STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH ___

JOSH KAUL, in his official capacity
as Attorney General,
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703

WISCONSIN DEPARTMENT OF
SAFETY AND PROFESSIONAL
SERVICES
4822 Madison Yards Way
Madison, WI 53705

WISCONSIN MEDICAL EXAMINING
BOARD
4822 Madison Yards Way
Madison, WI 53705

and

SHELDON A. WASSERMAN, M.D., in
his official capacity as Chairperson of
the Wisconsin Medical Examining Board
4822 Madison Yards Way
Madison, WI 53705

Plaintiffs,

v.

Case No. 2022-CV-
Declaratory Judgment: 30701

CHRIS KAPENGA, in his official capacity
as President of the Wisconsin Senate and
Co-Chair of the Joint Committee on
Legislative Organization
Wisconsin State Capitol, Room 220 South
Madison, WI 53702

DEVIN LEMAHIEU, in his official capacity as the Majority Leader of the Wisconsin Senate,
Wisconsin State Capitol, Room 211 South
Madison, WI 53702

and

ROBIN VOS, in his official capacity as the Speaker of the Wisconsin Assembly and Co-Chair of the Joint Committee on Legislative Organization
Wisconsin State Capitol, Room 217 West
Madison, WI 53702

Defendants.

COMPLAINT

INTRODUCTION

The Wisconsin statutes contain two sets of criminal laws that directly conflict with each other if both are applied to abortion. In these circumstances, it is well settled that the older law cannot be enforced. Specifically, Wis. Stat. § 940.04—which originated in the mid-1800s, at a time when Wisconsin women did not even have the right to vote—has been superseded and cannot be enforced as applied to abortions.

Wisconsin Stat. § 940.04 states a very broad ban, without exceptions that are now widely accepted as appropriate and necessary. It provides that it is a criminal felony to destroy the life of an unborn child at any point after

conception unless necessary to save the pregnant woman's life. Nationally, these broad bans were rarely, and disparately, enforced historically and not enforced at all after the Supreme Court's decision in *Roe v. Wade*. Subsequently, the Wisconsin Legislature enacted different criminal laws applicable to abortion after the point of viability and with broader exceptions for the pregnant woman's health. In addition, the Legislature passed various other laws with specific parameters under which physicians may lawfully provide abortions after conception.

The pre-*Roe* and post-*Roe* Wisconsin laws thus directly conflict if both were applied to abortion. Either it is lawful to provide a pre-viability abortion, or it is not. Either it is lawful to provide an abortion to preserve the mother's health, or it is not. These are exactly the circumstances where courts hold that the older law may not be enforced—particularly when that law imposes criminal sanctions.

Wisconsin abortion providers cannot be held to two sets of diametrically opposed laws, and the Wisconsin people deserve clarity. This Court should hold that Wis. Stat. § 940.04 has been superseded and cannot be enforced as applied to abortions.

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this dispute pursuant to Wis. Const. art. VII, § 8, and Wis. Stat. § 753.03, which provide for subject-matter jurisdiction over all civil matters within this State.

2. Defendants, as state officers, are subject to this Court's jurisdiction. *See Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976).

3. Venue is proper in Dane County because all defendants are state officers. Wis. Stat. § 801.50(3)(a).

PARTIES

4. Plaintiff Josh Kaul sues in his official capacity as the Wisconsin Attorney General, the elected constitutional officer under Wis. Const. art. VI, § 1, who directs the activities of the Wisconsin Department of Justice. *See* Wis. Stat. § 15.25. The Department of Justice consults with and advises agencies and officers in Wisconsin on the application and potential enforcement of Wisconsin's criminal laws. *See* Wis. Stat. § 165.25. The Department of Justice also provides training and guidance to law enforcement officers about Wisconsin's criminal laws. Wis. Stat. § 165.86. Thus, the Department of Justice should have clarity about the applicability of abortion laws in Wisconsin. The Attorney General sues in his official capacity as the Attorney General and

director and supervisor of the Department, with an address of 17 West Main Street, Madison, WI, 53703.

