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CIRCUIT COURT
DANE COUNTY, WI
2022CV001594

BY THE COURT:

DATE SIGNED: July 7, 2023

Electronically signed by Diane Schlipper
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 3

JOSH KAUL, et al.,

Plaintiffs,

and

CHRISTOPHER J. FORD, et al.,

Intervenors,

v. Case No. 22 CV 1594

JOEL URMANSKI, et al.,

Defendants.

DECISION AND ORDER

INTRODUCTION

After the Supreme Court decided *Roe v. Wade*, Wisconsin developed a statutory framework to regulate consensual abortions. Since the reversal of *Roe*, states are left to decide whether to make abortion laws restrictive, permissive, or illegal altogether. Though Wisconsin's legislature created comprehensive post-*Roe* laws, it never explicitly repealed

the more restrictive pre-*Roe* laws. Now, several doctors and state agencies ("the Doctors")[1] say they are confused as to when it is legal to provide consensual abortions: Are they to follow the pre- or post-*Roe* rules?

The Doctors argue that the more permissive laws impliedly repealed the more restrictive laws. They seek a declaratory judgment that Wis. Stat. § 940.04(1), the pre-*Roe* statute titled "Abortion," has been impliedly repealed by Wis. Stat. § 940.15, the post-*Roe* statute also titled "Abortion." Defendant Joel Urmanski, the District Attorney for Sheboygan County, now moves to dismiss the Doctors' complaints.

The Court DENIES the motion to dismiss because the Doctors state a claim upon which relief may be granted. Specifically, they allege Urmanski threatens to prosecute Wisconsin physicians under § 940.04 for performing consensual medical abortions. Urmanski has no authority to do this because according to *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994), this pre-*Roe* statute says nothing about abortion—there is no such thing as an "1849 Abortion Ban" in Wisconsin. A physician who performs a consensual medical abortion commits a crime only "after the fetus or unborn child reaches viability …." Wis. Stat. § 940.15(2). Accordingly, the Doctors may proceed with their claims for declaratory and injunctive relief.

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[1] The Intervenor-Plaintiffs are three doctors working with women experiencing difficult pregnancies. The original Plaintiffs are Attorney General Josh Kaul, the Wisconsin Department of Safety and Professional Services, the Wisconsin Medical Examining Board, and its Chairperson Sheldon Wasserman. The Defendants are Sheboygan County District Attorney Joel Urmanski, Dane County District Attorney Ismael Ozanne, and Milwaukee County District Attorney John Chisholm.

For ease of reference, this decision refers to the Plaintiffs together as "the Doctors." District Attorneys Ozanne and Chisholm do not join the motion to dismiss, so this decision need not discuss them further.

I. BACKGROUND

A. Wisconsin's history of abortion legislation and Wis. Stat. § 940.04.

Wisconsin has regulated abortion since its founding.[2] Our earliest abortion statutes prohibited the use of substances or instruments on a woman with an unborn "quick child" with the intent to destroy the quick child unless "necessary to preserve the life of the mother." At the time, "quickening" meant "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy." *Dobbs v. Jackson*

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[2] A history of Wisconsin's abortion laws will not be material to the present task of interpreting Wis. Stat. § 940.04(1). However, a brief survey of that history provides context.

Wisconsin's first abortion prohibition, Wis. Stat. ch. 133, § 11 (1849) read, in full:

> Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance what-ever, 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.

Wis. Stat. ch. 164, § 11 (1858) contained the same language as the prior ch. 133, § 11, except that it omitted the word "quick" to read: "Every person who shall administer to any woman pregnant with a ~~quick~~ child …."

In 1955, the legislature repealed the remnants of these 19th century laws and enacted the text that has become Wis. Stat. § 940.04. With only two exceptions, the text of that statute "has remained untouched since 1955." *State v. Black*, 188 Wis. 2d. 639, 664, 526 N.W.2d 132 (1994) (Heffernan, C.J., dissenting). Those exceptions are:

- In 2001 Wisconsin Act 109, §§ 586-588, the legislature replaced verbal descriptions of the applicable criminal penalties with the now common "Classes" of punishment.
- In 2011 Wisconsin Act 217, § 11, the legislature repealed subsections (3) and (4).

