IN THE SUPREME COURT OF WISCONSIN
Appeal Number 2023AP002362

JOSH KAUL, WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, WISCONSIN MEDICAL EXAMINING BOARD and CLARENCE P. CHOU, MD,
Plaintiffs-Respondents,

CHRISTOPHER J. FORD, KRISTIN J. LYERLY and JENNIFER J. MCINTOSH,
Intervenors-Respondents,

v.

JOEL URMANSKI, as DA for Sheboygan County, WI,
Defendant-Appellant,

JOHN T. CHISHOLM, as DA for Milwaukee County, WI and ISMAEL R. OZANNE, as DA for Dane County, WI,
Defendants-Respondents.

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

BRIEF OF DEFENDANT-RESPONDENT ISMAEL R. OZANNE

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INTRODUCTION

In his opening brief, Defendant-Appellant Joel Urmanski states that he "has not taken a position during the litigation of this case on what the law on abortion should be" but that he "does have an opinion on what the law currently is." (Urmanski Br. at 14) Urmanski reads Wisconsin Statutes Section 940.04(1) to "prohibit[] performing abortions (including consensual abortions) from conception until birth (subject to § 940.04(5))." (*Id.* at 14) Defendant-Respondent Ismael R. Ozanne continues to participate in this appeal, in part, to protect his discretion and the discretion of other district attorneys in Wisconsin to make prosecutorial decisions that are appropriate under the particular circumstances of each case. Ozanne notes that interpreting existing law, as set forth both in Wisconsin statutes and in binding and persuasive authorities, is one of many considerations that goes into his exercise of discretion in determining whether to charge a violation of Wisconsin law in any given circumstance. In that sense, Ozanne agrees that Urmanski—just like any one of Wisconsin's 71 district attorneys—may have his own opinion of what current Wisconsin law provides. That discretionary reading of Wisconsin law, including statutes, however, cannot extend so far as to create inconsistencies in how the law is interpreted across Wisconsin's 72 counties. In other words, while different district attorneys might reach different conclusions on how the law should be applied in any given set of circumstances, this Court cannot and should not countenance differences among district attorneys in the meaning of a particular criminal statute. Specifically with respect to Section 940.04(1), Urmanski may have his own "opinion on what the law currently is," but he is not alone in that regard. Ozanne has his own opinion as well, and as set forth in this brief, his position is that Urmanski's interpretation of the statute is unavailing, and that the circuit court's interpretation of Section 940.04(1) as only prohibiting feticide and not consensual abortions, which has been the law in effect since (at least) December 2023, is the most appropriate interpretation of that statute.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ozanne agrees with the Statement on Oral Argument and Publication in Urmanski's Opening Brief. (Urmanski Br. at 13)

ISSUE PRESENTED

Ozanne agrees with the Issues Presented as stated in Urmanski's Opening Brief. (Urmanski Br. at 12-13)

STATEMENT OF THE CASE

Ozanne limits his Statement of the Case to more fully and accurately identify for this Court the positions he advanced in the proceedings below. Ozanne was joined as a defendant below in the Amended Complaint filed on September 16, 2022 (R. 34) and in the Complaint filed by the Intervening Plaintiffs. (R. 75) Ozanne separately answered both the State Plaintiffs' Amended Complaint and the Intervenors' Complaint on November 30, 2022. (R. 86-87) In both Answers, Ozanne expressed no affirmative view on the merits of the arguments set forth in either of the operative complaints. Ozanne did, however, raise ten separate affirmative defenses, including prosecutorial discretion, the rule of lenity, and the doctrine of constitutional avoidance. (R. 86 at 22-24; R. 87 at 16-18)

As accurately set forth in Urmanski's Statement of the Case, Ozanne took no position on the merits of the State Plaintiffs' motion for judgment on the pleadings or the merits of the Intervening Plaintiffs' motion for summary judgment, although he did oppose the entry of an injunction against himself. (R. 168) Moreover, in responding to both sets of Plaintiffs' respective motions, Ozanne requested a decision from the circuit court declaring the meaning of the law so that, as District Attorney of Dane County, he would be in a position to know it for the purpose of evaluating potential charges. (*Id.* at 3-5)