5. The Wisconsin Department of Safety and Professional Services (DSPS) conducts investigations of physicians for unprofessional conduct that includes violations of law. Wis. Stat. §§ 448.02(3), (8), 440.03(3m) ("The department may investigate complaints made against a person who has been issued a credential"). That includes "a violation . . . of any laws or rules of this state . . . substantially related to the practice of medicine and surgery." Wis. Admin. Code Med §§ 10.03(1)(a), (3)(i). Attached to DSPS is the Wisconsin Medical Examining Board, which may discipline licenses of doctors based on such investigations. Wis. Stat. §§ 448.02, 448.03. Thus, DSPS may be called upon to investigate or gather information pertaining to alleged violations of any applicable abortion laws. DSPS is located at 4822 Madison Yards Way, Madison, WI, 53705.

6. Plaintiff Wisconsin Medical Examining Board is created by Wis. Stat. § 15.405(7) and, pursuant to Wis. Stat. ch. 448, subchapter II, has duties that include issuing licenses to practice medicine and surgery. The Board's duties also include considering allegations of unprofessional conduct and issuing discipline, which may include alleged violations of Wisconsin laws regarding abortions. *See* Wis. Stat. § 448.02; Wis. Admin. Code Med

§§ 10.03(1)(a), (3)(i). The Board's address is 4822 Madison Yards Way, Madison, WI, 53705.

7. Plaintiff Sheldon A. Wasserman, M.D., sues in his official capacity as Chairperson of the Wisconsin Medical Examining Board. In that official capacity, his address is 4822 Madison Yards Way, Madison, WI, 53705.

8. Pursuant to Wis. Stat. § 165.25(1m) and Wis. Stat. § 14.11(1), the Governor has requested that the Department of Justice appear for and represent these state entities and officials in the prosecution of this action.

9. Defendant Chris Kapenga is President of the Wisconsin Senate and Co-Chair of the Joint Committee on Legislative Organization and is sued in his official capacity. The Legislature, over which President Kapenga exercises leadership duties, has passed a series of laws regarding abortion that are in conflict. After *Roe v. Wade* rendered Wis. Stat. § 940.04 unconstitutional, the Legislature failed in its duty to enact a revisor's correction bill eliminating the law as unconstitutional, *see* Wis. Stat. § 13.92(2)(L), or to otherwise affirmatively repeal the law in light of directly conflicting statutes passed post-*Roe*. Further, the Legislature and/or its members or committees have repeatedly sought to intervene, and in some cases have intervened, in cases under Wis. Stat. § 803.09(2m) on behalf of the Wisconsin Legislature, Wisconsin Senate, or Wisconsin Assembly pursuant to Wis. Stat. § 13.365, where the enforceability of state law was at issue. For such official capacity

claims, President Kapenga's address is Wisconsin State Capitol, Room 220 South, Madison, WI, 53702.

10. Defendant Devin LeMahieu is the Majority Leader of the Wisconsin Senate and is sued in his official capacity. The Legislature, over which Majority Leader LeMahieu exercises leadership duties, has passed a series of laws regarding abortion that are in conflict. After *Roe v. Wade* rendered Wis. Stat. § 940.04 unconstitutional, the Legislature failed in its duty to enact a revisor's correction bill eliminating the law as unconstitutional, *see* Wis. Stat. § 13.92(2)(L), or to otherwise affirmatively repeal the law in light of directly conflicting statutes passed post-*Roe*. Further, the Legislature and/or its members or committees have repeatedly sought to intervene, and in some cases have intervened, in cases under Wis. Stat. § 803.09(2m) on behalf of the Wisconsin Legislature, Wisconsin Senate, or Wisconsin Assembly pursuant to Wis. Stat. § 13.365, where the enforceability of state law was at issue. For such official capacity claims, Majority Leader LeMahieu's address is Wisconsin State Capitol, Room 211 South Madison, WI, 53702.

11. Defendant Robin Vos is the Speaker of the Wisconsin Assembly and Co-Chair of the Joint Committee on Legislative Organization and is sued in his official capacity. The Legislature, over which Speaker Vos exercises leadership duties, has passed a series of laws regarding abortion that are in conflict. After *Roe v. Wade* rendered Wis. Stat. § 940.04 unconstitutional, the

Legislature failed in its duty to enact a revisor's correction bill eliminating the law as unconstitutional, *see* Wis. Stat. § 13.92(2)(L), or to otherwise affirmatively repeal the law in light of directly conflicting statutes passed post-*Roe*. Further, the Legislature and/or its members or committees have repeatedly sought to intervene, and in some cases have intervened, in cases under Wis. Stat. § 803.09(2m) on behalf of the Wisconsin Legislature, Wisconsin Senate, or Wisconsin Assembly pursuant to Wis. Stat. § 13.365, where the enforceability of state law is at issue. For such official capacity claims, Speaker Vos's address is Wisconsin State Capitol, Room 217 West, Madison, WI, 53702.

