IN THE SUPREME COURT OF WISCONSIN

APPEAL NO: 2023AP002362

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD, AND CLARENCE P. CHOU, M.D.,

Plaintiffs-Respondents,

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

Intervenors-Respondents,

vs.

JOEL URMANSKI, as District Attorney for Sheboygan County, WI,

Defendant-Appellant,

ISMAEL R. OZANNE, as District Attorney for Dane County, WI and JOHN T. CHISHOLM, as District Attorney for Milwaukee County, WI,

Defendants.

On Appeal from the Circuit Court of Dane County
Case No. 2022CV001594
Honorable Diane Schlipper Presiding

PETITION TO BYPASS OF DEFENDANT-APPELLANT JOEL URMANSKI

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INTRODUCTION

Defendant-Appellant Joel Urmanski petitions to bypass and asks this Court to take jurisdiction of this appeal. Wis. Stat. §§ 808.05; 809.60. The undersigned has conferred with counsel for the Plaintiffs-Respondents Josh Kaul, Wisconsin Department of Safety and Professional Services, Wisconsin Medical Examining Board, and Clarence P. Chou, M.D. (the "State Agencies") and the Intervenors-Respondents Christopher J. Ford, Kristin J. Lyerly, and Jennifer J. McIntosh (the "Doctor-Intervenors"). Although they disagree with Urmanski as to the appropriate outcome of this appeal and some of the specific issues appropriate for bypass, they agree with Urmanski that this case warrants bypass and thus do not oppose Urmanski's request that this Court take immediate jurisdiction of this appeal.

This case presents an important legal question, the resolution of which will have a statewide impact: whether, after the U.S. Supreme Court overruled *Roe v. Wade* and its progeny, Wis. Stat. § 940.04—and § 940.04(1) specifically—prohibits performing consensual abortions in Wisconsin unless the abortion meets the criteria for a therapeutic abortion under § 940.04(5) (*i.e.*, it is necessary to save the life of the mother). Section 940.04, titled "Abortion," provides:

> (1) Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.
>
> (2) Any person, other than the mother, who does either of the following is guilty of a Class E felony:
>
> (a) Intentionally destroys the life of an unborn quick child; or
>
> (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is unnecessary to prove that the fetus was alive when the act so causing the mother's death was committed.
>
> (5) This section does not apply to a therapeutic abortion which:
>
> (a) Is performed by a physician; and
>
> (b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and
>
> (c) Unless an emergency prevents, is performed in a licensed maternity hospital.

> (6) In this section "unborn child" means a human being from the time of conception until it is born alive.

Urmanski, the district attorney for Sheboygan County, has not taken a position during the litigation of this case on what the law on abortion should be. That is an issue for the Legislature and the Governor. This case is not about to what extent abortion should be regulated as a matter of public policy. Urmanski does have an opinion on what the law currently is, however. Urmanski believes § 940.04—and § 940.04(1) specifically—prohibits performing abortions (including consensual abortions) from conception until birth (subject to § 940.04(5)).

Before *Roe*, this Court affirmed convictions of abortion providers under § 940.04(1). In *State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968), this Court explained: "'Abortion' is defined in sec. 940.04(1), Stats., as an intentional destruction of an unborn child by any person other than the mother. An unborn child is defined in sec. 940.04(6), Stats., as a human being from the time of conception until it is born alive." 40 Wis. 2d at 181. *Mac Gresens* stated § 940.04(1) has three elements: "a living unborn child, a destruction and the intent to destroy." *Id.* An abortion performed by a doctor involves the intentional destruction of an unborn child (as defined in § 940.04(6)), and *Mac Gresens* upheld the conviction of a doctor for performing a consensual abortion. *See also State v. Cohen*, 31 Wis. 2d 97, 142 N.W.2d 161 (1966).

After *Roe*, Wisconsin officials could not enforce § 940.04(1) against consensual abortions. *See Larkin v. McCann*, 368 F. Supp. 1352 (E.D. Wis. 1974). The Legislature never expressly repealed § 940.04, however. Indeed, it refused to do so. "If a decision declaring a statute unconstitutional is subsequently overruled, the operative force of the act is restored by the overruling decision without any necessity for reenactment." Singer, 1 Sutherland Statutes and Statutory Construction § 2:7 (7th ed.); *see also Cty. of Door v. Hayes-Brook*, 153 Wis. 2d 1, 27, 449 N.W.2d 601, 612 (Abrahamson, J., concurring). When the U.S. Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228

(2022), Urmanski believes the operative force of § 940.04(1) was restored and it could be enforced as to consensual abortions (just as before *Roe*).

The circuit court here disagreed. The circuit court, relying on this Court's decision in *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), concluded § 940.04 was not an abortion statute after all but instead only applied to feticide. Because the circuit court concluded § 940.04 was not an abortion statute, it did not address legal theories on which the State Agencies relied when they brought this lawsuit against Urmanski and two other district attorneys: (1) that subsequent legislative enactments had superseded any application of § 940.04 to abortion, *i.e.*, it had been impliedly repealed and (2) that the doctrine of *desuetude* applies to prevent applying § 940.04 to consensual abortions. Nor did the circuit court address an additional argument by the Doctor-Intervenors: that enforcing § 940.04 as to abortions would violate the Due Process Clause.

Urmanski appeals and asks this Court to take jurisdiction. The issue on which the circuit court denied Urmanski's motions to dismiss and subsequently granted judgment—whether § 940.04 is an abortion statute in the first place—potentially implicates several of this Court's criteria for review, including Wis. Stat. §§ 809.62(1r)(c)2., 809.62(1r)(c)3., 809.62(1r)(d), and/or 809.62(1r)(e). Further, assuming this Court agrees with Urmanski that § 940.04(1) applies to abortions, each of the remaining merits issues the circuit court left unresolved meets this Court's criteria for review and should be decided without remand. This case also presents a novel issue of standing.

