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

Case No. 2022-CV-1594
Case Code: 30701

Plaintiffs,

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

Intervenors,

v.

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.

BRIEF IN SUPPORT OF INTERVENORS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

The Physician Intervenors, Dr. Christopher J. Ford, Dr. Kristin Lyerly, and Dr. Jennifer Jury McIntosh fear they may be subjected to criminal investigation or prosecution based on some prosecutors' public statements that § 940.04 could be used to prosecute those who provide abortions. Under the arcane language of the statute, even abortions to preserve the health and well-being of a pregnant patient would be disallowed. The threat or criminal prosecution has caused individual physicians, hospitals, and health systems to alter how care is provided to pregnant patients.

This threat comes despite the fact the Wisconsin Legislature has replaced § 940.04 with a scheme of abortion laws regulating (versus outlawing) the practice and despite the Wisconsin Supreme Court's determination that § 940.04(2) is a feticide statute—which this Court has concluded extends to § 940.04(1).

Because § 940.04 is no longer a law criminalizing medical abortions, the Physician Intervenors seek a declaration so stating such and an injunction to support this declaration.

I. FACTUAL AND LEGAL BACKGROUND

A. Wisconsin physicians' ability to practice sound, evidence-based medicine is hindered by prosecutors' statements indicating they intend to prosecute the performance of abortions under § 940.04.

Dr. Christopher J. Ford is a Wisconsin-licensed emergency medicine physician residing and practicing in Wisconsin. (Dkt. 72, ¶¶ 1, 4, 5; Dkt. 75, ¶ 4.) He received his Doctor of Medicine from the Medical College of Wisconsin, is certified by the American Board of Emergency Medicine, and is a Fellow of the American College of Emergency

Physicians. (Dkt. 72, ¶¶ 2, 4; Dkt. 75, ¶ 4.) In the emergency rooms where he practices, he regularly cares for patients who are pregnant and experiencing serious complications. (Dkt. 72, ¶¶ 7-10; Dkt. 75, ¶ 4.)

Dr. Kristin Lyerly is a Wisconsin-licensed obstetrician-gynecologist residing in Wisconsin and providing full scope care to women who may become pregnant, are pregnant, or are experiencing serious complications of pregnancy. (Dkt. 70, ¶¶ 1, 3, 4-5; Dkt. 75, ¶ 5.) She received her Doctor of Medicine and Master of Public Health from the University of Wisconsin-Madison and is a Fellow of the American College of Obstetricians and Gynecologists. (Dkt. 70, ¶¶ 2, 4; Dkt. 75, ¶ 5.) Until June 2022, Dr. Lyerly practiced in Wisconsin. (Dkt. 70, ¶¶ 5, 10; Dkt. 5, ¶ 5.)

Dr. Jennifer Jury McIntosh is a Wisconsin-licensed maternal fetal medicine physician residing and practicing in Wisconsin (Dkt. 71, ¶¶ 1, 5; Dkt. 75, ¶ 6). She holds degrees as a Doctor of Osteopathic Medicine (D.O.) and a Master of Science in Clinical and Translational Science (Dkt. 71, ¶ 2; Dkt. 75, ¶ 6). As a specialist in maternal and fetal health, Dr. McIntosh cares solely for patients with high-risk pregnancies, which may be high for maternal reasons, fetal reasons, or both. (Dkt. 71, ¶¶ 6-8; Dkt. 75, ¶ 6.)

Drs. Ford, Lyerly, and McIntosh (together, the "Physicians"), are a group of Wisconsin physicians practicing emergency medicine, obstetrics and gynecology, and maternal fetal medicine. Each routinely treats pregnant patients experiencing serious complications of their pregnancies and, at times, each performs abortions. (Dkt. 70, ¶¶ 7-9; Dkt. 71, ¶¶ 6-8; Dkt. 72, ¶¶ 7, 9; Dkt. 75, ¶ 14.)

Dr. Ford practices primarily in hospital emergency rooms, where at times he has mere seconds or minutes to diagnose a pregnant patient whom he has never treated before and perform life- or health-saving measures that may include an abortion (Dkt. 72, ¶¶ 5-7; Dkt. 75, ¶ 15.). Dr. McIntosh is a maternal fetal medicine specialist, meaning all of her patients are pregnant and at high risk due to maternal reasons, fetal reasons, or both (Dkt. 71 ¶¶ 6-8; Dkt. 75, ¶ 15.). Dr. Lyerly is an obstetrician-gynecologist performing full scope care for pregnant patients, some of whom experience serious complications. (Dkt. 70, ¶ 7; Dkt. 75, ¶ 15.)

Prior to June 24, 2022, when the Physicians were called upon to perform abortions, they could do so for any reason prior to viability of the fetus, and post-viability, where they deemed it necessary to preserve the life or health of their patient. (Dkt. 75, ¶ 16.[1]) A robust scheme of statutes establish when, how, and where Wisconsin physicians may perform lawful abortions. *See*, *e.g.,* Wis. Stat. §§ 940.15, 253.105, 253.10, 253.107, and 48.375 (all establishing the manner in which abortions lawfully may be performed). Wisconsin physicians, including these intervening Physicians, have practiced safely and effectively within these parameters for decades. (Dkt. 75, ¶ 18.)

Following *Dobbs*, some Wisconsin prosecutors have expressed belief that the fall of *Roe* allows them to prosecute abortion under a separate, arcane Wisconsin statute, § 940.04. (Dkt. 75, ¶ 21; Dkt. 153, ¶ 21)

[1] In his Answer, Urmanski denies this characterization of the state of the law prior to June 24, 2022 (Dkt. 153, ¶ 16.) The statutes referenced in this paragraph contradict Urmanski's denial.

The Wisconsin Department of Safety and Professional Services (DSPS) conducts investigations of physicians who have allegedly engaged in unprofessional conduct, which includes violations of law. Wis. Stat. §§ 448.02(3), (8), 440.03(3m) ("The department may investigate complaints made against a person who has been issued a credential"). That includes "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 the Wisconsin Medical Examining Board, which may discipline licenses of doctors based on such investigations. Wis. Stat. §§ 448.02, 448.03. Thus, DSPS could be called upon to investigate or gather information pertaining to alleged violations of any applicable abortion laws. (Dkt. 75, ¶ 8.)