Ozanne further supported Urmanski's Petition to Bypass the court of appeals, noting that because the circuit court's decision had resulted in a definitive declaration that Section 940.04(1) is a feticide statute that does not apply to

consensual abortions, it provided the clarity and definiteness he had sought, and that his interests were adverse to reversal of the judgment below. (Resp. of Defs. Ismael R. Ozanne and John T. Chisholm to Pet'n to Bypass at 8)

ARGUMENT

I. Urmanski's statutory interpretation arguments do not support his reading of Section 940.04(1) as prohibiting consensual abortion.

Wisconsin's jurisprudence has developed a strong and robust approach to statutory interpretation over time. The law is both clear and well-developed in its application. Yet from pages 24 to 32 of his brief, Urmanski resorts to a grab bag of over ten statutory interpretation arguments to support his reading of Section 940.04(1). In an effort to aid this Court's review, Ozanne notes several infirmities in Urmanski's hasty arguments and flaws in his application (or lack thereof) of well-established canons of statutory interpretation.

A. Urmanski improperly relies on legislative history to discern the meaning of Section 940.04(1).

Urmanski repeatedly insists that Section 940.04(1) is unambiguous. (*See, e.g.*, Urmanski Br. at 29 ("Here, there is no grievous ambiguity or uncertainty … ."); *id.* ("Section 940.04(1) has a clear and unambiguous application… .").) Yet Urmanski continuously cites to and relies upon legislative history (sometimes improperly referring to it as "statutory history") by claiming that he is simply "confirming" the statute's plain meaning. Urmanski's use of legislative history in this context is improper and violates well-established principles of statutory interpretation.

The Court's established method of statutory interpretation commences with an analysis of the language of the statute itself because it is "assume[d] that the legislature's intent is expressed in the statutory language." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. In so doing, the Court gives statutory language "its common, ordinary, and accepted meaning"

and, in addition to the text of the statute itself, may consider a statute's context, structure, purpose, and statutory history so long as these elements "are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.*, ¶48. If a statute's language, context, structure, purpose, and statutory history yield a "plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning," without consulting extrinsic sources of information like legislative history. *Id.*, ¶46 (citation omitted). Also, Wisconsin courts have cautioned that a statute's history is distinct from its "legislative history," which was "never enacted" by the legislature and includes "interpretive resources outside the statutory text." *Gallego v. Wal-Mart Stores, Inc.*, 2005 WI App 244, ¶13 n.5, 288 Wis. 2d 229, 707 N.W.2d 539; *Kalal*, 2004 WI 58, ¶50.

Urmanski's frequent reliance on the Legislative Council comments from 1953, along with his discussion of Section 940.15's legislative history, are improper, as those sources constitute legislative history that is not to be considered during a plain meaning analysis. (*See, e.g.*, Urmanski Br. at 25 (reasoning the legislative council notes "can be considered as indicative of legislative intent"); *id.* at 17 n.2 ("The Legislative Council's comments to § 340.08 of the 1953 revision reflect the legislative history of section 940.04(1), (5), and (6)."); *see id*. at 40 ("[T]he legislative history of § 940.15 shows that the statute was not intended as a substitute for § 940.04."). Urmanski attempts to conceal his reliance on the legislative history of Section 940.04 by referring to these sources as "statutory history," yet regardless of the label, this reliance is improper. Urmanski relies upon the legislative history far more than simply "confirming" a plain-meaning analysis—instead, legislative history is integral to his plain meaning analysis—and the Court should reject his attempt to do so.

B. The contemporaneous applications of Section 940.04(1) that Urmanski urges this Court to consider do not support his interpretation of the statute.