For more comprehensive reading, the Wisconsin Legislative Reference Bureau has recently published a history of abortion laws dating to the Wisconsin Territory. Madeline Kasper, Jillian Slaight, and Isaac J. Lee, *A Brief History of Abortion Laws in Wisconsin (rev. ed)*, 6 LRB REPORTS 4 (2022), available online at https://docs.legis.wisconsin.gov/misc/lrb/lrb_reports/history_of_abortion_laws_6_4.pdf

The *Black* dissent also contains a thorough appendix on the history of abortion legislation in Wisconsin. *Black*, 188 Wis. 2d at 661-64 (Heffernan, C.J., dissenting).

Women's Health Org., 597 U.S. __, 142 S. Ct. 2228, 2249 (2022); *See id.* n.24 (discussing the history of "quick" and "quickening").

However, those early statutes have long since been repealed. Today, the statute under which the Doctors say they fear prosecution, Wis. Stat. § 940.04, reads as follows:

> (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.

Wis. Stat. § 940.04.

In 1973, the Supreme Court declared § 940.04 unconstitutional. *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973). Since then, the Wisconsin Legislature passed a series of laws to regulate abortions. Most significantly, 1985 Wisconsin Act 56—the "Abortion Prevention and Family Responsibility Act of 1985"—created Wis. Stat. § 940.15, which allows pre-viability abortions and also allows post-viability abortions "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." Wis. Stat. §§ 940.15(2)-(3). Additionally, the legislature enacted several other statutes regulating abortions, including rules about gaining consent, performing an ultrasound, and special rules about abortions after a sexual assault. *See* Wis. Stat. §§ 48.375, 253.10, 253.107, and 253.105.

Last year, the Supreme Court overturned *Roe* and held that there is no federal constitutional right to abortion at any stage and that "the Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion." *Dobbs*, 142 S. Ct. at 2284. In overturning *Roe*, the Supreme Court placed abortion regulation back in the hands of the states. *Id.*

Wisconsin is thus left with two statutes titled: "Abortion," Wis. Stat. §§ 940.04 and 940.15.

B. Factual allegations.

On a motion to dismiss, courts "accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. Although this decision combines all Plaintiffs into a group of "Doctors," the Plaintiffs are better understood as two groups with materially different allegations.

The Court takes the following facts as true for purposes of this motion.

The first group of Plaintiffs allege they are physicians who practice medicine in Wisconsin. Int. Compl. ¶¶ 4-6, dkt. 75. They allege "Wisconsin prosecutors have expressed belief that the fall of *Roe* allows them to prosecute abortion under a separate Wisconsin

statute, § 940.04." Int. Compl. ¶ 21, dkt. 75. As a result, these physicians "fear their practice of medicine may lead to felony conviction …." *Id.* ¶ 26.

The second group of Plaintiffs includes several governmental actors. For purposes of this decision, they make only two material factual allegations. They allege they are state officers and they further allege "Urmanski has publicly stated that he will enforce the ban in Wis. Stat. § 940.04(1)." Pl. Amend. Compl., ¶¶ 4-9, 26, dkt. 34.

Urmanski now moves to dismiss each Plaintiffs' complaint for failure to state a claim upon which relief can be granted.

II. LEGAL STANDARD

A motion to dismiss tests the legal sufficiency of the claim. *Wausau Title Inc. v. Cnty. Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999). When reviewing a motion to dismiss, the court is to treat the facts in the complaint, and all reasonable inferences to be drawn from those facts, as true. *Data Key Partners*, 2014 WI 86, ¶ 19. Although the facts pleaded are accepted as true, legal conclusions are not. *Id.* ¶ 18 (citing *John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 19, 284 Wis. 2d 307, 700 N.W.2d 180). A complaint should not be dismissed at this stage unless it is "quite clear" that there are no conditions under which a plaintiff could recover. *Morgan v. Pa. Gen. Ins. Co.*, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979).

