its prior decision, that is for that court to do—not lower courts. *See Jefferson County. v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000) (lower courts cannot disregard on-point supreme court decisions even if "convinced" the supreme court "will overturn" it); (*see* Doc. 170:16).

And second, that's what Urmanski can't escape. Short of reaching absurd results, this Court cannot distinguish *Black*'s holding that Wis. Stat. § 940.04(2)(a), which prohibits "any person, other than the mother, who intentionally destroys the life of an unborn quick child," does *not* apply to abortion. The language in Wis. Stat. § 940.04(1), which prohibits "any person, other than the mother, who intentionally destroys the life of an unborn child," is, except for the word "quick," identical. (Doc. 147:11–13.) Urmanski argues that *Black* should be overturned, but, as he recognizes, (Doc. 170:26–29), that can be addressed only by the supreme court.

Urmanski argues that the presumption of consistent usage is "not absolute," (Doc. 170:19–20), but even the case he cites and its internal citation reject that very idea, refusing to give the same statutory language different meanings. *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶¶ 12–13, 367 Wis. 2d 712, 877 N.W.2d 604 (rejecting different meanings for "give"/"given"); *General Castings*

Corp. v. Winstead, 156 Wis. 2d 752, 758–59, 457 N.W.2d 557 (Ct. App. 1990) (rejecting different meanings for "employment"). Those cases emphasize that courts must "avoid" and "reject" such interpretations "unless the context clearly requires such an approach." *Planned Parenthood*, 367 Wis. 2d 712, ¶ 12 (quoting *General Castings*, 156 Wis. 2d at 759). Urmanski cannot explain how almost completely identical language in Wis. Stat. 940.04 would "clearly require[]" treating one subsection as prohibiting abortion but the other not. *Id.*

Urmanski argues that applying *Black*'s rationale to Wis. Stat. § 940.04(1) would "lead[] to unreasonable results." (Doc. 170:20–22.) His arguments boil down to: (1) how Wis. Stat. § 940.04 was understood before *Black*, and (2) a surplusage argument relating to Wis. Stat. § 940.04(5). (Doc. 170:20–22.)

Urmanski's pre-*Black* arguments ignore the basic problem faced by the court in *Black*: the need to "construe" Wis. Stat. §§ 940.04(2)(a) and 940.15 as having "distinct role[s]" to avoid the *direct conflict* between the statutes that would otherwise exist. *Black*, 188 Wis. 2d at 646. Indeed, Urmanski advances arguments that appear in the *Black* dissent—i.e., arguments considered but rejected by the supreme court in deciding *Black*. *See* 188 Wis. 2d at 648–61 (Heffernan, C.J., dissenting).

And so, if *Black* did not apply to Wis. Stat. § 940.04(1), as Urmanski tries to argue, this Court would be right back at the implied repeal problem that the court in *Black* could only avoid because Wis. Stat. § 940.04 is a feticide statute, only. And this in turn is one reason why Urmanski's argument about "surplusage" in Wis. Stat. § 940.04(5) fails: it presumes Wis. Stat. § 940.04 would be doing *any* work as to

abortion if *Black* did not apply. Urmanski's surplusage (and other) arguments in Section III.D. of his brief would all require reading Wis. Stat. § 940.04 in a vacuum and not in the context of other closely related (and, if applicable to abortion, conflicting) statutes.[1]

Urmanski's surplusage argument about Wis. Stat. § 940.04(5) also would apply just as much to interpreting Wis. Stat. § 940.04(2)(a) as Wis. Stat. § 940.04(1): Wis. Stat. § 940.04(5) says "[t]his section"—i.e., section 940.04 as a whole—does not apply to a "therapeutic abortion" necessary to save the woman's life. And yet, here again, Urmanski's argument appears in the *Black* dissent. *See Black*, 188 Wis. 2d at 651 (Heffernan, C.J., dissenting) (discussing Wis. Stat. § 940.04(5)).

And Wis. Stat. § 940.04(5) *is* doing work in the feticide statute—just not the work Urmanski says it should do. It makes clear that it cannot apply to abortion, even in extreme circumstances. As to Wis. Stat. § 940.04(1), Wis. Stat. § 940.04(5) reinforces that where a pregnant woman will die if she does not receive an abortion, the absence of the otherwise-necessary requirements to ensure voluntary and

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[1] If this Court now concluded that *Black* does not control, the Court would need to address Plaintiffs' preserved arguments that if Wis. Stat. § 940.04 applied to abortion, it's been impliedly repealed. Urmanski's arguments regarding statutory and legislative history, statutory titles, and statutory ambiguity, (*see* Doc. 170:20–22), are all arguments that cannot be considered without also considering Plaintiffs' implied repeal arguments.