This case is likely bound for this Court regardless of how the Court of Appeals decides the issues. Requiring this case to be briefed to and decided by the Court of Appeals prior to this Court's review will only result in unnecessary expenditures of judicial time and resources, as well as taxpayer funds, and will needlessly delay resolution of a legal question of significant importance to the State. Urmanski requests this Court take jurisdiction, reverse the circuit court, and order dismissal of the State Agencies' and Doctor-Intervenors' claims against Urmanski.

ISSUES PRESENTED

Urmanski seeks reversal of the circuit court's denial of his motions to dismiss and the grant of judgment against Urmanski. The circuit court should have dismissed this case. This appeal presents the following issues:

Issue No. 1: Does § 940.04, and § 940.04(1), (5), and (6) specifically, prohibit performing consensual abortions, subject to the exception in § 940.04(5)?

Circuit Court's Answer: The circuit court held § 940.04 "says nothing about abortion" and "does not prohibit a consensual medical abortion." (R.147:2, App.049; R.147:20, App.067.) The circuit court relied on this Court's decision in *Black* and concluded "*Black*'s holding that [§ 940.04(2)(a)] 'is not an abortion statute' and 'is a feticide statute only' must apply equally to Subsection (1)." (R.147:14, App.061.) The circuit court ultimately declared "Wis. Stat. § 940.04 does not apply to abortions." (R.183:14, App.093.)

Court of Appeals Answer: N/A

Urmanski's Answer: The circuit court erred. Section 940.04, and § 940.04(1) specifically, applies to prohibit abortions (including consensual abortions). *Black* does not foreclose applying § 940.04(1) to a consensual abortion and, even if it did, *Black* should be overruled to the extent it would foreclose such an application.

Issue No. 2: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), has that prohibition been impliedly repealed or superseded by subsequent legislation such that it can no longer be applied to consensual abortions?

Circuit Court's Answer: The circuit court did not address this question.

Court of Appeals Answer: N/A

Urmanski's Answer: Section 940.04(1) prohibits performing abortions (including consensual abortions) from conception until birth (subject to § 940.04(5)), § 940.04(1) does not conflict with and has not been impliedly repealed by subsequent legislation, and § 940.04(1) can be enforced as to abortions. To the extent *Black* holds otherwise, it should be overruled.

Issue No. 3: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), is that prohibition unenforceable as to abortions under the Due Process Clause because it is unconstitutionally vague on its face or compliance is impossible?

Circuit Court's Answer: The circuit court did not address this question.

Court of Appeals Answer: N/A

Urmanski's Answer: Section 940.04 can be enforced as to abortions (including consensual abortions). It is not unconstitutionally vague on its face, compliance with § 940.04 is possible, and the Doctor-Intervenors have not stated a claim that application of § 940.04 to abortions violates the Due Process Clause.

Issue No. 4: If § 940.04, and § 940.04(1), (5), and (6) in particular, otherwise would apply to and prohibit performing consensual abortions, subject to § 940.04(5), is that prohibition unenforceable because of alleged disuse and reliance on *Roe v. Wade* and its progeny?

Circuit Court's Answer: The circuit court did not address this question.

Court of Appeals Answer: N/A

Urmanski's Answer: This Court need not reach this issue because only the State Agencies raised it. They lack standing (see Issue #5). Regardless, § 940.04 can be enforced as to abortions (including consensual abortions). The doctrine of *desuetude* does not apply in Wisconsin and, if it did, this case does not implicate the doctrine.

Issue No. 5: Do the State Agencies have standing to bring their own claims in this action and, if not, can they rely on the standing of an intervenor to remain in the action and benefit from a judgment obtained by an intervenor?

Circuit Court's Answer: The circuit court concluded the State Agencies had standing and presented a justiciable controversy as to Urmanski. After Urmanski moved for reconsideration, the circuit court concluded it did not need to determine whether the State Agencies presented a justiciable claim because Urmanski

conceded a justiciable controversy exists between Urmanski and one of the Doctor-Intervenors.

Court of Appeals Answer: N/A

Defendant-Appellant Urmanski's Answer: The circuit court erred when it concluded the State Agencies presented a justiciable controversy and it further erred when it later determined it need not decide that question because a justiciable controversy exists between Urmanski and one of the Doctor-Intervenors. The existence of a justiciable controversy between Urmanski and an intervenor does not eliminate the need to determine the standing of the State Agencies to bring their claims. The State Agencies lack standing.

REVIEW CRITERIA RELIED UPON

The various issues in this case implicate one or more of the following criteria of § 809.62(1r): (a), (c)2., (c)3., (d), and (e).

STATEMENT OF THE CASE

I. Legal and Factual Background

A. Wisconsin's Early Abortion Laws

Wisconsin enacted its first prohibition on abortion in 1849. *See* Revised Statutes of Wisconsin, ch. 133, § 11 (1849). It provided: "[e]very person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree." In 1858, the Legislature removed the requirement the unborn child be "quick." Revised Statutes of Wisconsin, ch. 164, § 11 (1858). The Legislature also enacted related provisions with lesser penalties (1) prohibiting persons from attempting to assist a pregnant woman to "procure a miscarriage" and (2) prohibiting a woman from attempting to procure her own miscarriage. *Id.* at ch. 169, §§ 58, 59.