12. To the extent that it has application here, compliance with Wis. Stat. § 893.825 will occur with service of the Complaint on the above defendants.

FACTUAL ALLEGATIONS

13. The Wisconsin Legislature enacted the first version of the statute that today is listed as Wis. Stat. § 940.04(1) in 1849. It prohibited the administering of substances to, or use of instruments on, a woman pregnant with a "quick child" with the intent to destroy the quick child unless "necessary to preserve the life of [the] mother." Wis. Stat. ch. 133, § 11 (1849).

14. At the time, "quickening" was generally understood to mean the time at which the pregnant woman first detects fetal movement, which

typically occurs during either the fourth or fifth month of pregnancy. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulations and Questions*, 44 Stan. L. Rev. 261, 281–82 (1992); Samuel W. Buell, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774, 1780–81 (1991).

15. In 1858, the Wisconsin Legislature amended the 1849 statute (Wis. Stat. ch. 133, § 11 (1849)) to remove the word "quick" such that the statute applied to prohibit the intentional destruction of a pregnant woman's "child" unless "necessary to preserve the life of [the] mother." *See* Wis. Stat. ch. 164, § 11 (1858). That year, the Wisconsin Legislature also added a related provision prohibiting the administering of substances or use of instruments on a pregnant woman with the intent to procure "the miscarriage of any such woman." Wis. Stat. ch. 169, § 58 (1858).

16. By the end of the nineteenth century, most states had laws prohibiting abortion during all phases of pregnancy with "therapeutic exceptions" for abortions to save the life of the pregnant woman. Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1784–85.

17. These mid-19th century laws generally remained listed in state statute books subject to only minor amendments until the 1950s and 1960s. Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1795–96.

18. Though these mid-19th century laws criminalizing abortion at any stage of pregnancy remained "on the books" for all that time, they were rarely

enforced. Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1789–90; Mark A. Graber, *Rethinking Abortion: Equal Choice, The Constitution, and Reproductive Politics* at 42–53 (1996).

19. Scholars estimate that between 1900 and 1970, one of every three to five pregnancies ended in abortion. Graber, *Rethinking* at 41–42. Married women obtained the vast majority of those abortions. *Id.* at 42.

20. Scholars also estimate that during the 1950s and 1960s, each year, approximately one million abortions that violated listed criminal statutes occurred. Graber, *Rethinking* at 42; Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1789.

21. In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), a federal district court declared that Wis. Stat. § 940.04(1) was unconstitutionally overbroad as it purported to prohibit pre-quickening abortions. *Id.* at 302.

22. In its 1973 decision in *Roe v. Wade*, the United States Supreme Court declared unconstitutional statutes criminalizing abortion at any stage of pregnancy except when necessary to save the life of the pregnant woman. *Roe v. Wade*, 410 U.S. 113 (1973).

23. *Roe* specifically listed Wis. Stat. § 940.04 as one such statute. *Id.* at 118 n.2. At the time, Wis. Stat. § 940.04 stated that it prohibited the "intentional[]" destruction of the life of an "unborn child" unless necessary to "save the life of the mother," and it defined "unborn child" as a "human being from the time of conception until it is born alive."

24. Following *Roe*, the Wisconsin Legislature passed laws prohibiting abortion either after 20 weeks or after viability, and also passed a network of laws providing specific parameters for how physicians should perform abortions.

25. The United States Supreme Court overturned *Roe* in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022), on June 24, 2022.

CLAIMS FOR RELIEF

COUNT I

Wisconsin Stat. § 940.04 is unenforceable as applied to abortions because subsequent enactments have superseded any such application.

(Declaratory Relief Sought)

26. Plaintiffs reallege and incorporate herein by reference the foregoing paragraphs of this Complaint as if set forth here in full.

27. Any court of record in this State is authorized to enter a declaratory judgment declaring that a statutory provision, or an application of a statutory provision, is unenforceable. *See* Wis. Stat. § 806.04(1).