Urmanski also argues that this Court should address Plaintiffs' disuse argument, Count II of the Amended Complaint. (Doc. 170:29–30.) While this Court would need to consider Plaintiffs' implied repeal arguments if it concluded *Black* does not control, Plaintiffs have not moved for judgment on their disuse claim. Plaintiffs would move for summary judgment on their disuse claim, which relies on facts outside the pleadings, if this Court either did not grant judgment on Count I of the Amended Complaint or if a grant of judgment on Count I were not affirmed on appeal.

informed consent does not transform the abortion into feticide under Wis. Stat. § 940.04(1). Similarly, Wis. Stat. § 940.04(5) reinforces that physicians are not criminally liable under Wis. Stat. § 940.04(2)(b) in the event a pregnant woman dies. This is what the Legislature did in excepting abortion and other medical care from its post-*Black* crimes against unborn children. *See* Wis. Stat. § 939.75(2)(b).

Lastly, Urmanski cites older criminal cases from before 1985 (when the Legislature enacted Wis. Stat. § 940.15), (Doc. 170:17–19), but he fails to consider the timing of *Black*. At the time those cases were decided, the statutory conflict faced by the *Black* court did not exist; the conflict arose in 1985 with the enactment of Wis. Stat. § 940.15. As this Court explained, those earlier cases predated the 1994 *Black* decision "by three decades," and this Court must follow the "most recent pronouncement." (Doc. 147:13) (quoting *Spacesaver Corp. v. DOR*, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987)).

B. The Legislature's acquiescence to *Black*'s rationale further confirms that the rationale controls here.

As this Court has also correctly recognized, the fact that the Legislature has not changed the language of the prohibition since the supreme court interpreted it further confirms that *Black*'s rationale is binding. (Doc. 147:12.) Urmanski's arguments against legislative acquiescence are misguided.

Courts presume that the supreme court's interpretation of the same statutory language remains in effect when the Legislature leaves it intact. *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993). This presumption applies with extra force when the Legislature makes other relevant changes on the subject but leaves

the interpreted language intact. *Olson,* 175 Wis. 2d at 641–42; *Cf. Wenke v. Gehl Co.*, 2004 WI 103, ¶ 36, 274 Wis. 2d 220, 682 N.W.2d 405.

Urmanski suggests that the Legislature would not have known "§ 940.04 was subject to an interpretation that it did not apply to abortion" because that "question" was "overshadowed" by the facts of *Black*. (*See* Doc. 170:23–25.) He points to *Wenke*, where the Legislature did not act again on the "nuanced concept" at issue in the prior decision or amend the statute after the supreme court addressed it. *Wenke*, 274 Wis. 2d 220, ¶ 36 (emphasizing the "complete inaction by the legislature" on the subject and particular statute since the prior decision). *Wenke* just makes Plaintiffs' point.

Here, the legal question asked in *Black* was whether specific language criminally prohibited abortion or feticide. In contrast to *Wenke*, where the Legislature did nothing after the earlier decision, here the Legislature *did* address crimes against unborn children post-*Black* including feticide, and addressed abortion, but left the language interpreted by *Black* as it was. That there have been "numerous bills . . . introduced, but not enacted" on Wis. Stat. § 940.04 since *Black*, (Doc. 170:25), just reinforces application of legislative acquiescence here. *Olson,* 175 Wis. 2d at 641–42.

Urmanski misses the point in suggesting that the Legislature would not have realized *Black* would affect Wis. Stat. § 940.04(1), (Doc. 170:23): since *Black*, the Legislature has not amended the very language that the supreme court interpreted as applicable only to feticide, not abortion. So this Court must therefore presume that feticide-only interpretation "remains in effect." *Olson*, 175 Wis. 2d at 641. And the text of that prohibited conduct is nearly identical to the text at issue here.

Urmanski fares no better in arguing legislators would have had no reason to amend the language in Wis. Stat. § 940.04 because *Black* discussed *Roe*'s ban on prohibitions of pre-viability abortions. The language at issue in *Black* applied to an "unborn quick child," a *post*-viability prohibition unaddressed by *Roe*. If the Legislature wanted that language to apply to abortion, it could have amended the statutory text interpreted by *Black*. It did not.