B. The Legislature Enacts § 940.04

Wisconsin's abortion laws remained relatively unchanged, except for modifications to their penalties, until the 1950s when the Legislature revised the criminal code. *See generally State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994) (Appendix to Dissent); Wis. Stat. §§ 340.095, 351.22, and 351.23 (1947 versions). Section 940.04 was created as part of this revision. *See* 1953 Wisconsin Act 623, § 340.08; 1955 Wisconsin Act 696, § 940.04. What became § 940.04(1), (5), and (6) in the 1955 revision was first proposed as § 340.08 of a revision that was enacted in 1953 but allowed to expire in favor of the 1955 revision. The Legislative Council's comments to § 340.08 of the 1953 revision reflect the legislative history of § 940.04(1), (5), and (6). Those comments refer to an "operation" and state "[t]his section penalizes the person who performs an abortion on another" and "[t]his section is a substantial restatement of the present law." Wisconsin Legislative Council Judiciary Committee Report on the Criminal Code at 66-67 (1953) (R.88:12-13.)

C. The Legislature Enacts § 940.15 and Declines to Repeal § 940.04

In 1985, the Legislature enacted Wis. Stat. § 940.15, which states: "[w]hoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class I felony." § 940.15(2). The statute defines viability and provides an exception "if the abortion is necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician." § 940.15(1), (3).

Section 940.15 was part of 1985 Wis. Act 56. The initial draft of the bill (1985 Assembly Bill 510) contained language repealing § 940.04. *See* Initial Draft of 1985 Assembly Bill 510, 1985-86 Legislature, LRB-4124/1 at 2 (R.88:40 ("940.04 of the statutes is repealed and recreated to read").) The Legislature removed the language repealing § 940.04, however, during subsequent drafting. *See, e.g.*, Assembly Substitute Amendment to 1985 Assembly Bill 510, 1985-86

Legislature, LRBs0289/2 (R.138:1-28). 1985 Wisconsin Act 56 enacted the new ban as a separate section and did not repeal § 940.04. And, in the years since 1985, numerous bills have been introduced that would have repealed § 940.04, but none have been enacted.[1]

D. Other Wisconsin Abortion Restrictions

Various other Wisconsin laws regulate abortion in various ways. Wis. Stat. § 253.107 bans abortion "if the probable postfertilization age of the unborn child is 20 or more weeks," except in cases of "medical emergency." § 253.107(3)(a). Wis. Stat. § 940.16 bans partial-birth abortions outside of emergency circumstances. And, various Wisconsin laws impose physician admitting privilege requirements, impose informed consent requirements, prohibit using abortion-inducing drugs unless certain criteria are satisfied, prohibit using public funds for abortions subject to certain exceptions, and address parental consent requirements for abortions for minors. *See* Wis. Stat. § 253.095; § 253.10; § 253.105; § 20.927; § 48.257; and § 48.375. None of these statutes contain language expressly legalizing abortions, and several of them contain language expressly disclaiming any such inference. *See, e.g.*, § 253.10(8); § 253.105(6); § 253.107(7) ("Nothing in this section may be construed as … making lawful an abortion that is otherwise unlawful.").

E. *State v. Black* and Subsequent Developments

In 1994, this Court decided *Black*, which held that a man who had allegedly committed feticide by violently assaulting his wife days before her due date, causing the death of the unborn baby, could be charged under § 940.04(2)(a). In doing so, this Court responded to the man's argument the statute was "to apply only in the context of consensual medical abortions." 188 Wis. 2d at 644. First, this Court disregarded the title of § 940.04 because § 940.04(2)(a) was "a feticide statute" and its language was "plain and unambiguous." *Id.* at 645. Second, this Court concluded

[1] *See, e.g.* 2023 Assembly Bill 218; 2015 Assembly Bill 880; 2015 Senate Bill 653; 2015 Assembly Bill 916; 2015 Senate Bill 701; 2007 Assembly Bill 749; 2007 Senate Bill 398; 2005 Senate Bill 721; 2005 Assembly Bill 1144.

that "[i]n order to construe secs. 940.04(2)(a) and 940.15, consistently" it would interpret § 940.04(2)(a) as "not an abortion statute." *Id.* at 646. This Court stated § 940.04(2)(a) "makes no mention of an abortive type procedure" and rather "proscribes the intentional criminal act of feticide: the intentional destruction of an unborn quick child presumably without consent of the mother." *Id.* In short, this Court concluded § 940.04(2)(a) "is a feticide statute only" and applied to Black's alleged actions. *Id.* at 647.

Addressing concerns raised by the ACLU as amicus that § 940.04(2)(a) could be used against a woman or her physician in the context of an abortion, this Court stated such concerns were "unfounded" because:

> By its own terms it cannot apply to a mother. *See also* sec. 940.13 (abortion statutes cannot be enforced against any woman who obtains an abortion). Any attempt to apply sec. 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under *Roe v. Wade*. Further, any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.

188 Wis. 2d at 646. This Court responded to the ACLU's argument that § 940.04 as a whole should be interpreted to apply only to consensual abortions as follows: "[w]e address only sec. 940.04(2)(a) and make no attempt to construe any other sections of sec. 940.04." *Id.* at 647 n.2.

Two justices (Chief Justice Heffernan and Justice Abrahamson) dissented and concluded that § 940.04 "was intended to apply only to medical abortion." 188 Wis. 2d at 660. The dissenters noted the majority conceded it was interpreting § 940.04(2)(a) in isolation without considering other provisions of the statute and that, had the majority considered the statute in context, "it cannot reasonably conclude that it does not solely apply to medical abortion." *Id.* at 650. The dissenters noted resort to legislative history was appropriate because sub. (2)(a) had more than one possible meaning and the relevant legislative materials established § 940.04 "was intended to apply only to medical abortion." *Id.* at 650-660.