III. ANALYSIS

Broadly speaking, the Doctors make two claims. First, they say § 940.04 has been impliedly repealed by subsequent enactments regulating abortions. Pl. Amend. Compl. ¶¶ 30-54, dkt. 34; Int. Compl. ¶¶ 28-36, dkt. 75. Second, they claim that § 940.04 is

unenforceable as applied to abortions because of its disuse, because of past reliance on *Roe v. Wade*, and/or "because it is premised on arcane language, belies modern medicine, and contains impossible requirements." Pl. Amend. Compl. ¶¶ 60-63, dkt. 34; Int. Compl. ¶¶ 37-43. Urmanski argues that each claim must be dismissed.

The Court discusses Urmanski's arguments, in turn.

A. The Doctors allege sufficient facts to show standing.

Urmanski's first argument for why these claims must be dismissed is limited to the second group of Plaintiffs—the government Plaintiffs—who Urmanski says lack standing. Specifically, Urmanski says these Plaintiffs "do not assert legally protectable interests in this controversy …." Urmanski Br., dkt. 91:11.[3]

Ordinarily, Urmanski would be correct because under the first element of Wisconsin's test for standing, courts require that "the party whose standing is challenged has a personal interest in the controversy …." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n,* 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 797 N.W.2d 789 (footnotes omitted). However, our supreme court has allowed government officers to proceed with claims that present "unique issues of interest to this state and its citizens …." *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 239 N.W.2d 318 (1976). In *Lynch*, for example, this meant that a district attorney could seek a declaratory judgment about the meaning of the open meetings law because his statutory "right of enforcement" and "overall duty" as a prosecutor justified

[3] More specifically, Urmanski argues that the government Plaintiffs fail to allege a justiciable controversy. Because standing and justiciability are "overlapping concepts," any distinction will not be material to the present decision. *Foley-Ciccantelli,* 2011 WI 36, ¶ 47; *see also Tooley v. O'Connell,* 77 Wis. 2d 422, 438, 253 N.W.2d 335 (1977); *City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983).

recognizing his standing. *Id.* at 673. As another example, in *In re State ex rel. Att'y Gen.,* the Wisconsin Attorney General had standing to seek a declaration about the constitutionality of a statute "of vital concern … to the entire public." 220 Wis. 25, 264 N.W 633 (1936). The policy reasons for Wisconsin's standing doctrine further bolster the government Plaintiffs' standing argument. *McConkey v. Van Hollen,* 2010 WI 57, ¶ 18, 326 Wis. 2d 1, 783 N.W.2d 855 (dismissal means "another person who could more clearly demonstrate standing would bring an identical suit, raising judicial efficiency concerns … a different plaintiff would not enhance our understanding of the issues in this case.").

Urmanski concedes that "[i]n rare cases, courts have allowed government officials to bring declaratory judgment actions …." Urmanski Br., dkt. 91:11 (citing *Lynch,* 71 Wis. 2d at 671-72). This is one of those rare cases.

B. The Doctors state a claim for declaratory relief.

Urmanski next argues that the Doctors' claim for implied repeal must be dismissed because both § 940.04(1) and later-enacted statutes regulating abortion can coexist. Urmanski Reply Br., dkt. 111:5. Implied repeal can happen in two circumstances: (1) when an earlier statute is "manifestly inconsistent and repugnant to the later act" or (2) "when the intent of the legislature to repeal by implication clearly appears." *State v. Dairyland Power Cooperative,* 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971). So, to determine whether some later act has impliedly repealed § 940.04(1), the Court must first determine what § 940.04(1) means.

1. The text of § 940.04(1).

The starting point to determine the meaning of a statute and whether it conflicts with later enacted statutes is the language of the statute itself. When beginning with statutory interpretation, the focus is on the language of the statutory text, read reasonably, along with statutory context and structure. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 44-46, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* ¶ 45. That is not to suggest that context is not important. It is. *Id.* ¶ 46. Statutory language is to be interpreted as part of the whole, in relation to the language of surrounding or closely-related statutes, and to avoid absurd or unreasonable results. *Id.* When statutory language is unambiguous, there is no need to consult extrinsic sources, including legislative history. *Id.*

Subsection (1) of § 940.04 states:

> Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.

Although the title of this statute is "Abortion," statutory titles "are not part of the statutes." Wis. Stat. § 990.001(6). If there is any conflict between a statute's title and its text: "text must control over title." *Aiello v. Vill. of Pleasant Prairie*, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996); *State v. Lopez*, 2019 WI 101, ¶¶ 26-29, 389 Wis. 2d 156, 936 N.W.2d 125.