Urmanski argues that "contemporaneous applications of Section 940.04" in the period proceeding its enactment also reflect an "understanding that § 940.04, like its predecessor statues, continued to prohibit abortions both before and after the quickening of a fetus." (Urmanski Br. at 26) As an initial matter, Urmanski cites no authority for the proposition that "contemporaneous applications" of a statute are a permissible tool of statutory interpretation. The sole authority Urmanski cites in support of this proposition is *Becker v. Dane County*, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390. (*Id.*) However, in *Becker*, the Court reviewed attorney general opinions from the 1920s, to which the Court referred as "contemporaneous interpretations" of the statutory language in question, not contemporaneous applications of the statute. 2022 WI 63, ¶19. Attorney General opinions—***of which Urmanski offers none***—appear to be the commonly accepted "contemporaneous interpretation" of a statute. *See State ex rel. City of West Allis v. Dieringer*, 275 Wis. 208, 219-220, 81 N.W.2d 533 (1957) (noting that "interpretations by the attorney general and the legal department of a state will have important bearing upon statutory meaning, since the attorney general and his office are required by law to issue opinions for the assistance of the various departments of the government administering the law" and that "[l]ike all precedents, where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving at the proper construction of a statute" (quoted source omitted)); *Town of Vernon v. Waukesha Cnty.*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980) (noting that "an Attorney General's opinion is entitled to considerable weight when the legislature amends a statute but makes no change in that part of the statute interpreted by the Attorney General" and that "[o]ne of the soundest reasons sustaining contemporaneous interpretations of

long standing is the fact that reliance has been placed thereon by the public and those having an interest in the interpretation of the law" (quoted source omitted)).

Second, courts will resort to contemporaneous interpretations of a statute, "only where the meaning is ambiguous and cannot be clarified through the use of intrinsic tools of statutory construction." *Madison Landfills, Inc. v. Libby Landfill Negot. Comm.*, 188 Wis. 2d 613, 629 n.22, 524 N.W.2d 883 (1994). As noted above, Urmanski contends that the meaning of Section 940.04 is unambiguous, yet he repeatedly consults extrinsic sources, such as legislative history and contemporaneous interpretations of Section 940.04, in aid of his "plain meaning" interpretation.

C. Urmanski's reading of Section 940.04(1) gives improper weight to statutory titles.

Urmanski spends one paragraph of his brief arguing that the title of Section 940.04, "Abortion," "confirms its applicability to consensual medical abortions." (Urmanski Br. at 26) However, as one of the cases cited by Urmanski (*Matasek*) acknowledges, pursuant to Section 990.001(6), "the titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes and history notes are ***not*** part of the statutes." Wis. Stat. § 990.001(6) (emphasis added); *see State v. Matasek*, 2014 WI 27, ¶37 n.22, 353 Wis. 2d 601, 846 N.W.2d 811. Further, Wisconsin case law overwhelmingly cautions against relying upon statutory titles to ascertain the statute's meaning, ***particularly*** when the statutory language is clear. *See State v. R.A.M.*, 2024 WI 26, ¶15, 412 Wis. 2d 285, 8 N.W.3d 349 (explaining that "the title of the statute does not alter our understanding of the statute, or compel us to add any additional conditions"); *State v. Dorsey*, 2018 WI 10, ¶30, 379 Wis. 2d 386, 906 N.W.2d 158 (noting that statutory titles may be helpful "***for the purpose of relieving ambiguity***" (emphasis added)); *Matasek*, 2014 WI 27, ¶37, n. 22 (noting that titles may "help in resolving statutory interpretation questions"). Here, according to Urmanski himself, there is no ambiguity, and thus no need to consult the statute's title to "resolv[e] statutory interpretation questions." It also bears noting that the

statute had the same title, "Abortion," when the *Black* Court interpreted Section 940.04 as proscribing feticide and that the Court disregarded the title "[i]n the face of such plain and unambiguous language." *State v. Black*, 188 Wis. 2d 639, 644-45, 526 N.W.2d 132 (1994).

D. Urmanski's invocation of the canon against surplusage is one-sided and fails to consider the entirety of Wisconsin's statutory scheme governing consensual abortions.