After *Black*, the Legislature passed a separate feticide statute, 1997 Wisconsin Act 295. 1997 Wisconsin Act 295 included language, enacted in Wis. Stat. § 939.75(2)(b)1., which stated the new feticide provisions are inapplicable to "[a]n act committed during an induced abortion," but also that this exception "does not limit the applicability of ss. 940.04, 940.13, 940.15 and 940.16 to an induced abortion" (thus indicating § 940.04 is an abortion statute).

II. Relevant Factual and Procedural Background

After *Dobbs*, the State Agencies initiated this case by suing legislative officers. (R.4:1-25.) The State Agencies then filed an Amended Complaint dropping the legislators and naming Urmanski and the district attorneys of Milwaukee County and Dane County, John Chisholm and Ismael Ozanne. (Doc. 34:1-28, App.005-032.) The Amended Complaint sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions based on the State Agencies' arguments that § 940.04 had been superseded by subsequent laws or, alternatively, was unenforceable as to abortions due to disuse.

Thereafter, the Doctor-Intervenors were allowed to intervene in this action. (R.80:1-3.) The Doctor-Intervenors also sought a declaratory judgment that § 940.04 is unenforceable as applied to abortions, as well as a permanent injunction against the application of § 940.04 to abortions. (R.75:1-15, App.033-047.) Like the State Agencies, they claimed § 940.04 had been superseded by subsequent legislation. They also claimed § 940.04 was unenforceable because it is premised on arcane language, belies modern medicine, and contains impossible requirements.

Urmanski moved to dismiss. Urmanski argued dismissal was warranted because (1) § 940.04 (and § 940.04(1), (5), and (6) in particular) applies to and prohibits performing consensual abortions from conception until birth, subject to the exception in § 940.04(5) for abortions to save the life of the mother; (2) this prohibition has not been impliedly repealed or superseded; (3) this prohibition is not unconstitutionally vague on its face and compliance is not impossible; and (4) the State Agencies' allegations of disuse and reliance on *Roe* did not state a claim that

would make the prohibition unenforceable. Urmanski also moved to dismiss the State Agencies as lacking standing. (R.91:1-41.)

In a July 7 Decision and Order, the circuit court denied Urmanski's motions to dismiss in part. (R.147:1-21, App.048-068.) The circuit court concluded the State Agencies had standing to bring their claims against Urmanski. (R.147:7-8, App.054-055.) The circuit court allowed the State Agencies' and Doctor-Intervenors' cases to proceed, but not on the theories they initially alleged. As the circuit court would later explain, the State Agencies and Doctor-Intervenors alleged claims based on the "false" premise that § 940.04 prohibits abortions. (R.160:3, App.071.) Rather, the circuit court concluded the State Agencies and Doctor-Intervenors stated a claim for relief because § 940.04 "says nothing about abortion," (R.147:2, App.049), and "does not prohibit a consensual medical abortion," (R.147:20, App.067). The circuit court relied on *Black* and concluded that "Black's holding that [Wis. Stat. § 940.04(2)(a)] 'is not an abortion statute' and 'is a feticide statute only' must apply equally to Subsection (1)." (R.147:14, App.061.)

The State Agencies and Doctor-Intervenors then moved for judgment on the pleadings and/or summary judgment. Urmanski opposed the motions for judgment on the pleadings and/or summary judgment and filed his own motion for reconsideration of the July 7 Decision and Order's conclusions. (R.169-171.) Chisholm did not oppose the Doctor-Intervenors' request for a declaratory judgment that § 940.04 does not apply to abortions, but argued Attorney General Kaul was not a property party. (R.167:1-6.) As to Ozanne, he did not oppose the State Agencies' or Doctor-Intervenors' motions for a declaratory judgment—he took no position—but did oppose issuance of a permanent injunction. (R.168:1-8.)

On December 5, 2023, the circuit court entered a final decision and order denying Urmanski's motion for reconsideration, granting Intervenor Lyerly's motion for summary judgment, and declaring § 940.04 does not prohibit abortions. (R.183:1-14, App.080-093.) On the standing of the State Agencies, the circuit court concluded it need not consider whether they presented a justiciable claim because

Urmanski conceded Intervenor Lyerly presented a justiciable controversy. (R.183:7, App.086.) The circuit court denied the requests for a permanent injunction. (R.183:14, App.093.) Urmanski has appealed; Ozanne and Chisholm have not.[2]

REASONS TO GRANT BYPASS

"A matter appropriate for bypass is usually one which meets one or more of the criteria for review … and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." Internal Operating Procedures at 8. These criteria are satisfied here.

I. Issue #1 Merits Review

The circuit court relied on *Black*, denied Urmanski's motion to dismiss, and granted judgment against Urmanski on the theory § 940.04 is not an abortion statute, *i.e.*, as enacted it does not prohibit consensual abortions, just feticide. This question potentially implicates several criteria for granting review.

First, the circuit court's reasoning conflicts with cases that apply § 940.04(1) to consensual abortions, *see State v. Mac Gresens*, 40 Wis. 2d 179, 161 N.W.2d 245 (1968) and *State v. Cohen*, 31 Wis. 2d 97, 142 N.W.2d 161 (1966). Thus, this issue implicates Wis. Stat. § 809.62(1r)(d).

Further, given *Black*'s context and express limitation of its analysis to an interpretation of § 940.04(2)(a), Urmanski's position in this lawsuit can prevail without overturning *Black*. Thus, even without *Mac Gresens* and *Cohen*, the applicability of § 940.04(1) to consensual abortions would present a novel question of law. *See* § 809.62(1r)(c)2. and 3. Under a proper application of the interpretive principles in *State ex rel. Kalal v. Circuit Court of Dane Cty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110, § 940.04(1)—when read in context and through reference to surrounding or closely related statutes and its statutory history—applies to prohibit performing consensual abortions. At minimum, this is a reasonable

[2] Ozanne and Chisholm are not parties to this appeal because they have not appealed the circuit court's decision. Urmanski does not oppose their participation in this appeal as *amicus curiae*, however.

interpretation and, if there is ambiguity, the statute's legislative history confirms it applies to consensual abortions.

