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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT 2

Case No. 2020AP485

WISCONSIN PROPERTY
TAX CONSULTANTS, INC.
AND WISCONSIN
MANUFACTURERS AND
COMMERCE, INC.,

Plaintiffs-Appellants,

v.

WISCONSIN
DEPARTMENT OF
REVENUE,

Defendant-Respondent.

APPEAL FROM A FINAL ORDER ENTERED BY THE
OZAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE SANDY A. WILLIAMS, PRESIDING

RESPONDENT'S BRIEF

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INTRODUCTION

This narrow appeal must remain focused on the only question the circuit court resolved: Does the primary jurisdiction doctrine allow dismissal of a dispute between the appellants and the Wisconsin Department of Revenue (DOR) over the scope of a new property tax exemption for machinery, where similar disputes are proceeding before the Wisconsin Tax Appeals Commission? That doctrine permits circuit courts to defer to administrative adjudicators (like the Commission) who the Legislature has empowered to resolve specialized areas of litigation (like tax exemption disputes). Because the circuit court did just that, its decision should be affirmed.

The appellants respond that taxpayers can evade the Commission simply by invoking administrative rulemaking requirements and constitutional provisions, but that misconstrues the Commission's broad jurisdiction under Wis. Stat. § 73.01(4) to resolve "all questions of law" arising under Wisconsin's tax code. Moreover, allowing taxpayers to skip the Commission and take their tax disputes straight to circuit court through this pleading stratagem would critically undermine the Commission's legislatively assigned role as the first stop for resolving tax disputes in Wisconsin.

But if this Court disagrees, it should decline the appellants' invitation to proceed beyond the sole issue the circuit court resolved. They ask this Court to also resolve the merits of their rulemaking and constitutional claims, even though the circuit court has never done so. That is not how the appeals process ordinarily works, and the appellants offer no good reason why this Court should depart from the ordinary process here.

If this Court does, however, choose to reach the merits, the appellants' claims fail. They assert that DOR needed to engage in rulemaking before administering the tax exemption

at issue, but DOR has simply applied the exemption's plain language, which does not require rulemaking. Their claim resting on the Wisconsin Constitution's Uniformity Clause also fails because that provision allows for absolute property tax exemptions—and that is exactly how DOR administers this particular exemption for machinery.

STATEMENT OF THE ISSUES

1. Was it proper to dismiss the appellants' complaint on primary jurisdiction grounds given similar ongoing proceedings before the Wisconsin Tax Appeals Commission, despite the presence of rulemaking and constitutional claims?

The circuit court answered yes, as should this Court.

2. If this Court finds that the circuit court wrongly dismissed the case, should it remand the case so the circuit court can consider the merits, rather than resolving the merits before the circuit court has had a chance to do so?

The circuit court did not address this issue, but this Court should answer yes, if it reaches the issue.

3. If this Court reaches the merits, does DOR administer Wis. Stat. § 70.111(27)'s tax exemption according to its plain terms such that DOR need not engage in administrative rulemaking?

The circuit court did not address this issue, but this Court should answer yes, if it reaches the issue.

4. If this Court reaches the merits, does DOR administer Wis. Stat. § 70.111(27) as an absolute exemption of certain machinery from taxation such that it complies with the Uniformity Clause?

The circuit court did not address this issue, but this Court should answer yes, if it reaches the issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

If this Court agrees that dismissal was proper on primary jurisdiction grounds or if it disagrees and remands for consideration of the merits, no oral argument or publication is necessary.

If, however, this Court proceeds to the merits, DOR respectfully submits that publication would be useful given the lack of appellate authority on the proper construction of Wis. Stat. § 70.111(27).

STATEMENT OF THE CASE

I. Statutory background.

A. Certain property in Wisconsin qualifies as taxable "manufacturing property," including machinery located at the site of manufacturing activity.

Wisconsin's property tax provides that "[t]axes shall be levied . . . upon all general property in this state except property that is exempt from taxation." Wis. Stat. § 70.01. That means all property in Wisconsin is taxable unless another statute exempts it from taxation.

Taxable manufacturing property is treated specially. Rather than being assessed and taxed locally like all other property, Wis. Stat. § 70.995 directs DOR to assess and tax manufacturing property. Businesses with manufacturing property also receive certain tax advantages, such as the state income tax credit for manufacturers under Wis. Stat. §§ 71.07(5n) and 71.28(5n).

To obtain this favorable tax treatment, businesses must ask DOR to classify their activities as manufacturing. *See* Wis. Stat. § 70.995(4). To do so, businesses must show that they use their property as "manufacturing property"

under Wis. Stat. § 70.995(1)–(3). The primary definition of manufacturing property resides in Wis. Stat. § 70.995(1)(a):

> "[M]anufacturing property" includes all lands, buildings, structures and other real property used in manufacturing, assembling, processing, fabricating, making or milling tangible personal property for profit. Manufacturing property also includes warehouses, storage facilities and office structures when the predominant use of the warehouses, storage facilities or offices is in support of the manufacturing property, and all personal property owned or used by any person engaged in this state in any of the activities mentioned, and used in the activity, including raw materials, supplies, machinery, equipment, work in process and finished inventory when located at the site of the activity.

