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CIRCUIT COURT
DANE COUNTY, WI
2022CV001594

STATE OF WISCONSIN **CIRCUIT COURT** **DANE COUNTY**

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD, and SHELDON A. WASSERMAN, M.D.,

Plaintiffs,

v.

CHRIS KAPENGA, DEVIN LeMAHIEU, and ROBIN VOS,

Defendants.

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

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs' complaint must be dismissed due to multiple insurmountable procedural flaws. The only defendants named in the suit are legislative officials with no enforcement power whatsoever with respect to any of the challenged laws. Plaintiffs' claims also depend on the speculative possibility of enforcement in the future, a hypothetical controversy not ripe for the Court's resolution. Indeed, according to Plaintiffs' own complaint, the challenged law was "rarely enforced" even before *Roe v. Wade*. Plaintiffs also cannot claim any legally cognizable interest of their own in this case, as they are not private citizens who fear enforcement of the law against them. Plaintiffs' claimed need for clarity about the scope of the law is merely an impermissible request for an advisory opinion about abstract legal questions. Any one of these defects, standing on its own, compels the Court to dismiss this case as non-justiciable.

Even assuming the Court could reach the merits, Plaintiffs' claims fail as well. Plaintiffs' first claim asserts that the Legislature repealed § 940.04(1)—not by passing a law taking it off the books, but by *implication*, when it later passed other abortion restrictions. But no subsequent enactment conflicts with § 940.04(1)'s general abortion prohibition, much less creates the kind of

completely irreconcilable contradiction necessary to find an implied repeal. And the fact that the Legislature has, over the years, amended, modified, or repealed other aspects of § 940.04, while leaving § 940.04(1) untouched, further undermines any suggestion of an implied repeal. Finally, Plaintiffs' second claim—that § 940.04(1) has simply lost its validity through "disuse"—has no legal foundation at all. Plaintiffs identify no instance in which the Wisconsin Supreme Court has ever recognized such a doctrine or invalidated a duly enacted law on that basis. Plaintiffs' complaint should be dismissed in its entirety for failure to state a claim even if the Court finds this dispute ripe and justiciable.

STATEMENT OF THE CASE

I. Statutory Background

The Wisconsin Statutes have several provisions restricting and regulating abortion. First, Wis. Stat. § 940.04 provides that "[a]ny person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony," except for an abortion which is "necessary, or is advised by 2 other physicians as necessary, to save the life of the mother." § 940.04(1), (5)(b). Section 940.04 predates *Roe v. Wade* and was most recently amended in 2012. *See* 2011 Wis. Act 217 § 11. However, this statute was unenforceable while *Roe* was in force. *See Larkin v. McCann*, 368 F. Supp. 1352 (E.D. Wis. 1974).

Second, § 940.15 provides that "[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 further 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 enacted in 1985, as part of a broader bill regarding abortion

and support for minor and school-age parents. *See* 85 Wis. Act 56 § 35. This bill did not mention § 940.04.

Third, § 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). This provision is based on a finding that "an unborn child is considered to be capable of experiencing pain if the probable postfertilization age of the unborn child is 20 or more weeks." *Id.* The Legislature enacted this provision in 2015—again without mentioning § 940.04. *See* 2015 Wis. Act 56 § 7.

Numerous Wisconsin statutes regulate abortion in other ways as well. Enacted in 1998, § 940.16 bans partial-birth abortions outside of emergency circumstances. *See* 97 Wis. Act 219 § 2. Other statutes regulate the conduct of legal abortions in various ways. For example, Wisconsin law requires physician admitting privileges, defines informed medical consent to the procedure, and regulates the prescription of abortion-inducing drugs. *See* Wis. Stat. §§ 253.095, 10, 105.

II. Procedural Background

Plaintiffs filed this suit on June 28, 2022, four days after the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *Dobbs* overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), holding that there is no federal constitutional right to abortion, and "return[ed] the issue of abortion to the people's elected representatives." 142 S. Ct. at 2243, 2259.

Plaintiffs are either state officials or agencies: Wisconsin Attorney General Josh Kaul, the Wisconsin Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and Sheldon A. Wasserman, M.D., the Chairperson of the Wisconsin Medical Examining Board. (Cmpt., ¶¶4-7.) The only Defendants named in the complaint are three officers of the

Wisconsin State Legislature: Senate President Chris Kapenga, Senate Majority Leader Devin LeMahieu, and Assembly Speaker Robin Vos. (*Id.*, ¶¶9-11.)

Plaintiffs' complaint seeks a declaratory judgment that § 940.04(1) is "unenforceable as applied to abortions." (Cmpt., Prayer for Relief.) As public officials, Plaintiffs do not allege they fear prosecution under the challenged statute or that Defendants, as three individual legislative officers, threaten any enforcement that would implicate Plaintiffs' legal interests. Rather, Plaintiffs allege that they "should have clarity" about the status of Wisconsin law governing abortion in order to provide guidance to other state agencies and officers, and in the case of Plaintiffs with medical-licensing duties, to guide them in any future licensing or disciplinary proceedings. (*Id.* ¶¶4-6.)