Even if *Black* forecloses Urmanski's position, this case implicates § 809.62(1r)(e). If necessary for Urmanski's position in this lawsuit to prevail, *Black* should be overturned to the extent it holds § 940.04(2)(a) cannot apply to consensual abortions or otherwise stands as a barrier to applying § 940.04(1), (5), and (6) to consensual abortions. Changes or developments in the law have undermined *Black*'s rationale and *Black*'s statements that § 940.04(2)(a) "cannot be used to charge for a consensual abortive type procedure." *See, e.g.*, *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶28, 400 Wis. 2d 50, 968 N.W.2d 684. *Black* is also "detrimental to coherence and consistency in the law," *id.*, to the extent its statements and reasoning regarding the applicability of § 940.04(2)(a) to consensual abortions conflict with other decisions of this Court like *Kalal*, *Mac Gresens*, and *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214. Moreover, *Black* is unsound in principle and "objectively wrong" to the extent it holds that § 940.04(2)(a) "is not an abortion statute" and "is a feticide statute only." *See State v. Reyes Fuerte*, 2017 WI 104, ¶18, 378 Wis. 2d 504, 904 N.W.2d 773. Urmanski provides the following reasons why, if necessary for his interpretation of § 940.04(1) to prevail, this Court should reexamine *Black* and conclude § 940.04(2)(a), as well as § 940.04 generally, applies to consensual abortions (even if it also applies to feticide):

1. *Black* was decided before *Kalal* and does not use the interpretive methodology adopted in that case. *Black* improperly interpreted § 940.04(2)(a) in isolation, without reference to the language of surrounding or closely-related statutes. The context provided by § 940.04(5)[3] and the then-existing § 940.04(3) and (4) show § 940.04 (and § 940.04(1)) would include consensual abortions within the

[3] If § 940.04, including § 940.04(1), did not apply to abortions, § 940.04(5) would be surplusage. Further, that subsection (5) provides an exception for certain types of abortions—those necessary to save the life of the mother—indicates other types of abortions are included in § 940.04(1)'s prohibition. *See FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 733 N.W.2d 287.

scope of its prohibitions.[4] Wis. Stat. § 939.75(2)(b)1. also references § 940.04 and categorizes it with statutes that apply to abortions.

2. Even if appropriate to interpret § 940.04(1) or (2)(a) in isolation, the common, ordinary, and accepted meaning of the terms "intentionally destroys the life of an unborn child" would include a consensual abortion.

3. "An inquiry into statutory history is part and parcel of a plain meaning analysis." *State ex rel. Nudo Holdings, LLC v. Bd. of Review for City of Kenosha*, 2022 WI 17, ¶23 n.16, 401 Wis. 2d 27, 972 N.W.2d 544. The statutory history of § 940.04(1) shows its reference to the intentional destruction of the life of an unborn child is derived from predecessor statutes that criminalized acts taken "with intent … to destroy such child." These predecessor statutes were applied in the context of consensual abortions. *See, e.g.*, *State ex rel. Tingley v. Hanley*, 248 Wis. 578, 22 N.W.2d 510 (1946); *Hatchard v. State*, 79 Wis. 357, 48 N.W. 380 (1891). When the Legislature used similar language in § 940.04(1) and (2)(a) it should be presumed the Legislature was acting "with full knowledge of existing laws and prior judicial interpretations of them" such that the same interpretation should apply. *See In re John Doe Petition*, 2010 WI App 142, ¶11, 329 Wis.2d 724, 793 N.W.2d 209.

4. *Black*'s statement that the statutory title "may be used only to resolve doubt as to the meaning of the statute," is inconsistent with more recent cases allowing consideration of titles as part of the contextual inquiry. *See State v. Lopez*, 2019 WI 101, ¶¶29-30, 389 Wis. 2d 156, 936 N.W.2d 125 (Ziegler, J., lead).

5. *Black* assumed separate statutes must be construed as governing distinct types of conduct, 188 Wis. 2d at 646, but this is inconsistent with the reality that the same conduct can be governed by multiple statutes. *See Grandberry*, 2018 WI 29 at ¶35. Indeed, in addition to § 940.04, Wisconsin law contains multiple partially overlapping prohibitions that may or may not apply to a particular abortion

[4] Wis. Stat. §§ 940.04(3) and (4) prohibited a woman from consenting to the destruction of the life of her unborn child, thus providing further context that § 940.04 included consensual abortions within its prohibitions.

depending on the circumstances. *See* § 940.16 (partial-birth), § 940.15 (post-viability), and § 253.107 (twenty-week ban). Overlapping criminal statutes are common and permitted in the law. *See generally United States v. Batchelder*, 442 U.S. 114, 123 (1979); *State v. Villamil*, 2017 WI 74, ¶¶42-49, 377 Wis. 2d 1, 898 N.W.2d 482.

6. To the extent *Black* construed § 940.04(2)(a) as having a distinct role of proscribing feticide, *Black*'s reasoning is undermined by the passage of subsequent feticide statutes that contain language indicating § 940.04 applies to induced abortions. *See* 1997 Wisconsin Act 295.

7. To the extent *Black* relied on a perceived inconsistency between § 940.04(2)(a) and § 940.15, 188 Wis. 2d at 646, the analysis was cursory, objectively wrong, and inconsistent with this Court's caselaw addressing incompatibility of statutes. As explained *infra* at 24-25, there is no inconsistency between § 940.04(2)(a) (or § 940.04(1)) and § 940.15 because it is not impossible to comply with both statutes. *Grandberry*, 2018 WI 29 at ¶21 ("In order for two statutes to be in conflict, it must be impossible to comply with both.").