Two aspects of this definition bear emphasis. First, real property is classified as manufacturing if the "predominant use" is merely "in support of" actual manufacturing activity, including "storage facilities" and "offices." Second, "*all* personal property" either "owned or used" by a person engaged in manufacturing activity qualifies, even if it is merely "machinery . . . located at the site of the activity." Accordingly, taxable "manufacturing property" includes more than just property used directly in the manufacturing process—it also includes property used to support the manufacturing activity.

B. Wisconsin Stat. § 70.11(27): A pre-existing exemption for some manufacturing machinery.

A long-standing property tax exemption covers manufacturing machinery that is used "exclusively and directly in the production process" (sometimes called herein the "Manufacturing Exemption"):

> Machinery and specific processing equipment; and repair parts, replacement machines, safety attachments and special foundations for that machinery and equipment; that are used exclusively and directly in the production process[1] in manufacturing tangible personal property, regardless of their attachment to real property, but not including buildings. The exemption under this paragraph shall be strictly construed.

Wis. Stat. § 70.11(27)(b).

Importantly, this provision does not exempt *all* manufacturing machinery from taxation; rather, it exempts manufacturing machinery *only* when it is "used exclusively and directly in the production process in manufacturing

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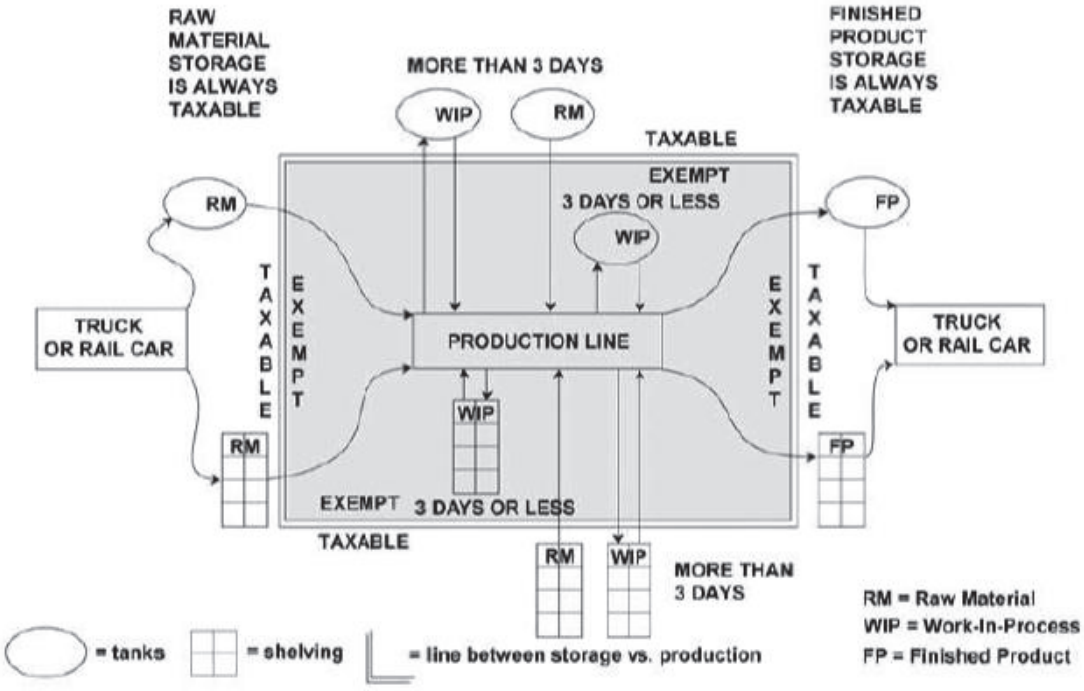
[1] This "production process" has its own (lengthy) definition in Wis. Stat. § 70.11(27)(a)5.:

> "Production process" means the manufacturing activities beginning with conveyance of raw materials from plant inventory to a work point of the same plant and ending with conveyance of the finished product to the place of first storage on the plant premises, including conveyance of work in process directly from one manufacturing operation to another in the same plant, including the holding for 3 days or less of work in process to ensure the uninterrupted flow of all or part of the production process and including quality control activities during the time period specified in this subdivision but excluding storage, machine repair and maintenance, research and development, plant communication, advertising, marketing, plant engineering, plant housekeeping and employee safety and fire prevention activities; and excluding generating, transmitting, transforming and furnishing electric current for light or heat; generating and furnishing steam; supplying hot water for heat, power or manufacturing; and generating and furnishing gas for lighting or fuel or both.

tangible personal property." *Id.* That is a narrower set of property than *all* machinery classified as "manufacturing property," given that this broader classification can cover machinery that is merely "located at the site of the [manufacturing] activity." *See* Wis. Stat. § 70.995(1)(a).