ARGUMENT

A motion to dismiss "tests the legal sufficiency of the complaint," assuming for purposes of the motion the truth of all well-pleaded facts in the complaint. *DeBruin v. St. Patrick Congregation*, 2012 WI 94, ¶11, 343 Wis. 2d 83, 816 N.W.2d 878. At this stage, the Court "will dismiss a complaint if it states no legal claim upon which relief can be granted," or if Plaintiffs have failed to allege sufficient facts to show a justiciable controversy. *Id.*; *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶11, 402 Wis. 2d 587, 977 N.W.2d 342. Plaintiffs' complaint fails in both respects, presenting a non-justiciable dispute and failing to state a claim on the merits.

I. Plaintiffs' Claims for a Declaratory Judgment Are Non-Justiciable.

"'A court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment.'" *Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶29, 393 Wis. 2d 1, 946 N.W.2d 17 (quoting *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211). This requirement is "[t]o allow courts to anticipate and resolve identifiable, certain disputes between adverse parties." *Olson*, 309 Wis. 2d 365, ¶28. "A

controversy is justiciable when: (1) a 'right is asserted against [a defendant] who has an interest in contesting it'; (2) the controversy is 'between persons whose interests are adverse'; (3) the plaintiff has a 'legally protectable interest' in the controversy; and (4) the controversy is 'ripe for judicial determination.'" *Papa*, 393 Wis. 2d 1, ¶ 29 (quoting *Olson*, 309 Wis. 2d 365, ¶29) (alterations in original). And even where all four justiciability factors are met, "[a] decision to grant or deny declaratory relief falls within the discretion of the circuit court." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶36, 244 Wis. 2d 333, 627 N.W.2d 866.

Plaintiffs' complaint fails on all four factors. By suing only three individual legislators in their official capacities, precisely none of whom play any role in the enforcement of Wisconsin's criminal law, Plaintiffs have filed a *non sequitur* lawsuit. Even in their official capacities, Defendants are in no better position to enforce the law or redress Plaintiffs' purported injury than any other private citizen of Wisconsin. These legislative officials do not enforce the law. Further, Plaintiffs' claims depend on contingent and speculative future events, such as non-parties' enforcement of the challenged statute. But Plaintiffs have not alleged such future enforcement, and they cannot point to sufficient facts in support of their claim. Finally, Plaintiffs do not show any interests sufficient to justify declaratory relief—nor could they. Instead, they seek from the Court only an advisory opinion. The Court should accordingly dismiss the Complaint without reaching the merits.

A. Legislative Leaders Are Improper Defendants.

Plaintiffs have failed to assert "a claim of right ... against one who has an interest in contesting it" and ensure that "the controversy is 'between persons whose interests are adverse.'" *Olson*, 309 Wis. 2d 365, ¶29 (quoting *Loy*, 107 Wis. 2d at 410). Because these two considerations here overlap, they should be considered together. *See Tooley v. O'Connell*, 77 Wis. 2d 422, 437,

253 N.W.2d 335 (1977) ("Therein lies the adversity. The plaintiffs seek to invalidate the financing system; the defendants by statute are required to operate under and maintain the system.").

Here, Plaintiffs' sole requested relief is a declaration "that Wis. Stat. § 940.04 is unenforceable as applied to abortions." (Cmpt., ¶50); (*see also id.* ¶58.) Consequently, "'[t]he Declaratory Judgment Act ... require[s] 'the joinder as parties ... of ... the public officers *charged with the enforcement of the challenged statute* ….'" *Koschkee v. Evers*, 2018 WI 82, ¶25, 382 Wis. 2d 666, 913 N.W.2d 878 (emphasis added) (quoting *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶140, 307 Wis. 2d 1, 745 N.W.2d 1). But it is axiomatic that legislators wield only the power to enact laws, not to enforce them. Wis. Const. art. IV, § 1; *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them."). Individual legislators (even those in leadership positions, like Defendants sued here) simply have no "duty of enforcement" that could pose a "threat" to anyone subject to § 940.04(1). *See Borden Co. v. McDowell*, 8 Wis. 2d 246, 256, 99 N.W.2d 146 (1959).

To be sure, Defendants dispute Plaintiffs' interpretation of the State's abortion laws. *See infra*, Part II. But adversity of parties requires more than a mere difference of opinion between different branches of government. "Difference of opinion is not enough to make a justiciable controversy." *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 629 (1936). Plaintiffs have not joined a defendant with any authority to enforce or apply the challenged laws, but only defendants who disagree with them about the proper application of state law. That failure on its own requires dismissal.