Urmanski contends that Section 940.04(1) must be construed to criminalize consensual abortions because any other interpretation of the statute, such as the feticide interpretation adopted in *Black*, 188 Wis. 2d 639, with respect to subsection (2)(a), would render subsection (5), which creates an exception for certain "therapeutic abortion[s]," and subsequently enacted feticide statutes, surplusage. (Urmanski Br. at 23)

Urmanski's invocation of the canon against surplusage is incomplete. Although construing Section 940.04(1) as anything other than an abortion statute would render the therapeutic abortion exception in Section 940.04(5) and subsequently enacted feticide statutes surplusage, construing Section 940.04(1) as an abortion statute would render several subsequent, and more specific, statutes pertaining to abortion, surplusage. *See, e.g.*, Wis. Stat. §§ 253.107(3)(a), 940.15(2). For example, if Section 940.04(1) is construed to prohibit persons other than the mother from performing consensual abortions ***at any stage of a pregnancy***, then the following statutes would be rendered surplusage:

- Section 253.107(3)(a) (prohibiting persons other than the mother from "perform[ing] or induc[ing] or attempt[ing] to perform or induce an abortion upon a woman … if the probable postfertilization age of the unborn child is 20 or more weeks").
- Section 940.15(2) (prohibiting persons from "intentionally perform[ing] an abortion after the fetus or unborn child reaches viability").

Second, it bears mention that the canon against surplusage is not absolute—courts are guided to read statutory language "***where possible*** to give reasonable effect to every word[.]" *Kalal*, 2004 WI 58, ¶46 (emphasis added); *State v. Mason*, 2018 WI App 57, ¶26, 384 Wis. 2d 111, 918 N.W.2d 78 ("[T]he 'preference for avoiding surplusage constructions is not absolute.'" (quoted source omitted)). Here, it is not possible to construe Section 940.04(1) as an abortion statute without rendering other, more recent and detailed statutes, surplusage.

E. Urmanski urges this Court to apply a far more strict and limited version of the general-specific canon of statutory interpretation than is supported by Wisconsin law.

Urmanski appears to concede that Section 940.15 is more specific than Section 940.04(1), as he develops no argument to the contrary. (Urmanski Br. at 27) However, Urmanski contends that the general specific-canon can only be invoked when two statutes irreconcilably conflict. (*Id.*) To that end, he contends that because a person could comply with Sections 940.04(1) and 940.15(2) by simply following Section 940.04(1), the canon has no application in this case. (*Id.*) Even if that were the standard for a "conflict," the canon is not so limited. This Court has explained that the canon "'avoids not contradiction but the superfluity of a specific provision that is followed by the general one, 'violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.'" *Townsend v. ChartSwap LLC*, 2021 WI 86, ¶25, 399 Wis. 2d 599, 967 N.W.2d 21 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 556 U.S. 639, 645 (2012)); *see also Estate of Gonwa ex rel. Gonwa v. DHFS*, 2003 WI App 152, ¶32, 265 Wis. 2d 913, 668 N.W.2d 122 ("The general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute."); *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206 (1970) (concluding that it is especially true that a specific statute controls over a general statute when the specific statute is enacted after the general statute).

F. Urmanski's construction of Section 940.04(1) would produce absurd results.

In construing the language of a statute, courts strive for constructions that are reasonable, and that avoid "absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46. The absurd-results canon can even be invoked as a tie breaker, when a statute's plain language is seemingly capable of two constructions, one of which produces an absurd result. *See Gasper v. Parbs*, 2001 WI App 259, ¶8, 249 Wis. 2d 106, 637 N.W.2d 399; *State v. Yellow Freight Sys., Inc*., 101 Wis. 2d 142, 153, 303 N.W.2d 834 (1981). In such circumstances, the canon directs the court to select the construction that does not produce an absurd result. *See Gasper*, 2001 WI App 259, ¶8; *Yellow Freight Sys., Inc*., 101 Wis. 2d at 153. The canon may also be invoked to override the plain meaning of an unambiguous statute when the plain meaning produces an absurd result. *Madison Metro Sch. Dist. v. Evers*, 2014 WI App 109, ¶¶22-23, 357 Wis. 2d 550, 855 N.W.2d 458 ("Courts generally apply unambiguous statutory language as written unless a plain meaning application produces an absurd result."). An absurd result occurs where the plain meaning of a statute renders the statute contextually inconsistent. *Sorenson v. Batchelder*, 2016 WI 34, ¶42, 368 Wis. 2d 140, 885 N.W.2d 362 (adopting contextual inconsistency as a form of absurd results). Urmanski's construction of Section 940.04(1) would render the statute contextually inconsistent and produce absurd results.