A graphic from DOR's Wisconsin Property Assessment Manual[2] illustrates how the "exclusively and directly in the production process" requirement in Wis. Stat. § 70.11(27)(b) leaves some manufacturing machinery subject to taxation:



(R.19.)

Although all of the property in this graphic would be classified as "manufacturing property" under Wis. Stat. § 70.995(1)(a), not all of it would fall within the Wis. Stat.

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[2] DOR publishes the Wisconsin Property Assessment Manual to explain property assessment practices in Wisconsin. *See* Wis. Stat. § 73.03(2a).

§ 70.11(27) exemption. Rather, only machinery in the shaded area would be exempt (because it is "used exclusively and directly in the production process") while machinery outside the shaded area would remain taxable (because it is *not* used as such).

C. Wisconsin Stat. § 70.111(27): A new exemption for machinery that is not used in manufacturing.

In 2017, the Legislature created a new tax exemption that applies to machinery, tools, and patterns but only when not used in manufacturing. Specifically, the statute exempts "machinery tools, and patterns, *not including such items used in manufacturing*." Wis. Stat. § 70.111(27)(b) (sometimes called herein the "Non-Manufacturing Exemption").

The pre-existing Manufacturing Exemption and the new Non-Manufacturing Exemption have a major difference in scope. The Manufacturing Exemption exempts machinery only when it is "used exclusively and directly in the production process in manufacturing tangible personal property." Wis. Stat. § 70.11(27)(b). The Non-Manufacturing Exemption, however, exempts all machinery that is *not* "used in manufacturing." Wis. Stat. § 70.111(27)(b).

The two exemptions, considered together, thus leave a category of machinery taxable: that which is "used in manufacturing" but not used "exclusively and directly in the production process."

D. DOR administers these two exemptions using two different tax forms, one for manufacturers and one for non-manufacturers.

Once DOR approves a manufacturing classification—that is, once it decides that a business owns property that qualifies as "manufacturing property" under Wis. Stat.

§ 70.995(1)—the manufacturer must report its qualifying property to DOR for assessment and taxation. All manufacturing personal property, including the machinery Appellants claim is exempt, is reported to DOR on Form M-P. (R. 24:4–19)[3]; *see* Wis. Stat. § 70.995(12)(a). Put differently, businesses report property to DOR on Form M-P only if it qualifies as "manufacturing property" under Wis. Stat. § 70.995(1)–(3). DOR then assesses the value of property reported on Form M-P and, based on those assessments, tax bills are submitted. Wis. Stat. § 70.995(5)–(7).

If, however, a business is not classified as a manufacturer—that is, if it does not own "manufacturing property" under Wis. Stat. § 70.995—it reports its property differently. That property is instead reported to local assessors on the Statement of Personal Property form. (R.24:23–27); *see* Wis. Stat. § 70.35(2). Any machinery that a non-manufacturer owns is reported on Schedule C of that form. (R. 24:24.)

II. Statement of facts.

On January 3, 2018, Wisconsin Manufacturers and Commerce, Inc. (WMC), sent a letter inquiring about DOR's administration of the Non-Manufacturing Exemption. WMC offered its view that the Non-Manufacturing Exemption exempts *all* machinery that was not already exempt under the Manufacturing Exemption:

> We believe the statutory language is clear in that machinery, patterns, and tools that are not used in

[3] Machinery listed on Form M-P can include various kinds of storage and material handling equipment (e.g. shipping and receiving equipment like forklifts), maintenance equipment (e.g. for production machines), and other miscellaneous manufacturing equipment (e.g. packaging equipment). (R. 24:8.)

> manufacturing (machinery used in manufacturing is already exempt) is exempt.

(R. 17.) That is, in WMC's view, the two exemptions combine to exempt *all* machinery from taxation.

Because WMC is not itself a manufacturer that pays taxes on any manufacturing property, its letter described only a hypothetical piece of property that, in its view, Wis. Stat. § 70.111(27) exempted:

> The statute does not provide an exclusion for machinery, patterns, and tools located on manufacturing property. Accordingly, a forklift used in a warehouse or in shipping and receiving at a manufacturing property clearly falls within the Act 59 exemption [i.e. Wis. Stat. § 70.111(27)] because it meets the definition of "machinery," and is not used in manufacturing – it is used for inventory management. A plain reading and logical interpretation of Act 59 would exempt such machinery. However because the machinery is located at a manufacturing property, it would remain taxable under the interpretation you shared with us on November 30th.[4]

(R. 17.)

DOR responded in a letter explaining that the Non-Manufacturing Exemption applies to non-manufacturing property reported to local assessors but *not* to manufacturing property reported to DOR on Form M-P:

> The new exemption [i.e. Wis. Stat. § 70.111(27)] applies to machinery, tools and patterns as previously reported on the Statement of Personal Property, Schedule C – Machinery, Tools, and Patterns. We have designed the 2018 form to make it clear that this property should no longer be reported.