Alternatively, even if Defendants' *legislative* powers were sufficient to create adversity, they remain improper defendants given their status as legislators. The Wisconsin Constitution is unequivocal: "Members of the legislature shall in all cases, except treason, felony and breach of

the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session." Wis. Const. art. IV, § 15. And "[n]o member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." Wis. Const. art. IV, § 16. These constitutional provisions, conferring legislative immunity and privilege on Wisconsin legislators, bar Plaintiffs' suit against Defendants. Indeed, Plaintiffs' suit is precisely the sort of interference with the legislative process that these constitutional privileges were designed to avoid. Legislative privilege predates Wisconsin's statehood, with its taproots traceable to English parliamentary struggles. The privilege protected members of Parliament against action by the Crown. *See State v. Beno*, 116 Wis. 2d 122, 141, 241 N.W.2d 668 (1984). Over time, the privilege expanded "to protect legislators against harassment by the executive." *Id.* But here, that is precisely the nature of the action initiated: the executive against three legislators.

B. Plaintiffs' Claims Are Unripe.

"Courts resolve concrete cases, not abstract or hypothetical cases." *Papa*, 393 Wis. 2d 1, ¶30. While a plaintiff seeking declaratory relief need not have suffered an injury already, "the facts [must] be sufficiently developed to allow a conclusive adjudication." *Olson*, 309 Wis. 2d 365, ¶43. "The facts on which the court is asked to make a judgment should not be contingent or uncertain," and the "potential outcomes" should be "certain to have a direct and immediate ... impact" on the parties. *Id.* ¶¶43, 69. In other words, the issues must be "real, precise, and immediate," not "hypothetical, abstract, or remote." *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶47, 255 Wis. 2d 447, 649 N.W.2d 626. "The purpose of ripeness is to avoid courts entangling themselves in abstract disagreements." *Papa*, 393 Wis. 2d 1, ¶30 (quotations omitted).

Here, Plaintiffs have made no allegations of any imminent injury. Indeed, their Complaint makes *no allegations at all* that the statute they challenge will soon be enforced against anyone.

They allege that the challenged provision, even before *Roe v. Wade*, remained "on the books" but "rarely enforced," and that it is now "long obsolete and unused," perhaps even lacking "the consent of the governed," (Cmpt. ¶¶18, 56-57.) But they do not allege that it will soon return to regular enforcement. If anything, their allegations suggest the opposite. The closest Plaintiffs come is alleging that "[e]nforcement of Wis. Stat. § 940.04(1) against abortion providers ... *would create* a direct conflict" with other statutes. (Cmpt. ¶49.) (emphasis added).

Plaintiffs certainly give no indication that they themselves will soon enforce the statute as part of their official duties. The Attorney General—who advises district attorneys, handles criminal appeals, and can represent the State in any case, including prosecutions, at the request of the governor or legislature—expresses no intent to enforce it. *See* Wis. Stat. 165.25(1), (1m), (3). As for the remaining Plaintiffs, they do not say they will enforce the law, but only that they "may be called upon to investigate" complaints, and that as a general matter they have discretion to "consider[] allegations of unprofessional conduct and issu[e] discipline." (Cmpt., ¶¶5-6.) Indeed, Plaintiffs have publicly taken positions against enforcement. AG Kaul "blasted" the Supreme Court's decision overturning *Roe v. Wade* and in its aftermath called on "elected officials to step up and protect access to safe and legal abortion."[1] Likewise, Plaintiff Wasserman attacked the

[1] "Gov. Evers, AG Kaul Announce Direct Legal Challenge to Wisconsin's 1800s-era Criminal Abortion Ban" (June 28, 2022), available at https://bit.ly/3Q6tj1C; "AG Kaul Reacts to *Dobbs v. Jackson Women's Health Organization* Decision," (June 24, 2022), available at https://bit.ly/3OXwaZD. Normally, a court may not consider matters outside of the pleadings on a motion to dismiss for failure to state a claim without converting the motion to one for summary judgment. *See* Wis. Stat. § 802.06(2)(b). However, because these above-linked articles are publicly available and include statements made by government officials, this Court may take judicial notice of these articles without converting the motion to one for summary judgment. *See, e.g.*, *State v. Wachsmuth*, 73 Wis. 2d 318, 331-32, 243 N.W.2d 410 (1976) (holding that a court may take judicial notice of publicly available government documents); *see also Ennenga v. Starns*, 677 F.3d 766, 773–74 (7th Cir. 2012) ("A court may take judicial notice of facts that are (1) not subject to reasonable dispute and (2) either generally known within the territorial jurisdiction or capable of accurate and ready determination through sources whose accuracy cannot be questioned.").