The Wisconsin Medical Examining Board is created by Wis. Stat. § 15.405(7) and, pursuant to Wis. Stat. ch. 448, subchapter II, has duties that include issuing licenses to practice medicine and surgery. The Board's duties also include considering allegations of unprofessional conduct, which include alleged violations of Wisconsin laws, such as the laws regarding abortions, and issuing discipline where appropriate. *See* Wis. Stat. § 448.02; Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i). (Dkt. ¶ 9.)

Joel Urmanski is the District Attorney for Sheboygan County, Wisconsin. As a district attorney, District Attorney Urmanski has authority to prosecute criminal actions within Sheboygan County. Wis. Stat. § 978.05(1). District Attorney Urmanski has publicly reported that he will prosecute violations of Wis. Stat § 940.04. *Sheboygan County D.A. says*

he'll prosecute providers accused of performing abortions in violation of state law, WTMJ-TV News Report (June 28, 2022).[2] (Dkt 75, ¶ 11; Dkt. 153, ¶11).

Ismael Ozanne is the District Attorney for Dane County, Wisconsin. As a district attorney, District Attorney Ozanne has authority to prosecute criminal actions within Dane County. Wis. Stat. § 978.05(1). Regardless of whether District Attorney Ozanne intends to enforce Wis. Stat. § 940.04 as applied to abortion, a successor in his office may intend to do so. (Dkt 74, ¶ 12; Dkt 87 ¶ 12).

John T. Chisholm is the District Attorney for Milwaukee County, Wisconsin. As a district attorney, District Attorney Chisholm has authority to prosecute criminal actions within Milwaukee County. Wis. Stat. § 978.05(1). Regardless of whether District Attorney Chisholm intends to enforce Wis. Stat. § 940.04 as applied to abortion, a successor in his office may intend to do so. (Dkt. 75, ¶ 13; Dkt 84, ¶ 13.)

Abortion is an essential part of comprehensive health care and when abortion is legal, it is safe. Brief of *Amici Curiae,* American College of Obstetricians and Gynecologists, American Medical Association, Wisconsin Medical Society, and Society for Maternal-Fetal Medicine (Dkt. 107, pp. 2, 4-6, 13.) The threatened application of § 940.04 against health care providers "jeopardizes the health and safety of pregnant people in Wisconsin and places extreme burdens and risks on providers of essential reproductive health care, without a valid medical justification. (Dkt 107, pp. 3, 6-12.) Any such application also creates inherent conflicts of interest for physicians, who must offer

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[2] A*vailable at*: www.tmj4.com/news/local-news/sheboygan-county-d-a-says-hell-prosecute-providers-accused-of-performing-abortions-in-violation-of-state-law.

appropriate treatment options without regard to their own self-interest. (Dkt 107, pp. 13-15.)

B. Wisconsin laws on abortion

Wisconsin did not prohibit abortion at the time it gained statehood; its earliest abortion law came into existence a year later. The 1849 statute criminalized "the willful killing of an unborn quick child" by injury to the mother or by administering to a woman "pregnant with a quick child...any medicine, drug, or substance whatever... or any instrument or other means, with intent thereby to destroy such child." Wis. Stat. §§ 133(10), (11) (1849).

In 1955, then existing abortion laws were consolidated and renumbered to § 940.04, in substantially the form the statute remains today. 1955 Wis. Act 696; Wis. Stat. § 940.04 (1955). The only substantive legislative change to § 940.04 since 1955 has been the repeal of subsections (3) and (4) in 2011, eliminating criminal penalties for a woman obtaining an abortion. 2011 Wisconsin Act 217 § 11.[3]

In 1970, a federal court declared that § 940.04(1)'s criminalization of the abortion of an embryo which had not quickened to be a violation of a woman's right to privacy, under the Ninth Amendment of the United States Constitution. *Babbitz v. McCann*, 310 F. Supp. 293, 299 (E.D. Wis. 1970). In 1973, the United States Supreme Court decided *Roe v. Wade,* 410 U.S.113 (1973) and *Doe v. Bolton,* 410 U.S. 179 (1973) recognizing a woman's constitutional right to abortion under the Fourteenth Amendment of the

[3] In addition to repealing criminal sanctions against those who obtain an abortion, 2011 Wisconsin Act 217 § 11 also created § 253.105 regulating the use of abortion-inducing drugs, added requirements that certain printed information be shared with patients; and added requirements related to informed consent.

United States Constitution.[4] *Roe* expressly references § 940.04 as a criminal statute similar to the Texas statute which the Court invalidates. *Roe*, 410 U.S. at 118, fn. 2.

In 1985, the Wisconsin Legislature passed the "Abortion Prevention and Family Responsibility Act" which, among other things, prohibits the performance of abortions post viability except to preserve the life or health of the mother (§ 940.15(2)), established that a woman who obtains an abortion may not be prosecuted (§ 940.13), and requires abortion at any stage be performed by a physician (§ 940.15(5)).

1985 Wisconsin Act 56 was borne out of a bipartisan Special Committee on Pregnancy Options. The original draft of the bill out of committee, 1985 AB 510, LRB-4124/1, would have expressly repealed § 940.04. However, a new amendment in the Assembly, Assembly Substitute Amendment 1, LRB s0289/2, deleted the express repeal of § 940.04 and instead proposed a nonstatutory provision stating that § 940.15 "may not be deemed to repeal" § 940.04. That nonstatutory provision was deleted in Amendment 6 to Assembly Substitute Amendment 1, LRB a2036/1. (*See* Pls.' App. 101; Dkt. 99 at 3.) Hence, the final version of 1985 Act 56 did not include any statutory or nonstatutory language indicating a legislative intent to repeal or to not repeal § 940.04 with the enactment of § 940.15.