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[4] The record contains no information about this "interpretation" that DOR purportedly shared with WMC on November 30, 2017, except for this reference.

> Manufacturing properties report machinery, tools, and patterns on Form M-P, Schedule M. Manufacturers should continue to report this property as they did in 2017 because the new exemption does not apply to manufacturers.

(R. 18.)

III. Procedural background.

After this letter exchange, WMC and Wisconsin Property Tax Consultants, Inc. ("Appellants"), filed a complaint in circuit court under Wis. Stat. § 227.40 seeking three forms of declaratory relief: first, a declaration that DOR relies on an unpromulgated (and thus invalid) administrative rule to administer Wis. Stat. § 70.111(27) (R. 2:8–10 ¶¶ 23–30); second, a declaration that DOR's administration of Wis. Stat. § 70.111(27) conflicts with the statutory text (R. 2:10–11 ¶¶ 31–37); and third, a declaration that DOR's administration of Wis. Stat. § 70.111(27) violates constitutional due process and equal protection guarantees (including the Wisconsin Constitution's Uniformity Clause) and unconstitutionally takes private property for public use without just compensation (R. 2:12 ¶¶ 38–42).

After the parties filed cross-motions for summary judgment, the circuit court issued an order dismissing Appellants' complaint. (R. 33.)

The circuit court did not reach the merits of Appellant's declaratory judgment claims; rather, it dismissed the case based on the primary jurisdiction doctrine. That doctrine generally provides that "where an administrative remedy is provided by statute, relief should first be sought from the administrative agency before bringing it to the court." (R. 33.) Because the Wisconsin Tax Appeals Commission is the administrative body tasked with "determin[ing] all questions of law and fact arising under the tax laws of the state" and because "there are numerous similar cases pending before the

Tax Appeal[s] Commission," the circuit court dismissed the complaint in favor of those ongoing Commission proceedings. (R. 33.)

After the circuit court entered its final judgment of dismissal, this appeal followed.

STANDARD OF REVIEW

The circuit court's dismissal on primary jurisdiction grounds is reviewed for abuse of discretion. *See Sawejka v. Morgan*, 56 Wis. 2d 70, 79–81, 201 N.W.2d 528 (1972)*; Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶¶ 38, 41, 298 Wis. 2d 468, 727 N.W.2d 546; *Wisconsin Bell, Inc. v. DOR*, 164 Wis. 2d 138, 141, 473 N.W.2d 587 (Ct. App. 1991).

Appellants contend that de novo review is appropriate citing *Butcher*, but they are wrong that *Butcher* applied de novo review to the primary jurisdiction issue; instead, it "conclude[d] [that] the circuit court properly exercised its discretion in applying the primary jurisdiction doctrine." 298 Wis. 2d 468, ¶ 41. That is abuse of discretion review, not de novo review. Appellants also cite *Employers Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733, 742, 469 N.W.2d 203 (Ct. App. 1991), but that case did not even review a circuit court's decision to dismiss a case in favor of ongoing agency proceedings. Rather, it applied de novo review to an argument over whether the circuit court itself had jurisdiction to consider a claim.

This Court should not reach the merits of Appellants' declaratory judgment claims; but if it does, DOR agrees that de novo review is appropriate.

ARGUMENT

I. The circuit court acted within its discretion by dismissing this case under the primary jurisdiction doctrine.

The primary jurisdiction doctrine allows circuit courts to dismiss cases that should first be brought to the administrative adjudicator with authority to consider them. Appellants wrongly argue that they can evade this doctrine and proceed directly to circuit court by pleading rulemaking and constitutional claims, but their argument misunderstands the broad scope of the Commission's jurisdiction over tax matters. And even if the Commission lacked jurisdiction over those claims, it could have reserved them for the circuit court to decide on judicial review. Either way, the circuit court properly dismissed Appellants' claims.

A. Dismissal of Appellants' statutory interpretation claim was proper.

"Under the primary jurisdiction doctrine, when an administrative agency and the circuit court both have jurisdiction over an issue, the circuit court has the discretion to defer to the agency to resolve the issue." *Butcher*, 298 Wis. 2d 468, ¶ 38. That is because "[a]dministrative agencies are designed to provide uniformity and consistency in the fields of their specialized knowledge [and] [w]hen an issue falls squarely in the very area for which the agency was created, it is sensible to require prior administrative recourse before a court decides the issue." *Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 420, 491 N.W.2d 484 (1992). When deciding whether to assume jurisdiction in these areas of overlapping authority, courts should consider "that the legislature created the agency in order to afford a systematic method of fact finding and policymaking and that

the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention." *Id.*

The administrative body with concurrent jurisdiction here is the Wisconsin Tax Appeals Commission (the "Commission"). The Commission is "an independent tribunal exercising quasi-judicial functions" in taxation disputes," *Sawejka*, 56 Wis. 2d at 76, and it is "the final authority for the hearing and determination of all questions of law and fact arising under" the tax code. Wis. Stat. § 73.01(4)(a); *see also Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 40, 311 Wis. 2d 579, 754 N.W.2d 95 (same). Taxpayers—including manufacturers—who dispute their tax assessments must bring their complaints to the Commission. *See* Wis. Stat. § 70.995(8). The losing party may seek judicial review of the Commission's decision in circuit court. *See* Wis. Stat. §§ 70.995(9) and 73.015.