2. *State v. Black* interpreted a closely-related statute with nearly identical language as "a feticide statute only."

Statutory interpretation also requires examining closely related statutes. *Kalal*, 2004 WI 58, ¶ 46. The most closely related statute to § 940.04(1) is the adjacent and almost

identically-worded § 940.04(2)(a). *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773 ("Statutes are closely related when they are in the same chapter, reference one another, or use similar terms."). For ease of reading, this decision will refer to these two closely related statutes as Subsection (1) and Subsection (2)(a).

In *State v. Black*, the state charged Glenndale Black under Subsection (2)(a) after he allegedly attacked his then-pregnant wife: "the alleged assault consisted of grabbing her by the hair, pulling her backward onto the sofa, and punching her in the abdomen twice …." 188 Wis. 2d 639, 641, 526 N.W.2d 132 (1994). After this assault, Black "allegedly refused to call for help or allow his wife to seek help for 15 minutes until she screamed from abdominal pain. When she was finally transported to the hospital, a full term baby was delivered dead …." *Id.* The trial court dismissed the complaint against Black because it concluded that Subsection (2)(a) "did not proscribe the conduct that Black was accused of committing." *Id.* at 643.

Our supreme court reversed. It concluded that Subsection (2)(a) was unambiguous: the text "could hardly be clearer. The statute plainly proscribes feticide." *Black*, 188 Wis. 2d at 642. Here, in relevant part, is the text of the unambiguous Subsection (2)(a) as interpreted in *Black*:

> Any person, other than the mother, who <u>does either of the following</u> is guilty of a Class E felony:
>
> (a) Intentionally destroys the life of an unborn quick child; or ….

Wis. Stat. § 940.04(2) (emphasis added).

Black's interpretation of Subsection (2)(a) is important to understanding the meaning of Subsection (1) because the two statutes are not only closely related, they are also effectively identical. To demonstrate this, if the Court replaces the term "does any of the following" with the prohibited act that follows, then the twin subsections may be compared using this table:

Wis. Stat. § 940.04(1) (emphasis added).	Wis. Stat. § 940.04(2) (emphasis added).
Any person, other than the mother, who intentionally destroys the life of an unborn child is guilty of a Class H felony.	Any person, other than the mother, who intentionally destroys the life of an unborn quick child is guilty of a Class E felony.

It should be immediately apparent that there are only two textual differences between these two subsections: First, Subsection (2)(a) modifies the noun "child" with the adjective "quick." Second, the felony classifications are different. It should follow that the only difference between these two subsections is that one protects an "unborn child" and the other protects an "unborn quick child." How, then, is it possible to view Subsection (1) as an abortion statute and Subsection (2)(a)—containing almost the same language—as a feticide statute?

It would be unreasonable and produce an absurd result to define these two subsections differently when their language and context is nearly identical. *Black* left no room for any alternative meaning of Subsection (2)(a): "The words of the statute could hardly be clearer. The statute plainly proscribes feticide." *Black*, 188 Wis. 2d at 642. Given

the unambiguous interpretation of this nearly-identical and closely related statute, there is no need to look for other clues to find the meaning of Subsection (1). The *Black* court tells us what it means: "It is a feticide statute only." *Id.* at 647. The only reasonable interpretation is that the legislature intended a higher penalty for the feticide of a viable fetus (Class E) versus a non-viable fetus (Class H).

Furthermore, the legislature never amended Subsections (1) and (2)(a) in the wake of *Black*, except to change the applicable penalty as part of a broad sentencing reform.[4] This confirms our supreme court's analysis because "we presume that the legislature is aware that absent some kind of response this court's interpretation of the statute remains in effect." *State v. Olson*, 175 Wis. 2d 628, 641, 498 N.W.2d 661 (1993); *see Allen v. Milligan*, No. 21-1086, slip op. at 42-43 (U.S. Jun. 8, 2023) (Kavanaugh, J., concurring) (collecting cases to show that courts have "ordinarily left the updating or correction of erroneous statutory precedents to the legislative process."). Simply put, if *Black* was wrong, then it was up to the legislature to "subsequently amend[] the statute to effect a change." *Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 52, 281 Wis. 2d 300, 697 N.W.2d 417 (quoted source omitted). But because the legislature never substantively changed Wis. Stat. § 940.04, it remains "a feticide statute only," with different penalties for viable versus non-viable fetuses. *Black*, 188 Wis. 2d at 647.