For example, Urmanski contends that regardless of whether *Black* remains good law, Section 940.04(1) must be construed to prohibit consensual abortions. (Urmanski Br. at 29-32) To the contrary, regardless of whether *Black* remains good law, construing Section 940.04(1) to prohibit consensual abortions would either render the statute contextually inconsistent with the remainder of Section 940.04 or with subsequent abortion statutes, thereby producing absurd results. *See Sorenson*, 2016 WI 34, ¶42. If this Court upholds *Black*'s construction of Section 940.04(2)(a) as a feticide statute, it would be absurd to construe Section 940.04(1) to simultaneously prohibit consensual abortions, when the prohibitions in both

subsections contain identical language, save for the term "quick." *See Sanders v. Wis. Claims Bd.*, 2023 WI 60, ¶22, 408 Wis. 2d 370, 992 N.W.2d 126 ("The 'presumption of consistent usage' canon holds, '[a] word or phrase is presumed to bear the same meaning throughout a text.'" (quoted source omitted)).

If, by contrast, as Urmanski claims, *Black* is no longer good law, then his constructions of Sections 940.04(1) and (2)(a) as prohibiting consensual abortions would render Sections 940.15(2), 253.107(3)(a), and countless other more detailed statutory provisions that govern the field of abortion regulation surplusage. Significantly, under this construction, Section 940.04(1) would impose a more serious felony classification for consensual abortions performed prior to quickening than that imposed by Sections 940.15(2) and 253.107(3)(a) for abortions performed after viability, or 20 weeks of pregnancy, respectively. *Contrast* Wis. Stat. §§ 940.04(1) (imposing Class H Felony); 940.15(2)(a) (imposing Class I Felony); 253.107(3)(a) (imposing Class I Felony). It would be absurd for a greater penalty to attach to a less serious criminal offense than more serious offenses.

G. Urmanski's argument that this Court should reject *Black* as dicta is inconsistent with this Court's precedent.

Urmanski argues that a portion of *Black*, 188 Wis. 2d 639, should be treated as dicta.[1] (*See* Urmanski Br. at 30 (reasoning that "it would be appropriate for this

[1] In the alternative, Urmanski argues that *Black*, 188 Wis. 2d 639, should be overruled. (*See, e.g.*, Urmanski Br. at 29.) But that is no small ask of the Court, and it is a request the Court takes very seriously, as it must thoroughly consider stare decisis. *See, e.g., Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶94, 264 Wis. 2d 60, 665 N.W.2d 257 (noting that "respect for prior decisions is fundamental to the rule of law" and that "a court's decision to depart from precedent is not to be made causally" (citations omitted)). In recognition of the Court's "abiding respect for the rule of law," the Court requires a "special justification" to overturn its precedent. *Id.* While Urmanski pays lip service to the need for a "special justification," he does not list the justifications previously articulated by the Court, nor does he cite to any caselaw where the Court has overruled its precedent for the reasons he offers.

The Court has identified five special justifications for overruling precedent, when: (1) changes or developments in the law have undermined the prior decision's rationale; (2) there is a need to make a decision correspond to newly ascertained facts; (3) precedent has become detrimental to coherence and consistency in the law; (4) the decision is "unsound in principle"; or (5) the decision is "unworkable in practice." *State v. Johnson*, 2023 WI 39, ¶20, 407 Wis. 2d 195, 990 N.W.2d 174.