Given the Commission's legislatively assigned role in resolving tax disputes, courts have repeatedly applied the primary jurisdiction doctrine to dismiss tax disputes in favor of proceedings before the Commission. For instance, in *Sawejka*, the circuit court declined to assume jurisdiction over a declaratory judgment claim that DOR misconstrued and unconstitutionally applied a retail sales tax law to a business. 56 Wis. 2d at 72, 79–80. The supreme court affirmed the dismissal, noting the wisdom of deferring to the Commission in such tax disputes:

> The legislature has created the tax appeals commission to afford a systematic method of fact-finding and policy formation under the Wisconsin tax laws. Uniform application of our tax laws is an admirable and necessary legislative and administrative goal. The courts should not unnecessarily interject themselves into this process.

Sawejka, 56 Wis. 2d at 80–81.[5]

Dismissal in favor of Commission proceedings also occurred in both *Butcher* and *Wisconsin Bell*. In *Butcher*, the circuit court dismissed declaratory judgment claims challenging the imposition of a sales tax on certain telecommunication services. *Butcher*, 298 Wis. 2d at 468, ¶ 6. Even though the case presented a pure statutory interpretation issue, dismissal was appropriate because "[d]eferral to the administrative agency under the primary jurisdiction doctrine is appropriate when an issue of statutory construction 'appear[s] to be inextricably interwoven with issues . . . [that] may require an understanding of . . . subjects within the expertise of [the agency].'" *Id.* ¶ 43 (citation omitted).

Likewise, in *Wisconsin Bell*, the circuit court dismissed declaratory judgment claims about whether Wisconsin's sales tax applied to certain telecommunications billing and collection services. 164 Wis. 2d at 140–41. This Court again affirmed the dismissal, reasoning that "[w]hether the factual issues are complex or simple, the agency has a role in the formation of tax policy and the application and

[5] Appellants say that *Sawejka* relied on a now-repealed jurisdictional provision in Wis. Stat. § 73.01. (App. Br. 16–17.) But that repealed provision (a modified version of which now appears at Wis. Stat. § 73.01(5)) simply described the kinds of DOR decisions that the Commission could review, not the substantive scope of its decision-making authority. Wisconsin Stat. § 73.01(4) is the relevant provision for that latter inquiry, and it exists today in materially the same form as it did when *Sawejka* was decided.

administration of the tax laws that deserves deference in a case such as this." *Id.* at 147.[6]

This case is not meaningfully different from *Sawejka*, *Butcher*, and *Wisconsin Bell*. Here, too, Appellants asked the circuit court to declare whether a tax statute applies to certain operations—in this case, whether Wis. Stat. § 70.111(27) exempts certain categories of manufacturing property. The Commission clearly has concurrent jurisdiction over such claims; indeed, when the circuit court was considering this case, the Commission had before it 55 cases raising the exact same statutory interpretation question presented here, some involving over 1,000 specific items of personal property. (R. 16:1–2 ¶¶ 2–3.) These cases will enable the Commission to resolve the scope of the relevant tax exemptions with reference to many items of actual property.

As the circuit court implicitly recognized, allowing this case to proceed first in the Commission presents two advantages. First, Appellants provide no facts about specific, real-world pieces of machinery that DOR allegedly has taxed improperly. As explained more in Argument III.A.2. below, their reliance on a single hypothetical piece of machinery (R. 2:10–11 ¶ 33) means the statutory analysis required here is not ripe for adjudication. Proceedings in the Commission, by contrast, involve challenges to taxes assessed on specific property. That both makes the job of interpreting the relevant tax exemption statutes easier and allows the Commission to issue a more precise decision about their scope.

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[6] Appellants note how *Wisconsin Bell* deferred to administrative proceedings that arose under Wis. Stat. § 227.41 (App. Br. 17–18), which begin in front of DOR before running through the Commission, but it is unclear why that matters here. The point is that courts act within their discretion by deferring to available administrative proceedings, regardless of how those proceedings may arise.

Second, allowing the Commission to apply its expertise in interpreting and applying tax laws would aid a reviewing court's analysis of this issue, if and when an aggrieved party sought judicial review of a Commission decision. *Sawejka*, *Butcher*, and *Wisconsin Bell* all recognize that the Commission's expertise aids any court when reviewing complex tax issues like this one.