Moreover, these citations are made in support of Defendants' argument that Plaintiffs' claims are unripe and non-justiciable, which are arguments also falling under Wis. Stat. § 802.06(2)(a)1-3., provisions that govern motions to dismiss based on a defendant's "[l]ack of capacity to ... be sued," lack of jurisdiction over "the subject matter," and lack of jurisdiction over "the person." Section 802.06(2)(b) does not require a court to convert a motion to dismiss

decision as a "step backward as a nation" that had "put the health, safety, and freedom of [women] who can get pregnant across the country at risk."[2]

Unable to allege a plausible threat of imminent enforcement, Plaintiffs must resort to hypotheticals and speculation in the face of numerous uncertainties. To decide the case in Plaintiffs' favor, the Court would have to interpret two (or more) abortion statutes, each with highly fact-specific exceptions. *See* Wis. Stat. § 940.04(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."); § 940.15(3)-(4) (exception to post-viability ban for abortions "performed in a hospital" and "necessary to preserve the life or health of the woman, as determined by reasonable medical judgment of the woman's attending physician"); § 253.107(1)(b), (2) (abortion restriction does not apply "in the case of a medical emergency" as defined by Wis. Stat. § 253.10(2)(d)). Having interpreted these statutes and determined the scope of each in the abstract, the Court would then have to "make every attempt to give effect to both by construing them together so as to be consistent with one another." *State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994). And the Court would have to do all this without the benefit of any concrete factual circumstances to which these fact-specific provisions apply. Instead, the Court would be forced to fill in the gaps with "hypothetical or abstract" scenarios about how the challenged statute *might* be interpreted, applied, or enforced. *Papa*, 393 Wis. 2d 1, ¶31.

based on these grounds into a motion for summary judgment when matters outside of the pleadings are submitted to the court.

[2] Dirr and Glauber, "Here's how Wisconsin leaders, politicians and others are reacting to the U.S. Supreme Court overturning Roe v. Wade," *Milwaukee Journal Sentinel* (June 24, 2022), available at https://bit.ly/3vHEMN0. The Court may take judicial notice of the statements in this article. *See* n.1, *supra*.

Furthermore, whether the challenged statute will have any real-world impact at all depends on a number of intervening contingencies, especially the enforcement decisions made by non-party district attorneys. Plaintiffs have not alleged in their Complaint any credible threat of prosecution that would implicate the alleged statutory conflict. That omission is unsurprising. All district attorneys have limited resources and may, for example, choose not to charge borderline cases that may potentially implicate one of the statutory exceptions. But, in all events, Plaintiffs' complaint includes nothing remotely suggesting an imminent threat of prosecutions under the challenged laws. Without review of real-world application and enforcement (if any), the parties and the Court would be left to argue about "abstract disagreements" or "contingent or uncertain" events, arising from nothing more than Plaintiffs' general apprehension about what prosecutors might decide to do in the future. *Olson*, 309 Wis. 2d 265, ¶43. Without some "'real, precise, and immediate" basis for adjudication, the Court should not wade into such a dispute. *Putnam*, 255 Wis. 2d 447, ¶47.

Unlike this case, precedents finding a ripe claim for declaratory relief have involved plaintiffs threatened with much more direct, immediate injury. In *Olson*, the plaintiff had received "conditional rezoning approval from the County" and was therefore "subject to compliance with" the challenged statute. 309 Wis. 2d 365, ¶63. His property-development efforts were therefore "directly impacted by application of the ordinance." *Id.* Likewise, in *Papa*, the challenged policy of the Department of Health Services was being "actively enforce[ed]" against the plaintiffs, so that there was "nothing hypothetical, abstract, contingent, or uncertain" about their claims. 393 Wis. 2d 1, ¶31 And in *Milwaukee District Council 48*, the plaintiff union, which was challenging a defendant's allegedly wrongful construction of a pension plan's eligibility provisions, showed the case was ripe by alleging several recent violations, which would automatically result in the alleged injury (loss of pension benefits). 244 Wis. 2d 333, ¶¶21, 43-44.

Putnam provides a particularly instructive example. Plaintiffs there challenged a cable company's late-fee policy and, to show ripeness, offered evidence that "on average, 10 to 15 percent of Time Warner's customers pay the late fee each month." 255 Wis. 2d 447, ¶46. That rendered the necessary facts for adjudication "an imminent and practical certainty." *Id.* All these precedents contrast starkly with the claims here, where no potential enforcement—much less actual enforcement—has even been alleged. The Court should dismiss the complaint as non-justiciable.

C. Plaintiffs Lack a Cognizable Interest in a Declaratory Judgment.

Wisconsin courts do "not issue advisory opinions based on non-existent facts." *Blazing v. Zurich Am. Ins. Co.*, 2014 WI 73, ¶73, 356 Wis. 2d 63, 850 N.W.2d 138. Courts guard in particular against giving advisory opinions "under the guise of a declaration of rights." *Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203, 188 N.W.2d 529 (1971); *see also State ex rel. La Follette*, 264 N.W. at 629 ("In the absence of constitutional provisions so requiring, courts will not render merely advisory opinions, even though such opinions be requested by coordinate branches of the government.").