8. To the extent *Black* relied on the existence of *Roe* to inform its reasoning, 188 Wis. 2d at 646, *Roe* has been overturned.

In short, Urmanski submits this Court should reassess *Black* to the extent *Black* would preclude applying § 940.04(2)(a), § 940.04(1), or any other part of § 940.04 to abortions (including consensual abortions). If *Black* precludes Urmanski's interpretation of § 940.04(1), *Black* should be overturned.

Finally, to the extent the circuit court applied the doctrine of legislative acquiescence to support its interpretation of § 940.04(1), this Court's criteria are implicated because the decision misapplies the doctrine. § 809.62(1r)(d). The circuit court relied on the Legislature's not having amended subsection (1) in the wake of *Black* as confirming the *Black* court's analysis. (R.147:12, App.059). But, *Black* did not provide a binding interpretation of § 940.04(1) or any part of § 940.04 other than § 940.04(2)(a). The basis of the doctrine of legislative acquiescence "is the

presumption that the legislature knows that a particular statutory interpretation is binding and, thus, recognizes that its inaction will leave that interpretation intact." *Amazon Logistics, Inc. v. LIRC*, 2023 WI App 26, ¶130, 407 Wis. 2d 807, 992 N.W.2d 168. *Black* cabined its decision to § 940.04(2)(a), and there were pre-*Black* decisions interpreting and applying § 940.04(1) in the context of consensual abortions. Legislators would have felt no need to correct any error in this Court's interpretation of § 940.04(2)(a) to ensure § 940.04(1) remained applicable to consensual abortions. *Wenke v. Gehl Co.*, 2004 WI 103, ¶36, 274 Wis. 2d 220, 682 N.W.2d 405. Regardless, "proper invocation of the doctrine of legislative acquiescence requires more than merely noting that the legislature has not amended a statute to 'correct' a prior judicial construction," *id.* at ¶35, and this case does not present circumstances justifying application of the doctrine. Finally, the doctrine is ultimately inapplicable because *Black*'s interpretation of § 940.04(2)(a) as not applying to consensual abortions was objectively wrong. 2004 WI 103 at ¶37.

II. Issues #2-4 Merit this Court's Review

If this Court agrees with Urmanski the circuit court erred when it concluded § 940.04, including § 940.04(1), is not an abortion statute, this Court should proceed to address the parties' other arguments relating to the applicability of § 940.04 to consensual abortions. Each of these arguments raises an issue that satisfies this Court's criteria for review. Further, each presents a question of law that merits resolution without remand. *See Village of Butler v. Cohen*, 163 Wis. 2d 819, 823 n.1, 472 N.W.2d 579 (Ct. App. 1991) (unnecessary to remand to decide question of law in the first instance).

A. Issue #2 Merits Review

The State Agencies and the Doctor-Intervenors both alleged § 940.04 is unenforceable with respect to abortions because, if it were, it would directly conflict with subsequent statutes addressing abortion or has otherwise been superseded by such statutes. In short, they alleged § 940.04 has been impliedly repealed or

amended to the extent it would apply to abortions. This issue implicates § 809.62(1r)(c)2. and 3 and, potentially, § 809.62(1r)(e).

This Court has never addressed whether the prohibition on abortion in § 940.04(1) has been impliedly repealed or amended by subsequent legislation, which would require either (1) that the earlier act be "so manifestly inconsistent and repugnant to the 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) (internal quotation marks and citation omitted), or (2) that "the 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). To be sure, in *Black* this Court stated:

> Any attempt to apply sec. 940.04(2)(a) to a physician performing a consensual abortion prior to viability would be unconstitutional under *Roe v. Wade*. Further, any attempt to apply it to a physician performing a consensual abortion after viability would be inconsistent with the newer sec. 940.15 which limits such action and establishes penalties for it.

188 Wis. 2d at 646. Again, given *Black*'s context and cabining of its decision to an interpretation of § 940.04(2)(a), this Court need not reexamine *Black* to conclude § 940.04(1) may be applied to consensual abortions. Notwithstanding *Black*, whether § 940.04(1) has been impliedly repealed or amended is a novel question of law, the resolution of which will have a statewide impact. § 809.62(1r)(c)2. and 3.

Nevertheless, if statements in *Black* regarding the compatibility of § 940.04(2)(a) with § 940.15 could otherwise be viewed as controlling the question of the compatibility of § 940.04(1) and § 940.15, this case merits review so this Court can reexamine *Black*. § 809.62(1r)(e). To the extent *Black* suggested an inconsistency between § 940.04(2)(a) (or § 940.04(1)) and § 940.15, *Black* was wrong. A conflict between laws does not exist because the same conduct would violate one statute but not the other. *Grandberry*, 2018 WI 29 at ¶¶ 20-21. Here, it is not impossible to comply with both § 940.04 and § 940.15. A physician can comply with both § 940.04 and § 940.15 by not performing any abortions unless

doing so was necessary to save the life of the mother. In other words, a physician who conforms his or her conduct to § 940.04 will necessarily also comply with § 940.15 and there thus is no conflict. *See Grandberry*, 2018 WI 29 at ¶30 (no conflict where reasonable means exist for complying with both statutes).

Rather, this is a case of overlapping criminal prohibitions that can produce different results when applied to the same conduct. That two statutes cover the same conduct or produce different results when applied to the same conduct does not mean they are in conflict. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem."); *see also Randolph v. IMBS, Inc.*, 368 F.3d 726, 731 (7th Cir. 2004) ("Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.").