B. Dismissal of Appellants' constitutional and rulemaking claims was also proper.

Appellants do not contest that the circuit court properly dismissed their statutory interpretation claim. They do, however, assert that the circuit court wrongly dismissed their rulemaking and constitutional claims, arguing that the Commission has no jurisdiction to consider them and thus that the circuit court had to do so.

But that construes the Commission's power too narrowly. Wisconsin Stat. § 73.01(4) grants the Commission authority to consider "all questions of law" arising under state tax law, a broad power that allows it to consider more than just statutory interpretation claims. And even if the Commission lacks authority over those two claims, it could still hold them in abeyance while resolving the principal statutory interpretation question. That would prevent taxpayers from evading the Commission entirely, as Appellants try to do, simply by adding rulemaking and constitutional claims to ordinary statutory ones.

1. The Commission has jurisdiction to consider constitutional claims.

The Commission also has jurisdiction to consider an argument that DOR's administration of Wis. Stat. § 70.111(27) violates the Wisconsin Constitution's Uniformity Clause. To show otherwise, Appellants point only to the general rule that "administrative agencies have no power to

declare state laws unconstitutional." *Warshafsky v. Journal Co.*, 63 Wis. 2d 130, 147, 216 N.W.2d 197 (1974); (App. Br. 25–26).

Whether or not that general rule applies to the Commission, it is irrelevant here because Appellants expressly do *not* ask for a declaration that Wis. Stat. § 70.111(27) itself violates the Uniformity Clause. They instead request a declaration that "the Department's *application* of Wis. Stat. § 70.111(27) . . . [v]iolates the uniformity clause of the Wisconsin constitution." (App. Br. 1 (emphasis added).) Appellants provide no authority for the proposition that the Commission cannot evaluate whether DOR's administration of Wis. Stat. § 70.111(27)—rather than the statute itself—violates the Uniformity Clause. While it might be true that agency adjudicators cannot invalidate state statutes, they undoubtedly can order their respective agencies to administer statutes in accordance with the Wisconsin Constitution.

Moreover, Wisconsin courts have repeatedly indicated that agencies *can* consider constitutional questions. In *Sawejka*, the supreme court affirmed dismissal in favor of Commission proceedings where the issue presented was "whether the court or the tax appeals commission should make the initial decision as to the validity *or constitutionality* of applying sec. 77.52(2)(a), Stats., to plaintiffs' business." 56 Wis. 2d at 80 (emphasis added). And in *American Family Mutual Insurance Co. v. WDOR*, 222 Wis. 2d 650, 653, 586 N.W.2d 872 (1998), the supreme court affirmed a Commission decision upholding the constitutionality of a tax statute, without hinting that the Commission lacked authority to even consider the argument.

And in *Metz*, the veterinarian "[was] not pursuing a claim that Wis. Stat. § 453.08(2)"—the relevant disciplinary statute—"[was] unconstitutional on its face." 305 Wis. 2d 788, ¶ 21. Rather, "[h]is constitutional claim [was] that the statute

[was] unconstitutionally vague as applied to him." *Id.* Because the agency could "provide the relief requested without invalidating the ordinance, the constitutional basis for the claims [did] not in itself support an exception to the exhaustion rule." *Id.* Specifically, the agency could find the statute inapplicable for policy reasons, constitutional reasons, or simply on the facts—but in any case, it did not need to declare the statute itself unconstitutional. *Id.* ¶ 23. The Commission has all those same choices available to it here.

The Commission has thus repeatedly considered constitutional claims in its tax cases, contrary to Appellants' assertion that it has a "long-standing policy" otherwise. (App. Br. 26.) They cite only two cases from 1974 and 1986, one positing that the Commission cannot invalidate a statute on constitutional grounds (App'x 34) and the other simply declining to address a constitutional issue because it was unnecessary to the decision (App'x 26). But the Commission *has* considered constitutional issues over and over again since then, just as Wis. Stat. § 73.04(1), *Sawejka*, *American Family*, and *Metz* indicate it can. *See, e.g., Hennick v. WDOR*, Wis. Tax. Rptr. (CCH) ¶203-095 (WTAC 1989) (statute did not violate federal or state Equal Protection clause) (Resp. App'x 011–017).[7]

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[7] *See also Republic Airlines v. WDOR*, Wis. Tax. Rptr. (CCH) ¶203-058 (WTAC 1989) (statute did not violate Commerce Clause) (Resp. App'x 059–079); *NCR Corporation v. WDOR*, Wis. Tax. Rptr. (CCH) ¶203-301 (WTAC 1992) (statute violated federal Equal Protection Clause); (Resp. App'x 018–058); *Hansen v. WDOR*, Wis. Tax. Rptr. (CCH) ¶400-068 (WTAC 1994) (statute did not violate Privileges and Immunities or Commerce Clauses) (Resp. App'x 007–010); *Wisconsin Steel Industries, Inc. v. WDOR*, Wis. Tax Rptr. (CCH) ¶400-191 (WTAC 1996) (statute did not violate federal or state Equal Protection clause) (Comm. D. Millis, presiding) (Resp. App'x 088–092); *Superior Hazardous Waste Group, Inc. v. WDOR*, (Wis. Tax. Rptr. (CCH) ¶400-377 (WTAC 1998) (statute did not