Since the passage of § 940.15, the Legislature has enacted a series of additional abortion laws establishing when, where, how, and by whom abortions may lawfully be performed. These include:

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[4] Both *Roe v. Wade* and *Doe v. Bolton* have been abrogated by subsequent case law and overruled by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022)

- **§ 69.186**, requiring hospitals, clinics, and facilities performing abortions to file an annual report containing certain information about patients (1985);

- **§ 253.10**, requiring abortion providers to give certain information to patients seeking abortions like the fetal age and resources regarding birth control, pregnancy, adoption, and abortion risks (1985);

- **§ 48.375**, requiring a minor to obtain consent to an abortion from her parent guardian, or another family member, except under certain circumstances (1991);

- **§ 253.10** amended to impose a 24-hour waiting period for women seeking an abortion, with certain exceptions, and requiring additional information be provided to a woman seeking an abortion such as fetal development, adoption, and child support (1995);

- **§ 69.186** amended to require hospitals, clinics, and facilities to report types of abortions performed (1997);

- **§ 940.16**, imposing criminal penalties on anyone performing a partial-birth abortion anytime between fertilization and delivery (1997);

- **§ 253.105**, imposing various restrictions on medication abortions, including that a physician perform a physical examination and the same physician be physically present in the room when the medication is given to the woman at least 24 hours later, effectively prohibiting telehealth for medication abortions (2011);

- **§ 253.10** amended again to require a physician to determine whether consent is freely given and, if not, provide information on services for domestic violence victims (2011);

- **§ 253.095**, requiring a physician to have admitting privileges to a hospital within 30 miles of where the abortion is performed (2013);

- **§ 253.10** amended again to require an ultrasound be performed regardless of medical necessity unless waived in writing (2013);

- **§ 253.107**, banning abortions after 20 weeks or when the fetus is capable of experiencing pain, creating a civil remedy (2015); and

- **§ 253.10** amended, requiring provider to inform patient of fetus' post-fertilization age and odds of post-delivery survival at that age and to provide perinatal hospice information (2015).

Neither § 940.15 nor any of the other modern abortion laws expressly reference *Roe v. Wade*, 410 U.S. 113, rely on it, or relinquish their enforceability should it be overturned.

C. Post-*Dobbs* developments

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), which overturned *Roe v. Wade* and its progeny and left the of the ability to regulate or proscribe abortion to the individual states.

Despite being called into special session twice to do so,[5] the Wisconsin Legislature has not enacted new legislation on abortion since *Dobbs*, nor repealed or amended any existing abortion law.

The Physicians are not aware of any prosecutions for consensual medical abortions under Wis. Stat. § 940.04 since *Dobbs* – or in the past 50 years. However, Urmanski states that he and other "Wisconsin prosecutors have expressed belief that the overturning of *Roe* allows for prosecution for the performance of abortions under Wis. Stat. § 940.04." (Dkt, 153 at ¶ 21).In a recorded interview, Urmanski stated he would enforce § 940.04 in cases of consensual medical abortion if law enforcement

[5] Governor's Executive Order 168 (June 8, 2022); Governor's Executive Order 175 (Sept. 21, 2022).

referred an investigation to his office.[6, 7] Urmanski is not alone with his public statement indicating he would prosecute abortions under § 940.04. Fond du Lac County District Attorney Eric Toney, who was the Republican candidate for attorney general in 2022, likewise said that he will enforce the law as a district attorney and would enforce and defend the law as attorney general.[8, 9]

The Physicians wish to continue practicing medicine in Wisconsin, treating pregnant patients, and providing safe and lawful abortions when the life or health of their patients is at stake. However, because some prosecutors have threatened prosecution under the arcane law—and others have remained silent, leaving open the possibility that they might prosecute—the Physicians fear their practice of medicine may lead to felony conviction, imprisonment for up to fifteen years, fines up to $50,000, and disciplinary action on their medical licenses (including revocation). (Dkt. 72, ¶ 11; Dkt. 75, ¶ 26.) In

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[6] **Wisconsin DA plans to prosecute doctors accused of performing abortions, WDJT;** *available at:* https://abc7chicago.com/abortion-wisconsin-sheboygan-county-district-attorney/12006862/. Video footage captures the following exchange:

Journalist:	"Do you plan to prosecute abortions that are considered illegal based on that 1849 law?"
Urmanski:	"If law enforcement forwards an investigation to us and it's a violation of law, we will prosecute it… I'm not going to go out there and say go ahead and commit this crime, do this, do that… It's not how I feel about the law, it's not my intentions or thoughts about any particular law. We enforce that law. So if there's a violation here, we'll enforce it."

[7] The Court may take judicial notice of Urmanski's (and other district attorneys) recorded and publicized statements pursuant to Wis. Stat. § 902.01(2)(b), because the statement is capable of accurate and ready determination by resort to viewing the video and cannot reasonably be questioned.

[8] **Josh Kaul, Eric Toney and Wisconsin's 2022 AG race**; PBS Wisconsin (Oct. 14, 2022) *available at:* https://pbswisconsin.org/news-item/josh-kaul-eric-toney-and-wisconsins-2022-ag-race/

[9] *But see,* **Wisconsin DAs and Prosecuting Abortion Cases**, PBS Wisconsin (July 1, 2022) (La Crosse County District Attorney Tim Gruenke stating he would enforce § 940.04 if upheld by the court, but stating it is unclear what criminal abortion laws apply at this time).

addition, each may be subject to licensure investigations or actions due to the lack of clarity about whether or not § 940.04 applies to abortion.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their complaint for declaratory judgment on June 28, 2022, alleging § 940.04 is unenforceable as applied to abortions because (1) it has been superseded, or impliedly repealed, by subsequent enactments, and (2) it has not been enforced for many decades. (Dkt. 4.) The original named defendants, three Wisconsin legislators, moved to dismiss Plaintiffs' complaint on August 22, 2022, alleging non-justiciability due to their lack of enforcement power with respect to any of the challenged laws, among other things. (Dkts. 21 and 29.) Plaintiffs subsequently amended their complaint, removing the legislative defendants and naming three current Wisconsin district attorney defendants, Joel Urmanski, Ishmael Ozanne, and John Chisholm ("Defendants").

The Physicians moved to intervene on November 3, 2022, on grounds that threatened prosecution under § 940.04 has created fear in them that their practice of medicine may lead to felony conviction, imprisonment, fines, and disciplinary action. (Dkt. 72, ¶ 11; Dkt. 75 at 10.) The Physicians allege that § 940.04 is unenforceable under *State v. Black,* 188 Wis. 2d 639, 526 N.W.2d 132 (1994); that the Legislature has replaced § 940.04 with § 940.15 and numerous other abortion statutes; and that § 940.04 is unenforceable against health care providers for abortions, because doing so would violate the Due Process Clause. (Dkt. 75, ¶¶ 28-43.) The Physicians seek a declaratory judgment declaring § 940.04 unenforceable as applied to abortions and a permanent injunction

enjoining Wisconsin district attorneys from initiating any enforcement of § 940.04. (Dkt. 75 at 15.)