Yet the only interest Plaintiffs allege here is an interest in receiving an advisory opinion. The Attorney General alleges that his department "should have clarity about the applicability of abortion laws in Wisconsin" in support of its duties to "consult[] with and advise[] agencies" and "provide[] training and guidance to law enforcement officers" about the criminal law of the State. (Cmpt., ¶4.) The remaining Plaintiffs, as regulators of the medical profession, allege they "*may* be called upon to investigate" physicians for unprofessional conduct related to abortions. *Id.* ¶¶5-6 (emphasis added). They imply that a ruling would help them perform these duties in this hypothetical scenario, *id.*, but otherwise assert no interest in declaratory relief.

Plaintiffs plainly lack the most common interest to support an action for a declaratory judgment on a statute's applicability: fear of prosecution. Typically, the proper party to "seek a construction of a statute or a test of its constitutional validity" by a declaratory judgment is a "potential defendant[]." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 674, 239 N.W.2d 313 (1976). This allows such parties to determine their rights "without subjecting themselves to forfeitures or prosecution." *Id.* But, of course, Plaintiffs are public officials and agencies—not individuals or entities who could be accused of violating the State's abortion laws—so they cannot claim this type of interest in the validity or interpretation of § 940.04(1).

A "right of enforcement" may also justify seeking declaratory relief, *see State ex rel. Lynch*, 71 Wis. 2d at 673, but Plaintiffs cannot claim that, either. First, § 940.04(1) is a criminal statute, and enforcement therefore is the duty of district attorneys. Wis. Stat. § 978.05(1); *Lynch*, 71 Wis. 2d at 673. Moreover, as noted *supra*, Plaintiffs have not alleged they have any intentions of enforcing § 940.04. They are not suing for a right to enforce § 940.04, but instead argue that it is *unenforceable*. (Cmpt., ¶¶50, 58.) To the extent they do have some enforcement role—for example, through the Attorney General's handling of criminal appeals, Wis. Stat. § 165.25(1)—they retain discretion not to enforce the statute with or without a declaration from this Court. *See, e.g.*, *State v. Annala*, 168 Wis. 2d 453, 472, 484 N.W.2d 138 (1992); Wis. Stat. § 448.02(3)(c) (sanctions for medical unprofessional conduct are within Board's discretion). Plaintiffs therefore have no cognizable interest in a declaration *against* enforcement of a statute they show no signs of enforcing.

Finally, Plaintiffs cannot bring suit based on a general interest in establishing the correct interpretation of state law. The Wisconsin Supreme Court rejected this possibility in *State v. City of Oak Creek*, holding that the attorney general "lacks the necessary authority to attack the constitutionality" of a state law. 2000 WI 9, ¶53, 232 Wis. 2d 612, 605 N.W.2d 526. That case

turned on whether the Attorney General could show an "interest ... recognized by law" in attacking a statute. *Id.* ¶¶17-18. The Court held "that the attorney general 'must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity,'" emphasizing that he "has no common-law powers or duties." *Id.* ¶21. The Court then concluded that because no statute empowered the Attorney General to challenge state laws, it was not within his power to do so. *Id.* ¶34; *see* Wis. Stat § 165.25. The same goes for the other Plaintiffs, which are either creatures of statute or maintain a position created by statute, and thus have only "limited ... statutory authority." *State Public Intervenor v. Wis. Dep't of Nat. Res.*, 115 Wis. 2d 28, 36, 339 N.W.2d 324 (1983); *see id.* at 41 (holding public intervenor lacked "legal capacity to seek a declaratory judgment" on the constitutionality of state law, pursuant the intervenor's "enabling statute"). None has the authority to bring a suit challenging the validity of state law. *See* Wis. Stat. § 448.02 (Medical Examining Board authority); *id.* § 440.03 (Department of Safety and Professional Services authority).

In short, no Plaintiff has a cognizable interest in this suit beyond seeking an impermissible advisory opinion. The Court must dismiss the Complaint.

II. Plaintiffs Fail to State a Claim on the Merits.

Assuming the Court does find this case justiciable, it should dismiss both claims on their merits for failure to state a claim. Plaintiffs first argue that Wisconsin's general prohibition of abortion has been repealed—not by any explicit act of the Legislature, but by mere implication from other, narrower abortion restrictions. None of these statutes affords any affirmative protection or authorization for abortion, and none overcomes the strong presumption against implied repeal. Plaintiffs' second claim is weaker still—an utterly novel argument that Wisconsin's general prohibition on abortion is now unenforceable due to "disuse" during the decades when *Roe v. Wade*

barred its enforcement. Plaintiffs' Complaint suggests no basis in law for such a claim, because there is none. Therefore, Court should dismiss both claims.

A. Section 940.04(1) Has Not Been Repealed by Implication.

Plaintiffs' principal claim, that § 940.04(1) has been repealed by implication, "is not favored in statutory construction." *Black*, 188 Wis. 2d at 645. "Rather, when two provisions are similar ... we must make every attempt to give effect to both by construing them together so as to be consistent with one another." *Id.*; *see also In re Commitment of Matthew A.B.*, 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999) ("We must reasonably construe statutes to avoid conflicts, and when statutes do conflict, we must attempt to harmonize them."). Wisconsin courts "will not 'lightly or quickly' conclude that statutory provisions are irreconcilable." *Matthew A.B.*, 231 Wis. 2d at 706. Instead, "[a]ll statutes passed and retained by the legislature should be held valid unless the earlier statute is *completely repugnant* to the later enactment." *State v. Zawistowski*, 95 Wis. 2d 250, 264, 290 N.W.2d 303 (1980) (emphasis added).