The circuit court therefore properly dismissed Appellants' constitutional claim on primary jurisdiction grounds. Just like in *Metz*, the Commission could rule in a manufacturer's favor without declaring Wis. Stat. § 70.111(27) unconstitutional. Instead, it could find that the exemption's plain language applies to the relevant property or it could agree that DOR's administration of the exemption violates the Uniformity Clause. Either way, the Commission's decision would not implicate any limits on an agency's authority to invalidate a state statute.

Two statutes show that the Commission has jurisdiction to hear rulemaking claims like Appellants'.

First, Wis. Stat. § 73.01(4) provides that the Commission may consider "all questions of law . . . arising under" state tax law. *Sawejka* rightly characterized this as a "broad grant of authority" that means what it says: the Commission may "hear and determine all questions of law and fact arising under the tax laws of the state, except as may be otherwise expressly designated." *Sawejka*, 56 Wis. 2d at 75; *see also DOR v. Menasha Corp.*, 2008 WI 88, ¶ 51, 311 Wis. 2d 579, 754 N.W.2d 95 ("The legislature designated the Commission as the final authority on all questions of law and fact arising under the tax statutes.").

Whether DOR administers Wis. Stat. § 70.111(27) in a way that requires administrative rulemaking is a "question of law" arising under the tax code. The rulemaking claim arose here only because of DOR's efforts to administer that tax exemption, and so the "broad" grant of authority to the Commission to consider "all" questions of law easily covers the claim. *See* Wis. Stat. § 73.01(4)(a); *Sawejka*, 56 Wis. 2d at 75.

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violate federal or state Equal Protection clause) (Comm. D. Millis, presiding) (Resp. App'x 080–087); *Arty's, LLC v. WDOR*, 2016 WL 3131450 (WTAC May 19, 2016) (statute not unconstitutional).

Second, Wis. Stat. § 227.40—which explains how challenges to a rule's validity can proceed—expressly contemplates an agency considering such claims. One method, as Wis. Stat. § 227.40(1) explains, is a declaratory judgment action (like Appellants') in circuit court. But another avenue for rule challenges runs through the agencies themselves:

> The validity of a rule . . . may be determined in any of the following judicial proceedings when material therein: . . . Proceedings under . . . ss. 227.52 to 227.58 . . . for review of decisions and orders of administrative agencies *if the validity of the rule or guidance document involved was duly challenged in the proceeding before the agency* in which the order or decision sought to be reviewed was made or entered.

Wis. Stat. § 227.40(2)(e). Because parties can raise rulemaking arguments in a chapter 227 judicial review proceeding only if the rule was "duly challenged . . . before the agency," that necessarily means agencies can consider rulemaking issues when adjudicating claims otherwise within their jurisdiction.

On top of the clear statutory authority to consider rulemaking claims, this Court has recognized an agency's authority to do so: "Whether an agency has applied a rule without promulgating it as required by Wis. Stat. § 227.10(1) is an issue that an administrative agency has the authority to rule on." *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 29, 305 Wis. 2d 788, 741 N.W.2d 244.

In *Metz*, the Veterinary Examining Board commenced administrative disciplinary proceedings against a veterinarian. *Id.* ¶ 3. The veterinarian tried to circumvent them by asserting in circuit court that the relevant disciplinary statute was unconstitutionally vague and that the disciplinary proceedings rested on an unpromulgated rule. *Id.* ¶ 4. This Court concluded that the exhaustion doctrine (a close cousin of the primary jurisdiction doctrine at

issue here[8]) required dismissal of both claims. *Id.* ¶¶ 12, 30. Recognizing that the administrative board had authority to consider the rulemaking claim, the *Metz* court concluded that "all the reasons that favor applying the [exhaustion] doctrine to the as-applied constitutional claim apply with equal force to the rulemaking claim." *Id.* ¶ 29.

This Court also confirmed agency jurisdiction over rulemaking claims in *Heritage Credit Union v. Office of Credit Unions*, 2001 WI App 213, 247 Wis. 2d 589, 634 N.W.2d 593. There, the Office of Credit Unions (a state entity) denied a credit union's application to open four branches in Wisconsin. *Id.* ¶ 1. In subsequent judicial review proceedings, the credit union argued that the denial rested on a policy that amounted to an unpromulgated rule. *Id.* ¶ 2. But because the credit union had not presented its rulemaking argument to the administrative entity, the claim failed due to Wis. Stat. § 227.40(2)(e), which required the credit union to do so in order to raise the claim during judicial review. *Id.* ¶ 27. This Court explained that "[t]he purpose of the requirement is to provide an opportunity for the agency to address a challenge to the validity of a rule before the challenger may seek judicial review of the challenge." *Id.*

Appellants ignore these authorities and instead argue that Wis. Stat. § 73.01(4)(a) does not expressly mention rulemaking as a kind of claim the Commission can consider. (App. Br. 14.) That argument fails for three reasons.