Court to treat the statements in *Black* addressing the applicability of Section 940.04(2)(a) to consensual abortion as dicta").) However, this Court has stated that its decisions do not contain dicta. *See Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶139 n.8, 403 Wis. 2d 607, 976 N.W.2d 519 (Rebecca Grassl Bradley, J., concurring) ("Our court does not recognize the concept of dicta, however."); *see also Wis. Just. Initiative Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶148, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (noting that this Court has "ceased calling language in [its] own opinions dicta. Indeed, since [2010], I cannot find any time we explicitly concluded that a portion of our own opinions was nonbinding dicta"); *id.*, ¶172 n.5 (Ann Walsh Bradley, J., dissenting) (noting the "thrust of [the Court's] recent jurisprudence" is that it "does not recognize the concept of dicta" and that the approach is "simple and clear. It does not require the reader to dissect an opinion to determine, under whatever definition of dicta is embraced, what is and is not 'necessary' or 'germane' to the holding.")

To the extent there is dicta in this Court's decisions, Urmanski does not demonstrate how the discussions in *Black* about Section 940.04(2)(a)'s applicability to consensual abortions were simply *dicta*, which is Latin for "something said in passing." *See* Obiter Dictum, *Black's Law Dictionary* (11th ed. 2019).

Additionally, the Court also "frequently review[s]" a sixth factor: "whether reliance interests are implicated and whether the decision has produced a settled body of law." *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶28, 400 Wis. 2d 50, 968 N.W.2d 684 (quoting *Johnson Controls*, 2003 WI 108, ¶99).

Urmanski does not engage with the caselaw addressing stare decisis, and to the extent his arguments are underdeveloped, this Court cannot—and should not—develop those arguments on his behalf. *See Papa v. DHS*, 2020 WI 66, ¶42 n.15, 393 Wis. 2d 1, 946 N.W.2d 17; *see also Clean Wis., Inc. v. PSC*, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.").

H. Urmanski's arguments against implied repeal are unpersuasive.

Urmanski acknowledges that a statute may be impliedly repealed in two situations, including when a "later statute covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first." (Urmanski Br. at 34 (quoting *Gilkey v. Cook*, 60 Wis. 133, 18 N.W. 639, 641 (1884)). Yet, Urmanski's arguments against the second form of implied repeal are all unpersuasive.

First, Urmanski contends that "[s]imply because other statutes regulate the same subject matter of abortion doesn't establish an implied repeal," because "where there are two affirmative statutes on the same subject, one will not repeal if both can stand together." (Urmanski Br. at 39 (quoting *State ex rel. City of Milwaukee v. Milwaukee Electric Ry. Light Co.*, 114 Wis. 386, 129 N.W. 623, 627 (1911)). However, as noted above, Section 940.04(1) cannot stand together with later enactments—instead, Section 940.04(1) completely eclipses the later enactments and renders them surplusage.

Second, Urmanski appears to argue that the legislature cannot impliedly repeal an earlier statute by enacting entire statutory packages that regulate the entire field of the earlier statute, and that do so in far greater specificity for that matter. (Urmanski Br. at 40) Instead, he appears to argue that an implied repeal can only occur where a single subsequent statute, on its own, substitutes the earlier statute. (*Id.*) To that end, he asserts that Section 940.15 has not impliedly repealed Section 904.04 because Section 940.15 does not, in and of itself, cover the whole subject of abortion regulation and instead, there are multiple other abortion statutes that prohibit or regulate abortion. (*Id.*) This argument is unsupported by any citation to legal authority, is illogical, and runs counter to this Court's precedent. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (courts need not address arguments unsupported by citations to legal authority). If anything, the fact that the legislature has enacted multiple statutes in chapters 940 and 253 that together regulate the entire field of abortion provides greater evidence of a

legislative intent to displace Section 940.04(1). *See, e.g.*, Wis. Stat. §§ 253.105, 253.107, 904.16. And, in *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶52, 308 Wis. 2d 684, 748 N.W.2d 154, the Court expressly stated that in analyzing whether an implied repeal has occurred, it is appropriate to look at "the general statutory framework set up by the legislature" in the subsequently enacted regulatory field. It is implicit in *Eischenseer*'s directive that subsequently enacted statutory packages together may indicate an implied repeal.