The plain texts of the statutes cited by Plaintiffs are not in conflict at all, much less "completely repugnant" to each other. The older statute, § 940.04(1), provides: "Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony." The newer statute, § 940.15(2), provides: "Whoever intentionally performs an abortion after the fetus or unborn child reaches viability ... is guilty of a Class I felony." A third statute bans abortion "if the probable postfertilization age of the unborn child is 20 or more weeks," § 253.107(3), and a fourth bans partial-birth abortion, § 940.16. All four statutes come with a single exception for certain types of medical emergencies. *See* § 940.04(5)(b) (excepting abortions "necessary ... to save the life of the mother"); § 940.15(3) (same for abortions "necessary to preserve the life or health of the woman"); § 940.16(3) (same for abortions "necessary to save the life of a woman"); § 253.107(3) (exception if "the woman is undergoing a medical emergency,"

defined in § 253.10(2)(d) as a condition "creat[ing] serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions").

All of these statutes prohibit certain abortions under particular, defined circumstances, subject to enumerated exceptions, but none contains any affirmative *permission* or *authorization* to perform any type of abortion. Section 940.15(2), for example, restricts abortions "after the fetus or unborn child reaches viability," but says nothing one way the other about abortions before viability. That alone suffices to show that there is no irreconcilable conflict triggering an implied repeal of § 940.04(1).

At most, some of the cited statutes are narrower or broader than others. They may overlap in certain applications, and some types of abortions may violate some of the statutes but not others. But the fact that these laws—like countless other statutes—may vary in scope does not make the broader laws *completely repugnant* to the narrower laws. Plaintiffs' claim might be stronger if Wisconsin had ever passed—as some other states have—affirmative statutory protections for a purported right to abortion. *E.g.*, 775 Ill. Comp. Stat. 55/1-15(b) ("Every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right."). But this State has not done so.

Plaintiffs' allegation that the passage of § 940.15 repealed the prior enactment in § 940.04(1) also flies in the face of that subsequent enactment's broader structure. Section 940.15 was enacted in 1985 as part of Assembly Bill 510. *See* 85 Wis. Act 56. The act did not explicitly repeal any part of § 940.04, even though it legislated on the very same subject by adopting § 940.15, and even though "it has been firmly established that 'the legislature is presumed to act with full knowledge of existing laws.'" *State v. Cole*, 2003 WI 112, ¶17, 264 Wis. 2d 520, 665 N.W.2d 328. At the same time, the Act explicitly repealed or amended numerous other statutes.

The Act repealed restrictions, originally enacted in 1933, on the sale and advertisement of contraceptives. 85 Wis. Act. 56, § 32m (repealing Wis. Stat. § 450.11(2), (3), (5), enacted as 1933 c. 420 § 1). The Act also amended an array of statutes governing support by grandparents for any children of dependent minors, support programs for school-age parents, and maternity coverage in group disability policies. *Id.* §§ 11, 16, 18, 20, 22, 27-30, 33, 38 (amending Wis. Stat. §§ 46.99, 49.40, 49.90, 115.91-93, 632.895, 940.27). Yet the Act did not mention § 940.04 even a single time.

Another enactment, which Plaintiffs fail to mention, makes any implied repeal even less plausible. In 2012, the Legislature repealed two *other* subsections of § 940.04 as part of a broader package of abortion regulations. *See* 2011 Wis. Act 217. That Act abolished the two provisions of § 940.04 which had previously imposed liability on a pregnant woman who intentionally procured the abortion of her unborn child. *See id.* § 11 (repealing § 940.04(3)-(4)). But this Act, just like the 1985 Act, left § 940.04(1) unmentioned and untouched. "Such statutory silence indicates that the legislature did not intend to repeal or reduce the operation of an existing statute." *State ex rel. Schultz v. Wellens*, 208 Wis. 2d 574, 578-79, 561 N.W.2d 775 (Ct. App. 1997).

Plaintiffs' claim of an implied repeal also proves far too much: it cannot make sense of Wisconsin's various post-*Roe* abortion statutes, which Plaintiffs do not dispute are valid and enforceable. Plaintiffs highlight two statutes, § 940.15 (post-viability abortion ban) and § 253.107 (twenty-week ban). (Cmpt., ¶¶30-32.) And, as already noted, a third statute bans partial-birth abortions. Wis. Stat. § 940.16. These three bans are overlapping in the sense that they cover the general topic of abortion, but they are not coterminous. Yet Plaintiffs do not contend that one has superseded or impliedly repealed the others. Plaintiffs also argue that § 940.04(1) is "incompatible" with laws that regulate legal abortions. (Cmpt., ¶35.) But some abortions remain legal notwithstanding this general prohibition, and the state's regulatory framework applies to

those procedures just the same as they do to abortions falling within the exceptions to Wisconsin's post-*Roe* abortion laws. No repeal by implication could single out only § 940.04(1), while maintaining in force all of the abortion statutes Plaintiffs do not dispute remain valid and in effect.