[4] When *Black* was decided, Subsection (1) was punishable with a $5,000 fine or three years imprisonment. The legislature replaced this written description of the punishment scheme with the shorthand phrase "Class H felony." 2001 Wisconsin Act 109, § 586; *see* Wis. Stat. § 939.50(3)(h).

3. Urmanski's counterarguments are not persuasive.

Urmanski rejects the comparison between Subsection (1) and its closely related Subsection (2)(a) for several reasons. He first points to a footnote in *Black* where the supreme court explicitly cabined its analysis to Subsection (2)(a), explaining that its opinion made no attempt to construe any other subsections of § 940.04. Urmanski Reply Br., dkt. 111:14-15; *Black*, 188 Wis. 2d at 647 n.2. However, this does not support Urmanski's argument. The fact that the supreme court in *Black* did not undertake an analysis of matters not presented is customary. "In general, [the supreme court] decides cases on the narrowest grounds presented." *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶ 5 n.3, 303 Wis. 2d 514, 735 N.W.2d 477.

Though the *Black* Court defined the relevant statutory text in 1994, Urmanski next argues that the proposition that Subsection (1) applies to feticide and not consensual abortions "cannot be squared with our supreme court's prior decisions." Urmanski Reply Br., dkt. 111:15. In support of this argument, Urmanski points to two 1960s cases where consensual abortions were prosecuted under Subsection (1): *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).

Assuming these cases contradict *Black*, they predate it by three decades. "When the decisions of our supreme court appear to be inconsistent, we follow its most recent pronouncement." *Spacesaver Corp. v. DOR*, 140 Wis. 2d 498, 502, 410 N.W.2d 646 (Ct. App. 1987); *Purtell v. Tehan*, 29 Wis. 2d 631, 636, 139 N.W.2d 655 (1966) ("Ordinarily, where there is a conflict in our past decisions, we prefer to adhere to the more recent cases."). So while the interpretation in the more recently-decided *Black* may not be

satisfying to Urmanski, that interpretation stands. This Court cannot "withdraw language from a previous supreme court case" or "dismiss a statement from an opinion by [the supreme] court by concluding that it is dictum." *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 51, 58, 324 Wis. 2d 325, 782 N.W.2d 682; *see Wisconsin Justice Initiative v. WEC*, 2023 WI 38, ¶ 139, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (our supreme court has "ceased calling language in [its] own opinions dicta.").

Furthermore, it would be unreasonable to split two substantially identical subsections of a single statute into two entirely different categories of prohibitions. Urmanski concedes that *Black's* interpretation must apply to Subsection (2)(a) ("It is a feticide statute only."). But if the Court then applies Urmanski's proposed interpretation that Subsection (1) is "an abortion statute," it would not only mean that § 940.04 takes the unusual step of prohibiting two distinct acts within the same statutory section—abortion in one subsection, feticide in another nearly-identical subsection—but Urmanski's proposed interpretation would also mean that enforcement of the feticide prohibition in Subsection (2)(a) would depend solely on whether the destroyed fetus had quickened or not. Urmanski provides no textual, contextual, or any other kind of analysis for the absurd result of criminalizing the feticide of only unborn "quick" children.

4. Wis. Stat. § 940.04 "is not an abortion statute."

For the above reasons, *Black's* holding that Subsection (2)(a) "is not an abortion statute" and "is a feticide statute only" must apply equally to Subsection (1). *See Black*, 188 Wis. 2d at 646-47. The Court turns next to an explanation of precisely what this

means—that is, an explanation of why *Black* cannot be read to support any interpretation of § 940.04 that prohibits consensual abortions.