On November 30, 2022, Urmanski moved to dismiss all of the Plaintiffs' and Physicians' claims for failure to state claims upon which relief can be granted. (Dkts. 89, 90.) The Court held oral argument on the motions on May 4, 2023. (Dkt. 115.)

The Court issued its Decision and Order on Urmanski's Motion to Dismiss on July 7, 2023. (Dkt. 147.) In it, the Court dismissed with prejudice all claims "premised on the assertion that Wis. Stat. § 940.04 prohibits abortions." (Dkt. 147 at 21.) The Court otherwise denied Urmanski's motion to dismiss, ruling "the Doctors state a claim for declaratory relief because they allege facts which, if true, show they may be prosecuted for performing lawful abortions." (Dkt. 147 at 21.)

Urmanski answered Plaintiffs' and Intervenors' complaints on July 21, 2023. (Dkt. 153.)

This Motion for Judgment on the Pleadings follows, in which Physicians ask the Court to enter declaratory relief and a permanent injunction in accordance with the Court's July 7, 2023 Decision and Order and this Brief in support of the Physicians' motion.

III. STANDARD OF REVIEW

A party may move for judgment on the pleadings after the issues has been joined between all parties and within a time so as not to delay trial. Wis. Stat. § 802.06(3). "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. The motion is "directed towards a determination of the substantive merits of the controversy." 3 Jay E. Grenig, *Wisconsin Practice Series: Civil Procedure, Judgment on the Pleadings* § 206.16, at 385 (4th ed.).

A court must first examine the complaint to determine whether a claim has been stated, then examine the responsive pleadings to ascertain whether there is an issue of material fact. *McNally,* 2018 WI 46, ¶ 23. Judgment on the pleadings is appropriate when there are no "genuine" issues of material fact and "the matters set forth in the pleadings show that the cause of action, or defense, can be disposed of as a matter of law." *Id.;* State Bar of Wisconsin, *Wisconsin Civil Litigation Forms Manual* § 8.01 (4th ed. 2018). The "pleadings" include the operative complaint and answer as well as any exhibits or documents referenced in the pleadings. *See* Wis. Stat. §§ 802.01(1), 802.04(3); *see also Poeske v. Estreen*, 55 Wis. 2d 238, 242–43 & n.3, 198 N.W.2d 625 (1972).

Under Wis. Stat. § 806.04(1) and (2), the Court may enter a declaratory judgment declaring rights, status, and other legal relations under a statute when brought by a party whose rights, status, or other legal relations are affected by the statute. "The Declaratory Judgments Act is singularly suited to test the validity of legislative action, prior to enforcement." *Weber v. Town of Lincoln,* 159 Wis. 2d 144, 148, 463 N. W. 2d 869 (Ct. App. 1990). "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. Wis. Stat. § 806.04(8).

IV. ARGUMENT

A. Physicians are entitled to declaratory judgment and a permanent injunction against enforcement of § 940.04 as applied to abortions because the statute criminalizes feticide, not consensual medical abortions.

In 1994, the Wisconsin Supreme Court issued the only existing judicial opinion interpreting any provision of § 940.04 against § 940.15—until this Court's July 7, 2023 Order (Dkt 147). In *State v. Black,* the Supreme Court held that, despite the statute's "Abortion" title, § 940.04(2)(a) is not an abortion statute at all; rather, it prohibits only (nonconsensual) feticide of a quick child. 188 Wis. 2d 639, 642. In the process, the court unequivocally described § 940.15 as the statute restricting consensual abortions, while § 940.04(2)(a) did not, explaining:

> [i]n order to construe secs. 940.04(2)(a) and 940.15, consistently, we view each statute as having a distinct role. Section 940.15 places restrictions (consistent with Roe v. Wade) 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. Section 940.04(2)(a), on the other hand, 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. at 646 (emphasis added).

Although the *Black* Court declined to opine specifically subsection 940.04(1)—likely because the defendant had not been charged under that section—the Court did not indicate its same rationale should not be extended to subsection (1). As this Court recognized, Subsections (1) and (2)(a) are identical, but for the fact that subsection (2)(a) applies only to an unborn "quick" child while subsection (1) omits that single word.[10] (Dkt 147, p. 11). According to the *Black* court, like subsection (1), the "the words of the

[10] The two subsections also assign different criminal penalty classifications.

statute could hardly be clearer. The statute plainly proscribes feticide." *Black*, 188 Wis. 2d at 642.

The decision leaves § 940.04(2)(a) with no impact on abortion. The Legislature did not revise this statute to override the Supreme Court's decision; nor did it revise the nearly identical § 940.04(1) to make it clearly applicable to consensual abortion or to demonstrate it is not, like subsection (2)(a), merely a feticide statute. To the contrary, the Legislature later removed subsections (3) and (4), which penalized the woman obtaining an abortion, which would have been inconsistent with a feticide statute (feticide requiring non-consent of the mother), further aligning § 940.04 and § 940.15 with the Supreme Court's interpretation in *Black*. All of this demonstrates the Legislature's tacit approval of the Court's interpretation of § 940.15 as Wisconsin's consensual abortion statute. *See Reiter v. Dyken*, 95 Wis. 2d 461, 471, 290 N.W.2d 510, 515 (1980) ("The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged.") Had the Legislature disagreed with the Court's interpretation in *Black* of § 940.15 as the consensual abortion statute, it should have—and understood it must—act accordingly to change the law.

Prior to enactment of § 940.15, two Wisconsin Supreme Court opinions, considered prosecutions for consensual abortions under § 940.04(1). *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968); *State v. Cohen*, 31 Wis. 2d 97, 142 N.W.2d 161 (1966). However, the Court in *Black* subsequently held that § 940.15 has the "distinct role" of governing consensual abortions in contrast to § 940.04. *Black*, 188 Wis. 2d at 646. Tellingly, Urmanski did not cite any cases where consensual abortion was prosecuted under § 940.04(1)

following the issuance of *Black*. *MacGresens* and *Cohen* have no bearing on an interpretation of § 940.04(1) today, long after the contradictory Wisconsin Supreme Court opinion in *Black* and numerous relevant legislative enactments on abortion have intervened.