Black also did not find any incompatibility with respect to *pre-viability* abortions, but instead said enforcement would be barred by *Roe*, not by the passage of § 940.15. 188 Wis. 2d at 646. *Roe* has been overturned. Thus, if *Black* is controlling on this issue, it indicates § 940.04(1)'s abortion ban would still apply to pre-viability abortions even if § 940.15 would apply to post-viability abortions.

Finally, later statutes addressing abortion were not intended as replacements for § 940.04. The legislative history of Wis. Stat. § 940.15 demonstrates it was not intended as a substitute for § 940.04, as the Legislature considered repealing § 940.04 but chose not to do so. *See Dairyland Power Co-op.*, 52 Wis. 2d at 52. With respect to the various other statutes on which the State Agencies and Doctor-Intervenors have relied, those statutes do not expressly legalize abortion, they are not fundamentally incompatible with § 940.04, there is no clear intent to substitute them for § 940.04, and several of them contain language establishing they were not intended to replace or repeal an otherwise applicable ban on abortion.

B. Issue #3 Merits Review

With respect to Issue #3, the Doctor-Intervenors argued below that, as applied to abortion, § 940.04 is unconstitutionally vague or violates due process by making compliance impossible and pointed to several aspects of § 940.04 they believe are problematic. If this Court agrees with Urmanski that § 940.04 otherwise applies to consensual abortions and has not been repealed or superseded, this Court will need to address them.

To be clear, the Doctor-Intervenors' arguments are meritless and must fail under the applicable legal standards. Section 940.04 is not unconstitutionally vague on its face as applied to abortions because the existence of clear-cut cases constituting a core of prohibited conduct renders a statute immune from a pre-enforcement facial challenge.[5] *See Planned Parenthood of Ind. & Ky. v. Marion Cty. Prosecutor*, 7 F.4th 594, 604-05 (7th Cir. 2021). Here, there is a discernable core to the prohibition in § 940.04(1) that would not implicate any of the Doctor-Intervenors' vagueness concerns, as it would plainly prohibit abortions on otherwise healthy mothers early in gestation. The Doctor-Intervenors' concerns involve application of the statute on the margins, but "[s]ome uncertainty at the margins does not condemn a statute." *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 540 (7th Cir. 2019); *see also State v. Courtney*, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976).

Further, the Doctor-Intervenors' reliance on other statutes regulating abortion to claim § 940.04 does not provide them with fair notice of prohibited conduct conflicts with this Court's precedents. *See Grandberry*, 2018 WI 29 at ¶35. Their concerns regarding the term "quick child" are irrelevant because that term

[5] The Doctors-Intervenors' claims are facial because they are not limited to challenging an application of § 940.04 to their own specific circumstances, but instead challenge the application of § 940.04 to abortions as a category. *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶45, 393 Wis. 2d 38, 946 N.W.2d 35.

does not appear in § 940.04(1), is not unconstitutionally vague,[6] and has already been defined by this Court.[7] Their argument that the exception for therapeutic abortions at § 940.04(5) is unconstitutionally vague has already been rejected by a federal court,[8] and most courts to consider the question have upheld similar statutes against vagueness challenges.[9] And, their claim that it would be impossible for a physician to perform a therapeutic abortion otherwise allowed by § 940.04(5) because licensed maternity hospitals no longer exist does not provide a basis for a broad-based declaration the statute cannot be applied to any abortions.[10]

Nevertheless, the Doctor-Intervenors' arguments present questions of law that have not previously been decided by this Court and the resolution of which will have a statewide impact. Further, because the Doctor-Intervenors' arguments sound in due process, they present questions of federal or state constitutional law that this Court may believe are real and significant enough to merit review.

C. Issue #4 Merits Review

With respect to Issue #4, the State Agencies below alleged that, even if § 940.04 were otherwise applicable as to abortions, the statute is now unenforceable

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[6] *See, e.g.*, *Smith v. Newsome*, 815 F.2d 1386, 1387 (11th Cir. 1987); *Brinkley v. State*, 253 Ga. 541, 542-44, 322 S.E.2d 49 (Ga. 1984).

[7] *State v. Timm*, 244 Wis. 508, 511, 12 N.W.2d 670 (1944); *Foster v. State*, 182 Wis. 298, 196 N.W. 233, 234 (1923).

[8] *Babbitz v. McCann*, 310 F. Supp. 293, 297-298 (E.D. Wis. 1970).

[9] *See, e.g.*, *Crossen v. Attorney General of Com. of Ky.*, 344 F. Supp. 587, 590 (E.D. Ky. 1972), *judgment vacated in light of Roe*, 93 S. Ct. 1413; *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970); *Cheaney v. Indiana*, 285 N.E.2d 265, 271 (Ind. 1972); *State v. Abodeely*, 179 N.W.2d 347, 354 (Iowa 1970); *State v. Munson*, 86 S.D. 663, 671, 201 N.W.2d 123 (S.D. 1972), *vacated and remanded in light of Roe v. Wade by* 410 U.S. 950. *But see, e.g.*, *People v. Belous*, 458 P.2d 194 (Cal. 1969).

[10] Even if no licensed maternity hospitals exist, the statute allows life-saving abortions to be performed elsewhere in an emergency, thus allowing a life-saving abortion in a location other than a licensed maternity hospital if no such hospitals exist. Regardless, this issue only affects the subset of abortions that otherwise meet the exemption under § 940.04(5) and does not provide a basis for declaring that § 940.04 on its face cannot apply to any abortions, when there is a core of conduct prohibited by § 940.04(1) that does not present this issue.

"because of its disuse and in light of reliance on *Roe v. Wade* and its progeny." (R.34:22, App.026.) In short, they invoked the doctrine of *desuetude*, which is "a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use." *United States v. Elliott*, 266 F. Supp. 318, 325 (E.D.N.Y. 1967).