The first reason why § 940.04 cannot prohibit consensual abortions is Urmanski says so himself—or at least he concedes as much under our supreme court's binding precedent. At oral argument, Urmanski took the position that "this statute encompasses both consensual abortions and feticide." Tr. of May 4, 2023 Hr'g, dkt. 146:37.[5] In support of this argument, Urmanski combined two disjointed sentences from a footnote and the main text of *Black* to say that its conclusion ("it is a feticide statute only") should be rejected either as dicta or because it relied on the now-overturned *Roe v. Wade*. Tr. of May 4, 2023 Hr'g, dkt. 14:35-36. Urmanski now concedes he was wrong. In an uninvited supplement filed three weeks after oral argument, Urmanski's attorney "clarified" that *Black* could not support application of § 940.04 to consensual abortions:

> During oral argument, I suggested that based on footnote 2 in the decision, the decision in *Black* could be read as saying that Wis. Stat. § 940.04(2)(a) could apply to both consensual abortions and feticide. As a clarification, DA Urmanski has acknowledged that in *Black*, our supreme court also stated that § 940.04(2)(a) "is not an abortion statute" and "is a feticide statute only."

[5] For greater context, here is a fuller version of the exchange:

> THE COURT: But the Court is also very clearly saying that it could hardly be clearer what the language means; right? Just those words in the quote, it could hardly be clearer. Aren't they also saying that? And that's certainly not dicta in this case.
>
> MR. THOME: I believe what they're saying is it could hardly be clearer that this statute encompasses both consensual abortions and feticide. Again, the factual context of the case matters. If somebody was charged with feticide saying, "This doesn't apply to me. This applies only to consensual abortions," they're saying, "No. It could hardly be clearer." And that's footnote 2. It is not limited only to consensual abortions.

Tr. of May 4, 2023 Hr'g, dkt. 146:36-37.

Urmanski Supp. Br., dkt. 125:3. The Court understands this "clarification" for what it is—a concession about the only reasonable way to read *State v. Black.*

The second reason why § 940.04 cannot prohibit consensual abortions is the Wisconsin Supreme Court deliberately chose to describe the prohibited conduct using the specially-defined legal term: "feticide." Courts use the special legal definition of words when appropriate because "technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Context is particularly important here because "a term with a common meaning and a technical meaning should be given its technical meaning if the context in which the term is used calls for such a meaning." *In re Marriage of Lang*, 161 Wis. 2d 210, 221, 467 N.W.2d 772 (1991) (citing 2A Sutherland, *Statutes and Statutory Construction*, sec. 47.28 at 223 (4th ed. 1985).).[6]

[6] "Unfortunately, courts as well as advocates have been known to overlook technical senses of ordinary words—senses that might bear directly on their decisions." *State v. Rector*, 2023 WI 41, ¶ 67, 407 Wis. 2d 321, 990 N.W.2d 213 (R. G. Bradley, J., concurring/dissenting) (citation, alterations, and quotation marks omitted).

Nevertheless, our supreme court routinely rejects common definitions in favor of technical ones. *Mueller v. TL90108, LLC*, 2020 WI 7, ¶ 19, 390 Wis. 2d 34, 938 N.W.2d 566 (rejecting the common definition and using the technical definition of "conversion" and "wrongful detention."); *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 82, 403 Wis. 2d 1, 976 N.W.2d 263 (R. G. Bradley, J., concurring) ("prevail"); *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶ 25, 402 Wis. 2d 539, 976 N.W.2d 821 ("vacancy"); *Waity v. LeMahieu*, 2022 WI 6, ¶ 27 n. 10, 400 Wis. 2d 356, 969 N.W.2d 263 ("contractual services"); *Stroede v. Society Ins.*, 2021 WI 43, ¶¶13-17, 397 Wis. 2d 17, 959 N.W.2d 305 ("lawful occupant of real property"); *Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶ 18, 392 Wis. 2d 35, 944 N.W.2d 598 ("consideration"); *Lang*, 161 Wis. 2d at 221-22 and n.8-9 ("inheritance"); *Weber v. Town of Saukville*, 209 Wis. 2d 214, ¶ 21, 562 N.W.2d 412 (1997) ("mineral extraction operations").

In some cases, the supreme court relies on a legal dictionary to provide the ordinary definition. *Moreschi v. Vill. of Williams Bay*, 2020 WI 95, ¶ 21, 395 Wis. 2d 55, 953 N.W.2d 318 (using *Black's Law Dictionary* to define "filing"); *State v. Brantner*, 2020 WI 21, ¶ 15, 390 Wis. 2d 494, 939 N.W.2d 546 (same for "control").