Several additional points on statutory interpretation further support the conclusion that subsection (1) applies solely to feticide like its counterpart, (2)(a). First, even though § 940.04 is titled "Abortion," the title of the statute cannot be used to create ambiguity in the statute" when the text of the statute is otherwise unambiguous. *Black*, 188 Wis. 2d at 642, *citing State v. Martin*, 162 Wis.2d 883, 897 n. 5, 470 N.W.2d 900 (1991); *Wisconsin Valley Imp. Co.*, 9 Wis.2d at 618, 101 N.W.2d 798 (respectively). Consistent with *Black,* 188 Wis.2d at 645, subsection (1) also "clearly and simply" proscribes feticide.

Second, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 11, 315 Wis. 2d 350, 361, 760 N.W.2d 156, 161, *citing State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears."). This fundamental canon of statutory interpretation eliminates any reading that would divorce the two nearly-identical subsections by reading one as prohibiting consensual abortion and another as prohibiting feticide. The only reasonable text-driven interpretation that avoids that absurd result is that both are feticide-only prohibitions.

For all of these reasons and as the Court has already determined, *Black* commands the conclusion that § 940.04(1), as well as subsection (2), applies to feticide only, and not consensual abortion. (Dkt 147, pp. 9-20.) Physicians are entitled to a declaratory judgment that § 940.04 may not be enforced against consensual abortions in Wisconsin.

B. Physicians are entitled to declaratory judgment and a permanent injunction against enforcement of Wis. Stat. § 940.04 as applied to abortions because the statute has been impliedly repealed by a suite of modern abortion laws passed by recent legislatures.

The Wisconsin Supreme Court's interpretation of § 940.04(2)(a) as a feticide-only statute logically extends to subsection (1), and the Physicians are entitled to declaratory relief for that reason alone. However, additional arguments support the same conclusion, which Physicians now present for the Court's additional consideration and for the purpose of preserving them upon appeal. *See State v. Hayes*, 2004 WI 80, ¶ 21, 273 Wis. 2d 1, 11, 681 N.W.2d 203, 208.

1. To interpret § 940.04 as enforceable against healthcare providers performing abortions would offend fundamental principles of democracy, nullifying nearly 50 years of abortion laws passed by recent legislatures.

Physicians ask this Court to declare § 940.04 unenforceable as applied to abortions because to interpret it otherwise would be the antithetical to the fundamental principles of democracy, in which the Legislature derives its power to govern only from the consent of the people, and in which acting legislatures are not hamstrung by the laws passed by their former counterparts of 50 or more than 100 years before.

In the course of moving for dismissal of Physicians' claims, Urmanski suggested that to interpret § 940.04 as impliedly repealed would counter the Legislature's power to

enact laws. In reality, just the opposite is true. No legislature gets to decide that its laws may never be amended, replaced, or repealed. This is particularly true when one considers that at the time of original enactment, the Wisconsin Legislature comprised of *only* men, voted into office by *only* men, at the exclusion of women. In the intervening years, women were granted the right to vote by the Nineteenth Amendment of the United States Constitution (1920).

Subsequent legislatures have since enacted multiple abortion laws that expand the detail of when, how, and by whom abortions may be provided. It would be antithetical to our democracy to hold that a law which has not been in force for more than 50 years could be resurrected and then used to nullify four decades of more modern enactments on the same subject.

As Article I, Section 1 of the Wisconsin Constitution, the first principle under Wisconsin's "Declaration of Rights," declares, the state government is instituted "deriving [its] just powers from the consent of the governed."

> This reflects the foundational assumption of our system of government: all authority resides with the people, and it is the people alone who have the authority to establish the terms and methods by which they will be governed. The constitution is that foundational charter in which the people determine their fundamental law, and by which they consent to be governed.

Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm'n, 2023 WI 38, ¶ 15, 407 Wis. 2d 87, 103, 990 N.W.2d 122, 130. Through their legislatures of the past 40 plus years, the people have governed the subject matter of consensual abortion, with a modern scheme of statutes that are comprehensive. There is no legal basis to resurrect an arcane statute to now nullify the will of the people.

2. A plain reading of Wisconsin's modern abortion laws demonstrates they were clearly intended to replace § 940.04.

Implied repeal may occur in either of two ways. In the first, an earlier act "is so manifestly inconsistent and repugnant to [a] later act that they cannot reasonably stand together." *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878, 881 (1971). In the second, a "later statute covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first." *Gilkey v. Cook*, 60 Wis. 133, 18 N.W. 639, 641 (1884). Although implied repeal has been described as "disfavored," that disfavor only maintains force where the statute claimed to be repealed is one of "longstanding and frequent use." *Dairyland*, 52 Wis. 2d at 51.

a. The plain statutory language of § 940.15 and Wisconsin's numerous other modern abortion statutes is unambiguous and comprehensive on the subject of abortion.

Numerous statutes enacted long after § 940.04 occupy its entire scope *and more*, encompassing the subject matter of abortion more comprehensively and including new, more specific provisions showing plainly that these statutes were meant to replace § 940.04.

Chief among these is § 940.15, which unquestionably is more encompassing and more specific than § 940.04. It is not simply a post-viability abortion statute; it speaks to both pre- and post-viability abortions. Under subsections (2) and (3), post-viability abortions are illegal unless performed by a physician in order to preserve the life or health of the mother. Under subsection (5), both pre- and post-viability abortions are illegal unless performed by a physician. ("Whoever intentionally performs an abortion and who

is not a physician is guilty of a Class I felony.") By the plain language of subsection (5), therefore, the legality of a pre-viability abortion is established: when it is performed by a physician. Section 940.15 is not silent on pre-viability abortion; it covers the legality of abortion throughout the entire pregnancy.

Beyond covering the entire length of pregnancy, § 940.15 provides even greater specificity about abortion than § 940.04, which plainly shows its provisions are a substitute for § 940.04(1). Subsection (1) defines viability, who must determine it, and against what standard. ("[V]iability means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb.") Subsection (3) allows for post-viability abortion if necessary to preserve the life or health of the woman, as determined by the medical judgment of the attending physicians. Subsection (4) specifies that rather than the "licensed maternity hospital" of § 940.04, an abortion to save the mother's life or health may be performed "in a hospital on an inpatient basis." Subsection (6) dictates how a physician must select the procedure for a life- or health-saving abortion. Subsection (7) specifies that none of the prohibitions apply to the expecting mother. Considered in sum, the statute covers the entire ground of § 940.04—the full duration of pregnancy—and more, serving as a more specific, fleshed-out substitute for § 940.04.