Plaintiffs' reliance on the Wisconsin Supreme Court's decision in *State v. Black*, which upheld a charge of feticide under another provision of § 940.04, is misplaced. 188 Wis. 2d 639. *Black* merely reiterated the strong presumption against implied repeal and specifically held that "when the legislature enacted sec. 940.15, Stats., it did not repeal sec. 940.04(2)(a)" but that "both" provisions "remained the law." *Id.* at 645. Having determined that § 940.04(2) covered only the crime of feticide, the Court "ma[d]e no attempt to construe any other sections of sec. 940.04," including the one Plaintiffs challenge here. *Id.* at 647 n.2.

Plaintiffs seize on a statement in *Black* that enforcing § 940.04(2)(a) against a "consensual abortive type of procedure" would be "inconsistent" with § 940.15, (Cmpt., ¶48 (quoting *Black*, 188 Wis. 2d at 646)), but Plaintiffs have clipped out crucial context that makes this very statement cut *against* implied repeal of § 940.04's general prohibition on abortion. Our supreme court actually wrote that "any attempt to apply it to a physician performing a consensual abortion *after viability* would be inconsistent with" § 940.15. 188 Wis. 2d at 646 (emphasis added). As for *pre-viability* abortions, the court said only that enforcement would be barred, not by the passage of § 940.15, but "under *Roe v. Wade*." *Id.* With that decision overruled, nothing in *Black* holds—or even suggests—that § 940.04(1) has been repealed or superseded with respect to pre-viability abortions.

Background principles of lenity, strict construction, and fair notice do not support Plaintiffs' claim of implied repeal, either. Plaintiffs do not actually raise a void-for-vagueness claim, but instead suggest that § 940.04(1) must be "strictly construed against enforcement"—and apparently, held entirely unenforceable as a result. (Cmpt., ¶46.) But the rule of lenity does not

sweep so broadly. Criminal statutes are strictly construed only when "a 'grievous ambiguity' remains after a court has determined the statute's meaning by considering statutory language, context, structure and purpose, such that the court must 'simply guess' at the meaning of the statute." *State v. Guarnero*, 2015 WI 72, ¶27, 363 Wis. 2d 857, 867 N.W.2d 400. The rule of lenity "do[es] not apply" where "we do not doubt the meaning of the criminal statutes at issue." *State v. Long*, 2009 WI 36, ¶21 n.6, 317 Wis. 2d 92, 765 N.W.2d 557, nor where "the statute's words 'manifest[] a clear meaning.'" *State v. Stewart*, 2018 WI App 41, ¶24, 383 Wis. 2d 546, 916 N.W.2d 188. "Such an interpretation would obstruct rather than carry out the legislature's intent." *Id.*

Here, there is no ambiguity, let alone "grievous" ambiguity. Section 940.04(1)'s meaning is plainly discerned by ordinary methods of statutory interpretation. Indeed, the Wisconsin Court of Appeals has applied the "clear and unambiguous meaning" of a statute, rather than a rule of lenity, in a case with far more serious apparent tension between an older and newer statute. *See State v. Mata*, 199 Wis. 2d 315, 319-21, 544 N.W.2d 578 (Ct. App. 1996), *abrogated on other grounds by State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. There, two tavern owners were charged with carrying concealed weapons, even though a later-enacted statute permitted tavern owners to go armed on their own premises. But because that permission allowed tavern owners only to "possess a handgun," *id.* at 320 (quoting Wis. Stat. 941.237(3)(d)), while saying "[n]othing" about "carry[ing] a *concealed* weapon," *id.* (emphasis added), the court upheld the charges.

By contrast, in the only case Plaintiffs cite finding an implied repeal under the rule of lenity, the later statute had *actually repealed* part of the older statute's definition of the offense. *State v. Christensen*, 110 Wis. 2d 538, 329 N.W.2d 382 (1983). There the charged offense was defined as elder abuse in "residential care institutions under section 146.32(2)," but thanks to a later statute

repealing § 146.32(2), "such institutions no longer exist[ed] under that statute." 110 Wis. 2d at 544. Here, of course, § 940.15 did not repeal § 940.04 or any cross-referenced statute. There is no grievous "doubt as to the statutory scheme," in stark contrast to *Christensen*. 110 Wis. 2d at 546.