Here is the complete technical definition of feticide according to the leading law dictionary:

> 1. The act or instance of killing a fetus, usu. by assaulting and battering the mother; esp., the act of unlawfully causing the death of a fetus; 2. An intentionally induced miscarriage.

Black's Law Dictionary 765 (11th ed. 2019). This is different from the technical definition of abortion, which is very long but begins with "[a]n artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus." *Black's Law Dictionary* 6-7 (11th ed. 2019). Thus, the word *Black* chose to describe the conduct prohibited by Wis. Stat. § 940.04 should be understood as "killing a fetus, usually by assaulting and battering the mother."[7]

In any event, dictionaries and interpretative canons are not strictly useful to understanding *Black* because "the language of an opinion is not always to be parsed as

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[7] The Court uses the most modern legal definitions of "abortion" and "feticide" from the 11th edition of *Black's Law Dictionary* because they most clearly articulate the meaning of those words without needing to resort to external caselaw. Here, in full, are the definitions of "abortion" and "feticide" as the Wisconsin Supreme Court would have seen them in 1994

> The spontaneous or artificially induced expulsion of an embryo or fetus. As used in legal context, usually refers to induced abortion. For the law relating to abortion, see Roe v. Wade …

Abortion, *Black's Law Dictionary* 7 (6th ed. 1990).

> Destruction of the fetus; the act by which criminal abortion is produced. The killing of an unborn child. State v. Horne, 282 S.C. 444, 319 S.E.2d 703, 704. *See also* Abortion; Prolicide.

Feticide, *Black's Law Dictionary* 621 (6th ed. 1990).

The 1990 definition of "feticide" does not directly refer to "assaulting and battering the mother." It relies instead on the definition in *State v. Horne,* a case in which a man "attacked his [pregnant] wife … with a knife, wounding her in the neck, arms, and abdomen." *Horne*, 319 S.E.2d at 704. So, although the dictionary changed between 1990 and 2019, the legal meaning of "feticide" did not.

though we were dealing with the language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). As Justice Hagedorn recently explained, the entire purpose of a judicial opinion is to explain statutes, hopefully in a manner that does not require even more analysis:

> Our opinions are not statutes, they interpret them. … Our opinions are explanations of how and why we decided a case a particular way. … But we don't know what we don't know. We make mistakes and misdescribe things and use imprecise language.

Wisconsin Justice Initiative, 2023 WI 38, ¶ 150 (Hagedorn, J., concurring).

This ties into the third and final reason why § 940.04 cannot prohibit consensual abortion—because even putting aside Urmanski's concession and the special legal definition of feticide—a commonsense reading of *Black* repeatedly demonstrates that "feticide" does not mean "abortion." The supreme court's intended meaning is evident from, at least, these five occasions:

The first textual clue about the meaning of "feticide" is that, immediately after describing how Glenndale Black allegedly punched his pregnant wife in her stomach, *Black* said that Subsection (2)(a) "plainly proscribes feticide, the action alleged of Black." *Black*, 188 Wis. 2d at 642 (emphasis added). Later, *Black* repeated this characterization when it said: "This is a case about feticide. This is a case in which a man allegedly caused the death of an unborn quick child, due to be born in five days, by violently assaulting the unborn child's mother." *Id.* at 644. These direct characterizations of feticide as an assault on the mother tell us exactly what "feticide" meant.

Second, *Black* said "we must disregard the title of the statute." *Id.* at 645 (the title is "Abortion."). This would not make sense if feticide meant, as the statutory title suggests, abortion.

Third, *Black* said "940.04(2)(a) … is not an abortion statute. It makes no mention of an abortive type procedure." *Id.* at 646 (emphasis added). This shows that "feticide" cannot mean "abortion" because a statute cannot prohibit something that it "makes no mention of." *State v. Smith*, 215 Wis. 2d 84, 91, 572 N.W.2d 496 (Ct. App. 1997) ("a statute is void for vagueness if it does not provide 'fair notice' of the prohibited conduct …."); *Gundy v. United States*, 588 U.S. __, 139 S. Ct. 2116, 2142 (2019).