And the Legislature did not stop there. The Legislature:

- Enacted § 940.16, also addressing pre-and post-viability abortion by

prohibiting the procedure of "partial-birth abortion" from the time of "fertilization until [] completely delivered," except when specifically necessary to save a mother's life "endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical disorder, physical illness or physical injury caused by or arising from the pregnancy itself."

- Enacted § 253.105, providing that a physician may provide a medication abortion prescription if the physician first performs the mother's physical exam 24 hours in advance and is physically present in the room when the medications are given to the woman. § 253.105(2).

- Enacted § 253.095, requiring a physician have admitting privileges to a hospital within 30 miles of where she performs an abortion.[5]

- Enacted § 253.107, specifying that an abortion may not be performed after the probable postfertilization age of the fetus is 20 weeks unless the mother is undergoing a medical emergency.

- Enacted § 253.10 and amended it several times, imposing a 24-hour waiting period for women seeking an abortion, requiring certain informed consent and that additional information be provided to the mother such as fetal development stage, adoption options, and child support laws.

The Legislature's enactment of these newer and more comprehensive laws defining when, how, where, and by whom abortions may be performed clearly replace the antiquated, less-defined reaches of § 940.04. Section 940.15 and other modern abortion statutes encompass the whole subject of abortion and embrace new provisions which plainly show they were intended as a substitute for the old law, and this Court should recognize the implied repeal of § 940.04 as a result.

b. Resort to legislative history to ascertain implied repeal is inappropriate and unnecessary.

"Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. "In construing or

'interpreting' a statute the court is not at liberty to disregard the plain, clear words of the statute." *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18, 20 (1967).

Even if legislative history were relevant, the Wisconsin Supreme Court has already declared it inconclusive for § 940.04. As it explained in *Black*, "[t]he legislative history of sec. 940.04(2)(a), Stats., 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." *Black*, 188 Wis. 2d at 642. Subsection (1) is no different; the two subsections share the same legislative history.

Legislative history, then, is not relevant to the implied repeal analysis because both the plain language of Wisconsin's abortion statutes is unambiguous, and because our state's highest court has declared that the limited legislative history that exists for § 940.04 sheds no light on legislative intent. Urmanski's supplemental letter to the Court on May 22, 2023, demonstrates just how convoluted—and ultimately unilluminating—a legislative history argument must become in order to conclude that § 940.04 was intended to apply to abortion. There, in response to Plaintiffs' and Physicians' argument that § 940.15 and later abortion statutes impliedly repealed § 940.04(1), Urmanski argues that the enactment of a feticide statute, § 939.75(2)(b)1., in 1997 stating the subdivision "does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16 to an induced abortion" necessarily demonstrates that the Legislature *did* intend § 940.04 to apply to abortion post-*Black*. (Doc. 125 at 1.) Urmanski argued that § 939.75(2)(b)1. thus "should be interpreted as subsequent legislation after *Black* indicating that § 940.04(1) is applicable to consensual abortions." (Doc. 125 at 1.)

Of course, “not limiting” applicability does not *create* applicability out of thin air if previously there was none. Urmanski’s position would require an astounding leap in logic: that later legislation purporting to “not limit” former legislation establishes proof of the legislatively-intended extent of applicability of the former. If that were an acceptable method of statutory construction, the meaning of statutes would be mere shifting sands. Here, it would require the Court to accept an (alleged) implied meaning in a cross-referenced enactment as *better proof* of the legislature’s intent than the legislature’s failure to amend or clarify § 940.04 *itself* after *Black* was issued to address the obvious implication of *Black*: that, like § 940.04(2)(a), subsection (1) is a feticide statute not applicable to consensual medical abortions. In other words, it makes no sense that the legislature would respond to *Black* to preserve the applicability of § 940.04(1) to abortion through only an oblique reference to § 940.04 in a different criminal statute under a different chapter, rather than amending or clarifying § 940.04 itself. Like the *Black* court concluded, such a strained reading of the relationship of statutes “offers no clearer indication of the legislature's intent than that indicated by the statute's own text.”[11] 188 Wis. 2d at 642.

3. Section 940.04, if interpreted as an abortion ban, would be manifestly inconsistent with and repugnant to § 940.15 and all other modern abortion laws.

[11] In the same letter to the Court, Urmanski also suggested that because several unenacted post-*Black* legislative proposals “indicate an understanding that § 940.04 continues to apply to abortions,” the statute should not be deemed impliedly repealed by § 940.15 or other abortion enactments. (Dkt. 125 at 2.) Even if consulting legislative history to interpret § 940.04 were appropriate or helpful here, such an inquiry is limited to “*actually enacted* and repealed provisions.” *Gallego v. Wal-Mart Stores, Inc.*, 2005 WI App 244, 288 Wis. 2d 229, 239, 707 N.W.2d 539, 544 (emphasis added) (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 (1989)).

Section 940.04 prohibits destroying the life of an unborn child except as permitted under subsection(5)—for a "therapeutic abortion" which "Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother" and "Unless an emergency prevents, is performed in a licensed maternity hospital." Wis. Stat. § 940.04(5). These conditions are inconsistent with § 940.15(3) and all other, more recent abortion statutes which demonstrate that abortions in Wisconsin are now regulated, not outlawed.

At least a dozen different laws enacted since the mid-1980s regulate when, how, where, and by whom abortions are to be performed.[12] The statutes require that healthcare providers report abortions to the state, provide certain information to patients, obtain informed consent, and conduct an ultrasound. *E.g.,* Wis. Stat. §§ 69.186; 253.10. The statutes mandate waiting periods and multiple visits and that only physicians can provide abortions. Wis. Stat. §§ 253.105; 253.10.

Under § 940.15, physicians are permitted to perform pre-viability abortions for any reason and post-viability abortions to "preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician." Wis. Stat. § 940.04(3). There are requirements for a waiting period, ultrasound, and certain information sharing—which are waived if there is a "medical emergency" which includes both risk of death and "serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." Wis. Stat. §§ 253.10(2)(d); (3)f.; (3g).