28. Over many decades, Wisconsin has created a statutory regime for abortion regulation that sets parameters for the providing of lawful abortions in our State.

29. This extensive, longstanding statutory regime is fundamentally inconsistent with a broad ban against abortions in Wisconsin.

30. Wisconsin Stat. § 940.15, enacted in 1985, criminalizes an abortion only after the point of "viability," which means "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support."

31. Wisconsin Stat. § 940.15's prohibition of abortions after "viability" does not apply "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(3). Wisconsin Stat. § 940.15 further states that "[n]othing in this subsection requires a physician performing an abortion to employ a method of abortion which, in his or her medical judgment based on the particular facts of the case before him or her, would increase the risk to the woman." Wis. Stat. § 940.15(6).

32. Relatedly, Wis. Stat. § 253.107 prohibits a physician from providing an abortion only after the "probable postfertilization age of the unborn child is 20 or more weeks," and offers an exception in the case of a "medical emergency." It defines "medical emergency" as a "condition, in a physician's reasonable medical judgment, that so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a 24-hour delay in performance or

inducement of an abortion will create serious risk of substantial and irreversible impairment of one or more of the woman's major bodily functions." Wis. Stat. §§ 253.107, 253.10(2)(d).

33. In addition to Wis. Stat. § 940.15 and Wis. Stat. § 253.107, Wisconsin law contains a broad regulatory framework that regulates the circumstances under which lawful abortions may be provided and obtained.

34. For example, Wis. Stat. § 253.095(2) provides that "[n]o physician may perform an abortion, as defined in s. 253.10(2)(a), unless he or she has admitting privileges in a hospital within 30 miles of the location where the abortion is to be performed" and imposes a civil forfeiture for a violation. Chapter 253 also contains various other provisions that regulate legal abortions, including informed consent, a waiting period, the use of ultrasound, how abortion-inducing drugs are administered, and later-term abortions, among other things.

35. These many statutes providing the parameters for when an abortion may be performed are incompatible with a statute that would broadly criminalize abortion at any stage of pregnancy unless necessary to save the pregnant woman's life.

36. Yet, that is exactly what Wis. Stat. § 940.04 would purport to do if applied to abortion. Wisconsin Stat. § 940.04, the pre-*Roe* 19th century prohibition, contains a subsection (1) that 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."

37. Wisconsin Stat. § 940.04 also contains a subsection (2) that provides that "[a]ny 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." In *State v. Black*, 188 Wis. 2d 639, 646, 526 N.W.2d 132 (1994), the Wisconsin Supreme Court held that Wis. Stat. § 940.04(2)(a) "is not an abortion statute," but rather "proscribes the intentional criminal act of feticide."[1]

38. Wisconsin Stat. § 940.04(5) provides that "[t]his 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."

39. Wisconsin Stat. § 940.04(6) provides that "unborn child" means "a human being from the time of conception until it is born alive."

40. Wisconsin Stat. § 940.15, enacted in 1985, and the nineteenth-century statute listed as Wis. Stat. § 940.04 would directly conflict in two main respects if Wis. Stat. § 940.04 were applied to abortion.

[1] When Plaintiffs use the term "abortion" in this complaint, it does not include the crime of "feticide" as articulated in *Black*.

41. First, Wis. Stat. § 940.15 prohibits abortion only "after the fetus or unborn child reaches viability" but Wis. Stat. § 940.04(1) would prohibit any abortion "from the time of conception."

42. Second, Wis. Stat. § 940.15 recognizes exceptions where an abortion is necessary to preserve the life *or health* of the pregnant woman. But Wis. Stat. § 940.04 would only make an exception when necessary to save the pregnant woman's life.

43. Wisconsin Stat. § 940.04 would also directly conflict with Wis. Stat. § 253.107 if Wis. Stat. § 940.04 were applied to abortion. Wisconsin Stat. § 253.107 prohibits abortion only after the "probable postfertilization age of the unborn child is 20 or more weeks," and offers an exception in the case of a "medical emergency." But Wis. Stat. § 940.04(1) would prohibit any abortion "from the time of conception" and would make an exception only when necessary to save the pregnant woman's life.