As explained in Issue #5 below, even considering this issue requires the determination of the standing of the State Agencies to bring this claim. Setting aside standing, however, this issue merits this Court's review because it presents a novel question of law, the resolution of which will have a statewide impact. To be sure, the doctrine of *desuetude* is incompatible with numerous statements from this Court that only the Legislature may determine the State's public policy and courts are duty-bound to enforce the law as written. *See, e.g.*, *Columbus Park Housing Corp. v. City of Kenosha*, 2003 WI 143, ¶34, 267 Wis. 2d 59, 80, 671 N.W.2d 633, 643. Indeed, only a single state appears to have expressly recognized the *desuetude* doctrine, which has been described as incompatible with democratic government. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 338 (2012). And, even if the doctrine were otherwise viable, it would not apply under these circumstances.

Nevertheless, this Court has not expressly addressed whether it should recognize the doctrine of *desuetude* and under what circumstances that doctrine would apply. Thus, setting the standing issue aside, the State Agencies' argument that *desuetude* applies here presents another reason for this Court to grant this petition. *See* Wis. Stat. § 809.62(1r)(c)2.-3.

III. Issue #5 Merits Review

Finally, this case presents novel questions of law regarding standing—specifically, whether the State Agencies had standing to pursue their own claims in this case or, alternatively, could rely on the standing of an intervenor to avoid dismissal of their own claims. The State Agencies are not threatened with application of § 940.04 and it is Urmanski's view they had no legally protectable interests in this controversy.

Nevertheless, the circuit court initially denied Urmanski's motion to dismiss and held the State Agencies did have standing. This issue implicates this Court's criteria at § 809.62(1r)(d), because the circuit court's decision conflicts with precedents holding that a mere difference of opinion between state officers does not create a justiciable controversy, *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627 (1936), and there is no justiciable controversy when a plaintiff seeks a declaratory judgment to resolve a difference of opinion between the plaintiff and the defendant regarding the application of a penal statute to third parties, *see Wisconsin Pharmaceutical Ass'n v. Lee*, 264 Wis. 325, 58 N.W.2d 700 (1953); *Wisconsin Education Association Council v. Wisconsin State Elections Board*, 2000 WI App 89, 234 Wis. 2d 349, 610 N.W.2d 108.

The circuit court relied on prior decisions allowing government officials to bring declaratory judgment actions against those who may be subject to the penal laws at issue, *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976), and *In re State ex rel. Att'y Gen.*, 220 Wis. 25, 264 N.W. 633 (1936), but Urmanski is not a person against whom the State Agencies seek to apply § 940.04. The circuit court also relied on this Court's decision in *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855, but this case does not present the "unique circumstances" that were present in *McConkey*. 2010 WI 57 at ¶17.

After Urmanski moved for reconsideration, the circuit court stated this issue was irrelevant because Urmanski acknowledges one of the Doctor-Intervenors presents a justiciable controversy. (R.183:7, App.086.) The circuit court appears to have applied what is known as the "one-good-plaintiff" rule. *See Chicago Joe's Tea Room, LLC v. Village of Broadview*, 894 F.3d 807, 813 (7th Cir. 2018) (explaining that "[a]s long as there is at least one individual plaintiff who has demonstrated standing to assert these rights as his own, a court need not consider whether the other … plaintiffs have standing to maintain the suit" (cleaned up)).

The circuit court's application of the "one-good-plaintiff" rule also merits this Court's review because it presents novel questions of law in Wisconsin:

1. Does the "one-good-plaintiff" rule apply in Wisconsin?

2. If so, does it apply when the "good plaintiff" is not a plaintiff, but an intervenor? Such a conclusion would seem to conflict with the general rule that "intervention will not be permitted to breathe life into a nonexistent lawsuit." *See Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983) (internal quotation marks and citation omitted). Indeed, although there is an exception to this rule when "it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay," *id.* at 536-37, cases applying that exception have still adjudicated the jurisdictional challenges to the original action. *See, e.g.*, *Village of Oakwood v. State Bank and Trust Co.*, 481 F.3d 364, 367 (6th Cir. 2007). They have not done what the circuit court did here and use an intervenor to cure defects in the original action.

3. Finally, even if the State Agencies could rely on the standing of the Doctor-Intervenors, must they independently demonstrate standing to pursue any distinct claims in the Amended Complaint (like the claim that § 940.04 is unenforceable against abortions due to disuse)? *See Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018) ("At least one plaintiff must demonstrate standing for each claim and form of requested relief.").

IV. This Court Is Likely to Consider this Case Regardless of How the Court of Appeals Decides the Issues

Finally, the applicability of § 940.04 to abortion has generated significant public interest and is a question this Court is likely to consider regardless of how the Court of Appeals decides the issues. This is a question of significant public importance requiring prompt resolution by this Court. This Court's resolution of this issue now, rather than later, will provide needed clarity to policymakers as to the current state of the law and will save taxpayer dollars by preventing the need to first brief this case to the Court of Appeals before it is reviewed by this Court.

CONCLUSION

This Court should grant Urmanski's Petition for Bypass and take jurisdiction of this appeal under Wis. Stat. §§ 808.05 and 809.60.

Dated this 20th day of February, 2024.

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CERTIFICATION

I hereby certify this Petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (8)(bm), and (8)(g). Although this is a Petition to Bypass, not a Petition for Review, this Petition conforms to the rules in Wis. Stat. § 809.62(2) for a petition for review produced with a proportional serif font. The length of this response is 7990 words. Word processing software (Microsoft Word) was used to determine the length of this response. The word count above is inclusive of all words in the Introduction, Issues Presented, Review Criteria Relied Upon, Statement of the Case, Reasons to Grant Bypass, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 20th day of February, 2024.

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