Finally, even if § 940.04(1) conflicted with later enactments, or was strictly construed to do so, the correct judicial "fix" would not be Plaintiffs' requested relief, a sweeping declaration that the statute is entirely "unenforceable as applied to abortions." (Cmpt., ¶50.) In cases where any of Wisconsin's statutory provisions conflict, courts do not simply void one or more of them; instead, they apply the familiar "rule of statutory construction in Wisconsin where two statutes relate to the same subject matter ... that the specific statute controls over the general statute." *Oneida Cnty. v. Sunflower Prop II, LLC*, 2020 WI App 22, ¶19, 392 Wis. 2d 293, 944 N.W.2d 52. The more specific § 940.15 would thus govern abortions performed after viability, and the more general § 940.04(1) would govern all other abortions.

Plaintiffs cite this rule of construction, (Cmpt., ¶47), but fail to grapple with its real effect. Courts use it to determine which law to apply to a particular case, but never to declare one competing law unenforceable across the board. *See, e.g.*, *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶21, 245 Wis. 2d 607, 629 N.W.2d 686 (applying law "confined to prison conditions" over competing law which "encompasses all rules promulgated by all administrative agencies in Wisconsin"); *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶37, 302 Wis. 2d 358, 735 N.W.2d 30 (applying medical-malpractice rules "specifically for claims against governmental bodies and officers, agents, or employees," instead of more general rules governing all medical malpractice claims). Were the rule otherwise, general provisions of law would fall right and left, invalidated whenever a more specific statute governed in some particular case. But proper statutory construction does not require that absurd result, nor does it allow this Court—on any grounds—to hold § 940.04(1) unenforceable.

B. Section 940.04(1) is Not Unenforceable Because of "Disuse" or Previous Non-Enforcement in Light of *Roe v. Wade.*

Plaintiffs' second claim for declaratory relief is that § 940.04 "is unenforceable as applied to abortions because of its disuse and in light of reliance on *Roe v. Wade* and its progeny." *See* (Cmpt., ¶¶52-58.) Plaintiffs cite no law at all—no case, no statute, no constitutional provision—as a basis for this claim. The reason for this omission is simple: the idea that § 940.04(1) has either fallen into desuetude or "lost the consent of the governed," *id.* ¶57, finds no support whatsoever in Wisconsin law. Defendants are not aware of any Wisconsin case invalidating a statute on these grounds. Plaintiffs' claim simply does not exist under Wisconsin law.

Only a handful of Wisconsin cases even mention a concept such as desuetude. Tellingly, none of these even defines the concept, much less recognizes it as grounds for invalidating a duly enacted statute. If anything, what references can be found only *disapprove* of such a principle. *See, e.g., Wis. Legislature v. Palm*, 2020 WI 42, ¶101, 391 Wis. 2d 497, 942 N.W.2d 900 (Kelly, J., concurring) ("To the extent that" nondelegation doctrine had been "allowed ... to fall into desuetude," the Court had only "been derelict in [its] duties" and should reverse course); *State ex rel. Melentowich v. Klink*, 108 Wis. 2d 374, 390, 321 N.W.2d 272 (1982) (Abrahamson, J., dissenting) (rejecting suggestion "that 'the long desuetude of any law amounts to its repeal'"). In *Black*, too, the Wisconsin Supreme Court rejected the argument of an amicus that 940.04 "fell into disuse" due to federal court decisions and therefore "violate[d] ... due process rights to fair notice of prohibited conduct." 188 Wis. 2d at 639 n.2.

Plaintiffs' twin attacks on § 940.04(1)—that either disuse or reliance on *Roe* renders it unenforceable—also run afoul of another, more firmly established principle of state constitutional law. Under the Wisconsin Constitution, no statute "may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute

applies." *Mayo v. Wis. Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶32, 383 Wis. 2d 1, 914 N.W.2d 678 (overruling *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 284 Wis.2d 573, 701 N.W.2d 440). The Wisconsin Supreme Court rejected the contrary view as an "extraordinary declaration" which "usurps the policy forming role of the legislature and creates uncertainty under the law." *Id.* Consequently, the rise and fall of *Roe v. Wade* can make no difference to the validity under state law of § 940.04(1). The provision must be void or in force based on its fidelity to the Wisconsin Constitution, not a court's divination of the meaning of "changing circumstances." The Court should therefore dismiss this claim.[3]

CONCLUSION

The Court should dismiss all of Plaintiffs' claims and enter judgment for Defendants.

Dated this 22nd day of August, 2022.

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[3] Plaintiffs allude to—but do not develop—an argument that Defendants failed in a purported "duty to enact a revisor's correction bill ... or to otherwise affirmatively repeal" §940.04(1) in the wake of *Roe v. Wade*. (Cmpt., ¶¶9-11 (citing Wis. Stat. § 13.92(2)(L)). Plaintiffs are wise not to press such a claim, because no such duty exists. Section 13.92 creates a "Legislative Reference Bureau," one of the tasks of which is "examin[ing] and identify[ing]" statutes with "defects, anachronisms, conflicts, ambiguities, and unconstitutional or obsolete provisions." *Id.*, § 13.92(2)(L). This statute certainly imposes no *duty* on the *Legislature* to enact "revisor's" or "correction" bills.

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