Third, Urmanski asserts that Section 940.15 did not impliedly repeal Section 940.04(1) because the legislative history (which, as demonstrated above, he cannot rely upon) indicates the legislature did not clearly intend for Section 940.15 to substitute Section 940.04(1). (Urmanski Br. at 40) In support, Urmanski cites the legislative history of Section 940.15 and notes that in enacting 1986 Wis. Act 56, the legislature considered and rejected drafts that would have repealed Section 940.04(1). Essentially, Urmanski argues that because the legislature did not expressly repeal Section 940.04(1), it could not have intended to impliedly repeal it. There would be little purpose to the implied repeal doctrine if an express repeal were needed to demonstrate a legislative intent to repeal. (Urmanski Br. at 40)

II. Urmanski's argument that the rule of lenity should not inform this Court's interpretation of Section 940.04(1) is unpersuasive.

Urmanski argues that "Section 940.04(1) has a clear and unambiguous application to consensual abortions" and, therefore, that "the rule of lenity should not be applied." (Urmanski Br. at 29) Urmanski asserts that the rule is intended for statutes presenting a "grievous ambiguity," and because Section 940.04(1) is clear, it does not require interpretation in favor of the accused. (*Id*. at 28-29) However, Urmanski's arguments against the rule of lenity fail to rebut the State Plaintiffs' position asserted below that the court must be particularly vigilant in recognizing implied repeal in the context of criminal penal statutes. (R.34 at 21 (citing *State v. Christensen*, 110 Wis. 2d 538, 546, 329 N.W.2d 382 (1983)))

Penal statutes are construed against enforcement where there is doubt as to the statutory scheme. *State v. Wilson*, 77 Wis. 2d 15, 28, 252 N.W.2d 64 (1977) ("Where there is doubt as to the statutory scheme, penal statutes should be strictly construed in favor of the accused."). This Court has emphasized that a court's duty to eliminate "doubt[] as to what conduct is subject to penal sanctions" takes precedence over the presumption against implied repeal because individuals must have "notice as to what conduct is criminal" and courts must avoid judicial overreach in enforcing penalties not clearly prescribed by the legislature. *Christensen*, 110 Wis. 2d at 546–48. This Court views its adherence to strict construction of penal statutes as both longstanding and a matter of strong public policy. *Wis Elec. Power Co. v. PSC*, 110 Wis. 2d 530, 536, 329 N.W.2d 178 (1983) (referring to the "court's long adherence to the rule of strict construction of criminal statutes"); *Christensen*, 110 Wis. 2d at 547 (emphasizing that "public policy favoring strict construction is stronger than public policy against implied repeal of statutes").

Despite Urmanski's attempts to distinguish the case, *Christensen* illustrates the principle of strictly construing criminal penal statutes against enforcement when there is conflict, or even simply doubt, within the statutory scheme. (Urmanski Br. at 29 (arguing that, unlike in *Christensen* where a later statute repealed part of the older statute's definition, there has been no repeal of Section 940.04(1))). In *Christensen*, the court concluded that a provision criminalizing abuse of an inmate in a residential care institution was impliedly repealed when a related licensing statute was repealed, creating "doubt [as to] what conduct is subject to penal sanctions." *Id*. at 535, 547-48. Similarly, in this case, if the Court concludes that Section 940.04 was applicable to consensual abortions when enacted, any uncertainty about what conduct is criminal—resulting from subsequent legislative changes, including the enactment of Section 940.15 and Wisconsin's broader statutory framework for lawful abortions—should be strictly construed in favor of the accused.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the circuit court.

Respectfully submitted this 11th day of September, 2024.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules in Wisconsin Statutes Rule 809.19(8) (b), (bm), and (c) for a brief and in this Court's July 2, 2024 Order. The length of this brief is 4,723 words.

Respectfully submitted this 11th day of September, 2024.

By: *Electronically signed by Douglas M. Poland*
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