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[12] *See infra.,* sec. IV.B.2.a. at pp. 21-22.

Minors have access to abortions with parental consent or judicial bypass—or without either if, *inter alia*: "[t]he person who intends to perform or induce the abortion believes, to the best of his or her medical judgment based on the facts of the case before him or her, that a medical emergency exists that complicates the pregnancy so as to require an immediate abortion." Wis. Stat. § 48.375(4)(b)1.

These numerous more modern statutes cannot be reconciled with the conditions set forth under § 940.04—limiting application solely to save the pregnant patient's life. There is no precedent to invalidate 40 years of legislative enactments in favor of an arcane, imprecise, outdated statute.

C. Section 940.04 is unenforceable as an abortion ban because to enforce it would violate health care providers' Due Process Clause right to fair notice of prohibited activity.

Consistent with *Black,* this Court has concluded that § 940.04 does not prohibit consensual medical abortions (Dkt. 147, p. 20). In reaching this conclusion, the Court recognizes the Due Process implications, stating that § 940.04 "makes no mention of an abortive type of procedure." [13] (Dkt. 147, p. 19 quoting *Black,* 188 Wis. 2d at 646). "This shows that 'feticide' cannot mean 'abortion' because a statute cannot prohibit something that it 'makes no mention of.'" (Dkt. 147, p. 19 quoting *State v. Smith,* 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997) ("a statute is void for vagueness if it does not provide 'fair notice' of the prohibited conduct[.]"). It is true that the use of § 940.04 for the prosecution of consensual medical abortions would violate the Due Process Clause

[13] The Physicians recognize that the Court need not address the Due Process implications if it otherwise concludes that § 940.04 is not applicable to abortions.

because the statute is wholly inconsistent with numerous abortion laws regulating abortions for the past 40 years, does not clearly prohibit abortions, is impossible to follow, and therefore it fails to provide fair notice to health care providers about what medical practices may be subject to criminal prosecution.

The vagueness doctrine derives from the Fifth and Fourteenth Amendments of the United States Constitution, the Fifth applying to the federal government and the Fourteenth to the states. *Johnson v. United States*, 576 U.S. 591, 595 (2015). No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Likewise, the Wisconsin Constitution provides: "No person may be held to answer for a criminal offense without due process of law[.]" Wis. Const. Art. I, § 8 (1). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson*, 576 U.S. at 595 quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). "Perhaps the most basic of due process's customary protections is the demand of fair notice." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring) (citations omitted).

"The requirement of clarity in regulation is essential to the protections provided by the Due Process Clause[.]" *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) citing *United States v. Williams*, 553 U.S. 285, 304 (2008). The Due Process Clause "requires the invalidation of that are impermissibly vague." *Id.*

"A statute is unconstitutionally vague if it fails to give fair notice to a person of ordinary intelligence regarding what it prohibits and if it fails to provide an objective

standard for enforcement." *State v. McKellips*, 2016 WI 51, ¶ 41, 369 Wis. 2d 437, citing *State v. Pittman*, 174 Wis. 2d 255, 276 (1993); *see also Fox Television Stations,* 567 U.S. at 253.

Interpreted as an abortion ban, § 940.04 would both: (1) fail to give fair notice to a person of ordinary intelligence regarding what it prohibits, and (2) fail to provide an objective standard for enforcement. It is not merely the arcane language of § 940.04 which creates these failures—it is also the interplay between this antiquated statute and numerous, more recent enactments governing abortions and the Supreme Court's interpretation of the statute in *Black*.[14]

Physicians who wish to comport their practice to Wisconsin law do not have a fair degree of definiteness of when they may perform abortions. (Dkt. 71, ¶¶ 12-13; Dkt. 72 ¶¶ 11; Dkt 75, ¶¶ 26-27, 39-42.) Physicians now question whether they may continue to follow the conscripts of abortion laws which have been enacted in recent years and decades, or whether this antiquated law, using arcane, non-scientific terms and requiring wholly invalid hospital licensure standards, has somehow been resurrected from the dead and could be enforced against them, despite the physicians' compliance with modern abortion laws. (Dkt 75, ¶¶ 26-27, 39-42).

As discussed above, in sections IV.B.2.a. and 3, the conditions set forth under § 940.04—limiting application solely to save the pregnant patient's life—are wholly inconsistent with standards in the later-enacted abortion laws. Hence, Physicians are not

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[14] Urmanski recognizes that § 940.04 is outdated and suggests that is a policy concern that should be directed at the Legislature and the Governor. (Dkt. 91, p. 30, 33). Unless or until a modern ban supersedes current abortion law, physicians should be able to rely on the modern-day scheme of abortion laws, as they have in recent decades.

able to discern the zone of proscribed conduct. Contextually, in light of the numerous other later-enacted abortion statutes, any prosecution under § 940.04 for a consensual abortion would fail to provide fair notice.

There are also textual concerns about the language of § 940.04 as an abortion ban.[15] First, it would be impossible to comply with the exception requirements under subsection (5) because there is no such thing as a "licensed maternity hospital," which absent an emergency, is the only place an abortion may be performed.

When a crime has an essential element that one cannot possibly perform, fundamental fairness is implicated. *United States v. Dalton*, 960 F.2d 121, 123-24 (10th Cir. 1992), citing 1 W. LaFave & A. Scott, Jr., Substantive Criminal Law § 3.3(c) at 291 (1986) ("one cannot be criminally liable for failing to do an act which he is physically incapable of performing"). Here, no therapeutic abortions can be provided in a "licensed maternity hospital." Licensure of Wisconsin hospitals is governed under Wisconsin Statutes chapter 50, subchapter II and the Wisconsin Administrative Code chapter DHS 124. There is no license specifically for "maternity hospital."