Fourth, *Black* said § 940.04(2)(a) "is a feticide statute only." *Black*, 188 Wis. 2d at 647. "Only" is an adverb that means: "alone in kind or class; sole," *The American Heritage College Dictionary* 972 (4th ed. 2002), or "and no one or nothing more besides; solely or exclusively." www.languages.oup.com/google-dictionary-en (last visited June 22, 2023). The only reasonable interpretation of the supreme court's usage of this adverb was that it meant to *exclude* the "abortive type procedure" discussed earlier so that it could refer *solely* to violent assaults.

Finally, if any doubt remained about the majority's understanding of the word "feticide," then the dissent confirms that meaning. Chief Justice Heffernan, joined by Justice Abrahamson, said that "the majority reads sec. 940.04(2)(a), Stats., in isolation and without context, to conclude that the language plainly and unambiguously proscribes 'feticide' and, further, that sec. 940.04(2)(a) cannot be used to charge for an abortive

medical procedure." *Id.* at 648; *see id.* at 654 (repeating this criticism in light of legislative history).

In sum, reasonable people may fairly debate whether the ordinary and everyday usage of the word "feticide" encompasses consensual medical abortions. But there can be no similar debate about what *State v. Black* meant when it used that word: Wis. Stat. § 940.04 "is a feticide statute only" and "feticide" does not mean "abortion." This must be true because: (1) Urmanski concedes that *Black* used the word feticide to exclude abortions, (2) feticide has a special legal definition that excludes abortions, and (3) numerous textual clues from *Black* indisputably confirm that the supreme court meant to exclude abortions when it chose the word "feticide." This Court must therefore conclude that § 940.04 does not prohibit abortion. Ultimately, "Wisconsin courts do not torture ordinary words until they confess to ambiguity." *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 25 n.7, 260 Wis. 2d 633, 660 N.W.2d 656 (quoted source omitted). For the above reasons, the meaning of "feticide" is not ambiguous—Wis. Stat. § 940.04 does not prohibit a consensual medical abortion.

C. The Doctors state a claim upon which relief may be granted.

Having determined that § 940.04 prohibits feticide and not abortion, some of the Plaintiffs' claims—that § 940.04 as applied to abortions has been impliedly repealed and is "premised on arcane language"— must be dismissed.

The Court recognizes that "[a] complaint's success does not depend on accurate labeling. When we 'examine the pleadings to determine whether a claim for relief has been stated,' we focus on the factual allegations, not the plaintiff's characterization of their legal

significance." *Tikalsky v. Friedman*, 2019 WI 56, ¶ 14, 386 Wis. 2d 757, 928 N.W.2d 502 (internal citation omitted). Indeed, Wisconsin's rules of civil procedure require nothing more from a complaint than "[a] short and plain statement of the claim …" plus "[a] demand for judgment for the relief the pleader seeks." Wis. Stat. § 802.02(1).

The Plaintiff physicians allege: "Wisconsin prosecutors have expressed belief that the fall of *Roe* allows them to prosecute abortion under a separate Wisconsin statute, § 940.04." Int. Compl. ¶ 21, dkt. 75. As a result, these physicians "fear their practice of medicine may lead to felony conviction …." *Id.* ¶ 26. This is a short and plain statement of their claim. They further demand this Court "declare Wis. Stat. § 940.04 unenforceable as applied to abortions." *Id.* ¶ 43. The Plaintiff government agents allege a similar threat by prosecutors and demand similar relief. Pl. Amend. Compl. ¶¶ 4-9, 26, dkt. 34.

These allegations state a claim for declaratory relief. Therefore, if the allegations are true, the Doctors may be entitled to a declaration that Urmanski cannot prosecute physicians for performing lawful abortions.

ORDER

For the reasons stated,

IT IS ORDERED that the claims premised on the assertion that Wis. Stat. § 940.04 prohibits abortions are dismissed with prejudice. The motion to dismiss is otherwise denied: the Doctors state a claim for declaratory relief because they allege facts, which if true, show they may be prosecuted for performing lawful abortions.

This is NOT a final order for purpose of appeal. Wis. Stat. § 808.03(1).