44. Similarly, chapter 253's broad regulatory framework for the conditions under which physicians may lawfully provide abortions also directly conflicts with Wis. Stat. § 940.04 if Wis. Stat. § 940.04 were applied to abortions. That framework establishes that physicians act lawfully when they comply with the extensive regulatory provisions for their medical practice.

45. Later-enacted laws impliedly repeal earlier-enacted laws where the earlier-enacted law conflicts with the later-enacted law or where the later-

enacted laws are intended as a substitute. *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936); *Wisth v. Mitchell*, 52 Wis. 2d 584, 589, 190 N.W.2d 879 (1971); *State v. Dairyland Power Co-Op.*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019); Scalia & Garner, *Reading Law*, 331 (2012).

46. The principle that laws cannot directly conflict is particularly true with regard to criminal laws. Criminal statutes are unconstitutionally vague in violation of due process if they fail to afford proper notice of the conduct they seek to proscribe or if they encourage arbitrary and erratic arrests and convictions. *County of Kenosha v. C&S Management, Inc.*, 223 Wis. 2d 373, 392, 588 N.W.2d 236 (1999). Penal statutes therefore are strictly construed against enforcement where there is doubt as to the statutory scheme. *State v. Christensen*, 110 Wis. 2d 538, 546, 329 N.W.2d 382 (1983).

47. Similarly, under the specific/general rule of statutory construction, where two conflicting statutes apply to the same subject, the more specific controls. *State ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686.

48. Moreover, the Wisconsin Supreme Court has already held that Wis. Stat. § 940.15 is incompatible with interpreting another subsection of Wis. Stat. § 940.04 as a broad ban against abortion. The court there ruled that "[s]ection 940.04(2)(a) cannot be used to charge for a consensual abortive type

of procedure." *Black*, 188 Wis. 2d at 646. It ruled that doing so "would be inconsistent with the newer sec. 940.15." *Id.*

49. Enforcement of Wis. Stat. § 940.04(1) against abortion providers also would create a direct conflict with multiple other, later-enacted Wisconsin statutes that enumerate conditions and parameters under which lawful abortions may be provided.

50. This Court therefore should declare that Wis. Stat. § 940.04 is unenforceable as applied to abortions.

COUNT II

Additionally, Wis. Stat. § 940.04 is unenforceable as applied to abortions because of its disuse and in light of reliance on *Roe v. Wade* and its progeny.

(Declaratory Relief Sought)

51. Plaintiffs reallege and incorporate herein by reference the foregoing paragraphs of this Complaint as if set forth here in full.

52. Wisconsin Stat. § 940.04 has not been enforced against abortions for many decades.

53. Even pre-*Roe*, such laws were sparingly, and disparately, enforced, despite the fact that pre-"quickening" abortions remained relatively common. Buell, *Criminal*, 66 N.Y.U. L. Rev. at 1789–90; Graber, *Rethinking* at 42–53.

54. Wisconsin's post-*Roe* statutes and regulations reflect the prevailing acceptance in the law of early-stage abortions, under certain restrictions, as opposed to the broad ban in Wis. Stat. § 940.04.

55. Further, Wisconsin citizens have relied on the long existence of *Roe v. Wade*. While *Roe* was in force, there was no need to take action to advocate for the direct repeal of Wis. Stat. § 940.04, which was unenforceable as a matter of federal constitutional law.

56. Where society has long relied on the existence of a constitutional civil liberty protecting against enforcement of a law, where a law has long fallen out of common usage, or where custom—as embodied in modern practice—has evolved, a long obsolete and unused law may become unenforceable based on notions of fairness or reliance.

57. Indeed, a law that has been deemed a violation of a constitutionally protected civil liberty for nearly half a century and has not subsequently again been enacted as law cannot be said to continue to have the consent of the governed.

58. This Court therefore should declare that Wis. Stat. § 940.04 cannot be enforced as applied to abortions until and unless new legislation is enacted into law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask this Court to enter a judgment in their favor and against Defendants, consisting of:

(a) A declaratory judgment pursuant to Wis. Stat. § 806.04, declaring that Wis. Stat. § 940.04 is unenforceable as applied to abortions; and

(b) Any such other relief as the Court may deem just and proper.

Dated this 28th day of June 2022.

Respectfully submitted,

JOSHUA L. KAUL
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Electronically signed by:

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