Although the Legislature amended the licensing requirements for hospitals, the Legislature never updated the text of § 940.04(5) to reflect these changes. Perhaps this is

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[15] In 1970 a federal court found that the terms "necessary" and the expression "to save the life of the mother" in § 940.04(5) were not unconstitutionally vague (and then declared that § 940.04(1)'s criminalization of the abortion of an embryo which had not quickened to be a violation of a woman's right to privacy, under the Ninth Amendment). *Babbitz v. McCann*, 310 F. Supp. at 297-98. Because this occurred more than 50 years ago and prior to the enactment of § 940.15 or other abortion laws, the Court did not address the contextual concerns or the now-current fact that there is no such thing as a licensed maternity hospital in Wisconsin.

because the Legislature never intended § 940.04 to be used against abortion providers going forward. Hence, subsection (5) states that therapeutic abortions must be performed in a "licensed maternity hospital," unless an emergency prevents this.[16] Because there is no such license in Wisconsin, it is impossible to provide a therapeutic abortion consistent with this section, absent an emergent situation.

Second, the term "quick" is an arcane term, inconsistent with the modern practice of maternal medicine. Notably, the U.S. Supreme Court stated that the exact meaning of "quickening" is subject to debate. *Dobbs*, 142 S. Ct. at 2249, fn 24 (citing differing definitions ranging from "live" child, a fetus at 6 weeks, or at least by the 16th to 18th week). Also problematic is that the term "quick child" is incompatible with terms used in other Wisconsin abortion statutes. Under § 940.15, "viability" is the relevant term and is defined as "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." Wis. Stat. § 940.15(1). Under § 23.107(3)(a), abortions after 20 weeks are prohibited, unless the patient is experiencing a medical emergency. The arcane, non-scientific, non-specific language, as well as varying terms or standards among the various abortion statutes causes a lack of fair notice.

[16] In comparison, under § 940.15(4), the Legislature states that post-viability abortions must be performed in a hospital on an in-patient basis, but does not require that pre-viability abortions be performed at a hospital.

Third, confusion is created by subsection (5), which exempts a therapeutic abortion that "Is necessary, or advised by 2 other physicians as necessary to save the life of the mother[.]" Wis. Stat. § 940.04(5). As written, it appears to say that either (1) a single physician may determine an abortion is necessary; or (2) two other physicians may determine its necessary even though the first physician disagrees. This means that physicians are faced with determining whether an abortion is necessary after a different physician has concluded it is not. This raises serious concerns about the potential prosecution of a physician who acts to save the life a patient, knowing full well that a prosecutor may try to rely on another physician's earlier determination as evidence against the reasonableness of the physician's medical judgment in a criminal case. Physicians also question whether their medical judgment about what may be necessary to protect their patient's life is consistent with that of local prosecutors or judges. (Dkt. 71; ¶ 13)

Finally, even the most educated, trained, and experienced physicians in the state find it difficult to determine what jeopardizes a pregnant patient's life versus only her health. (Dkt. 70, ¶ 8-9; Dkt. 71, ¶¶ 11-13; Dkt. 72, ¶¶ 9-10; Dkt. 75, ¶ 42.) In practice, many serious pregnancy complications present no black-line distinction between the two, and even complications that at first appear health-threatening can quickly and unpredictably become life-threatening (Dkt. 70, ¶ 9; Dkt. 71, ¶ 11; Dtk. 72, ¶¶ 9-10; Dkt. 75, ¶ 42.). Despite their best efforts, Wisconsin physicians have no crystal ball to definitively know if or when a patient will fall off that medical cliff, as every patient is unique.

Section 940.04 cannot be held to be enforceable against abortion providers without creating a lack of fair notice of what conduct is prohibited.

D. The uncertainty regarding § 940.04 extends beyond potential criminal enforcement to potential licensing actions.

The current lack of clarity about the potential applicability of § 940.04 extends beyond criminal actions and may impact licensing matters.

The Department of Safety and Professional Services (DSPS) "may investigate complaints made against a person who has been issued a credential." Wis. Stat. §§ 448.02(3), (8), 440.03(3m) For physicians, this includes an alleged "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). The Medical Examining Board considers allegations of unprofessional conduct, including alleged violations of Wisconsin abortion laws or allegations of substandard care. Wis. Stat. § 448.02; Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i).

Therefore, a physician may be subject to a complaint to DSPS, an investigation, or a licensing action based on any alleged noncompliance with § 940.04. Any person may file such a complaint; it need not be made by a patient.[17]

Paradoxically, a physician could be subject to licensure complaints, investigations, or actions should there be an allegation that the physician engaged in unprofessional conduct by departing from the standard of minimally competent medical practice creating an unacceptable risk of harm to a patient by refusing to provide necessary

[17] DSPS complaint process available at: https://dsps.wi.gov/Pages/SelfService/FileAComplaint.aspx

abortion care due to concerns that § 940.04 is enforceable. Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i). This could occur, for example, if the physician fails to timely provide an abortion to a patient creating an unacceptable risk of harm to the patient, based on the physician's belief that § 940.04 applies and would not permit an abortion under the circumstances presented. In other words, a physician who believes that she may be subject to criminal prosecution under § 940.04 who wishes to avoid criminal prosecution may be increasing her risk of being the subject of a DSPS complaint (and licensure action) for complying with a statute that may not apply to abortions.[18]

The Physicians should be able to practice medicine, exercising their medical judgment in the best interest of their patients without fear of unfounded investigations or licensing actions. This Court's declaration that § 940.04 is not enforceable against healthcare providers performing consensual abortions will provide much-needed clarity with respect to licensing matters, in addition to criminal prosecutions.

CONCLUSION

The Physician Intervenors fear they may subjected to criminal investigation or prosecution based on some prosecutors' public statements that they would use § 940.04 to prosecute those who provide abortions. The threat or criminal prosecution has caused individual physicians, hospitals, and health systems to alter how care is provided to pregnant patients. Because § 940.04 is no longer a law criminalizing medical abortions,

[18] The *amicus curiae* brief filed by heath care associations includes a discussion of how abortion bans create a conflict of interest for physicians and may jeopardize patient care. (Dkt. 107, pp. 19-13.)

the Physician Intervenors seek a declaration of such and an injunction to support this declaration.

FOR THESE REASONS, Dr. Ford, Dr. McIntosh, and Dr. Lyerly respectfully request that the Court:

DECLARE that Wisconsin Statute § 940.04 is unenforceable as applied to abortions;

ENJOIN Wisconsin district attorneys from initiating any criminal actions under Wisconsin Statute § 940.04 against health care providers for providing a consensual abortion; and

ORDER any other relief the Court deems just and proper.

Respectfully submitted this 7th day of August, 2023.

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Electronically signed by Diane M. Welsh

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