Urmanski points to Wis. Stat. § 939.75(2)(b)1., (Doc. 170:24), but that statute does not help him. It excepts abortions from various crimes against unborn children and states it was not intended to limit the applicability of Wis. Stat. § 940.04 and other statutes to an induced abortion. Urmanski tries to transform this exception to liability from particular criminal statutes into implied criminal liability for abortion under Wis. Stat. § 940.04. Wisconsin Stat. § 939.75(2)(b)1. of course says nothing about a *grant* of authority for separate prosecutions. And as the supreme court explained in *Olson*, the Legislature cannot overrule a prior court decision through separate statutory provisions without changing the previously interpreted text itself. *Olson*, 175 Wis. 2d at 641–42. Urmanski offers no response to *Olson*.

Without more, Urmanski makes the unsupported assertion that legislative inaction in changing the interpreted language should be excused because the public has remained confused as to whether Wis. Stat. § 940.04 still applies to abortion. This argument both trivializes the Legislature's role as lawmaker and reinforces the importance of this Court granting a declaratory judgment to provide clarity that Wis. Stat. § 940.04 does not apply to abortion.

III. This Court should grant a declaratory judgment that Wis. Stat. § 940.04 is unenforceable as to abortion.

A. A declaratory judgment will rectify the uncertainty that has existed since *Dobbs*.

Because *Black* compels the conclusion that Wis. Stat. § 940.04 is solely a feticide statute, this Court should grant a declaratory judgment under Wis. Stat. § 806.04 declaring that Wis. Stat. § 940.04 is unenforceable as to abortion. Wisconsin's Declaratory Judgment Act serves "to settle and to afford relief from uncertainty and insecurity" as to such questions that include "construction or validity" of a "statute." Wis. Stat. § 806.04(2), (12); *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 42–43, 309 Wis. 2d 365, 749 N.W.2d 211 (citation omitted).

Plaintiffs seeking declaratory judgment "need not actually suffer an injury before availing" themselves of a declaratory judgment action. To the contrary, "[w]hat is required" is just "that the facts be sufficiently developed to allow a conclusive adjudication." *Cottage Grove*, 309 Wis. 2d 365, ¶ 43. The very "underlying philosophy" of the Declaratory Judgment Act is to enable legal questions to be answered "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, 307, 240 N.W.2d 610 (1976). Wisconsin Stat. § 806.04 is to be "liberally construed and administered" and courts recognize that declaratory relief "is appropriate wherever it will serve a useful purpose." Wis. Stat. § 806.04(12); *Cottage Grove*, 309 Wis. 2d 365, ¶ 42 (citation omitted).

Importantly, the declaratory judgment action here is a particular kind: an official capacity suit to adjudicate the proper construction of state law. For those actions, courts engage in a legal fiction where the officials who administer the law in

question are named as defendants: "it has been necessary to engage in a fiction that allows such actions to be brought against the officer or agency charged with administering the statute." *Lister*, 72 Wis. 2d at 303. This is why arguments about what those officials personally think is ultimately irrelevant in this specific context: it is their offices' placement in the system of government that makes them proper defendants in a declaratory action about the construction of state law. *See id.*

The tremendous confusion that has existed about Wisconsin abortion law since *Dobbs* demonstrates that the clarity of declaratory judgment here will afford "relief from uncertainty and insecurity." Wis. Stat. § 806.04(12).

B. Given the significance of the issue, this Court may also decide to grant a permanent injunction.

In addition to a declaratory judgment, this Court may also decide to grant a permanent injunction. Both Urmanski and Ozanne object to an injunction. (Doc. 168:5–7; 170:39–40.) Plaintiffs appreciate all three Defendants' assurances that they will comply with the terms of any declaratory judgment. (Doc. 167:5; 168:4–5; 170:39–40.) Given the significance of this issue to Wisconsin, this Court may nevertheless still decide that an injunction is further warranted to aid in effectuating the declaratory judgment. *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957).

CONCLUSION

This Court should grant Plaintiffs' motion for judgment on Count I of Plaintiffs' Amended Complaint. It should declare that Wis. Stat. § 940.04 is unenforceable as to abortion.

Dated this 29th day of September 2023.

Respectfully submitted,

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