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[8] Exhaustion—like the primary jurisdiction doctrine—serves two important purposes. First, it "allow[s] the administrative agency to perform the functions the legislature has delegated to it and to employ its special expertise and fact-finding facility." *Id.* ¶ 13. And second, it "[p]revent[s] premature judicial intervention also allows the agency to correct its own error, thus promoting judicial efficiency; and, in the event judicial review is necessary, the complete administrative process may provide a greater clarification of the issues." *Id.*

First, it fails to grapple with the "broad" language of that provision. *Sawejka*, 56 Wis. 2d at 75. Appellants do not explain why "all questions of law" arising under the tax code do not include arguments that DOR must undertake rulemaking in order to administer its reading of a tax exemption like Wis. Stat. § 70.111(27). "All" means "all," not "some."

Second, the argument ignores Wis. Stat. § 227.40(2)(e), *Metz*, and *Heritage Credit Union*. In *Metz*, this Court recognized that the Veterinary Examining Board could consider a rulemaking argument, even though nothing in in its disciplinary statute[9] mentioned its authority to do so. Similarly, in *Heritage Credit Union*, nothing in Wis. Stat. § 186.015(5) (1999–2000) expressly said the Credit Union Review Board could consider rulemaking arguments, yet this Court held that such arguments *had* to be made to the Board in order to be raised in a judicial review proceeding under Wis. Stat. § 227.40(2)(e).

Third, it would make little sense to prevent the Commission from considering rulemaking arguments like Appellants'. Their rulemaking claim, as explained below, turns entirely on whether DOR administers Wis. Stat. § 70.111(27) according to its plain language—a statutory interpretation question that resides squarely within the Commission's competence and jurisdiction. Taxpayers cannot evade the Commission's authority over Wisconsin's tax code simply by tacking on unpromulgated rulemaking claims to statutory interpretation claims, as Appellants have done here. That would undermine the Legislature's clear intention to funnel tax disputes through the Commission.

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[9] That provision resided at Wis. Stat. § 453.07 (2007–08) when *Metz* was decided; today, it resides at Wis. Stat. § 89.07.

Appellants' only other argument points to Wis. Stat. § 227.40(4)(a), which says:

> [i]n any proceeding pursuant to this section for judicial review of a rule or guidance document, the court shall declare the rule or guidance document invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated or adopted without compliance with statutory rule-making or adoption procedures.

(*See* App. Br. 15.) They assert that because this provision refers to "the court," only a circuit court—not the Commission—can consider an unpromulgated rule claim. But that provision is worded in terms of a "court" because it addresses "judicial review" of a rule, which occurs when a "court" reviews an agency's decision. And one way such a "judicial review" proceeding can arise is through Wis. Stat. § 227.40(2)(e), which expressly *requires* "the validity of the rule or guidance document involved [to be] duly challenged in the proceeding before the agency." Under this scheme, an agency considers the rulemaking issue first, and then, during the "judicial review" proceeding, a "court" can declare the rule invalid.

Because the Commission could consider rulemaking claims like Appellants', the circuit court had discretion to dismiss their rulemaking claim.

2. Even if the Commission lacks jurisdiction to consider either claim, dismissal was still proper.

The circuit court still properly applied the primary jurisdiction doctrine, even if the Commission lacks jurisdiction to consider Appellants' rulemaking or constitutional claims. In that case, an aggrieved taxpayer should still bring its other claims to the Commission first and reserve any rulemaking or constitutional claims for the circuit

court to decide on judicial review. *See Hogan v. Musolf*, 163 Wis. 2d 1, 22, 471 N.W.2d 216 (1991).

In *Hogan*, a taxpayer wrongly argued (just like Appellants do here) that it could dodge the Commission and proceed directly to circuit court just because it pleaded constitutional claims. *Id.* at 223–24. The supreme court rejected that view, whether or not the Commission had authority to consider constitutional claims. That is because "as a general matter, any constitutional claims may . . . be reserved for determination by the circuit court." *Id.* at 224. The court reasoned that "agencies would become ineffectual if they lost their authority to review a case every time a constitutional claim was asserted." *Id.* That reasoning squarely defeats Appellants' effort to dodge the Commission using its Uniformity Clause claim.

And although *Hogan* did not address a rulemaking claim, its reasoning applies with equal force to those claims, too. The Commission similarly "would become ineffectual" if taxpayers could evade its jurisdiction just by asserting unpromulgated rulemaking claims. Such claims would be trivial to assert in nearly every case challenging DOR's interpretation of a statute—taxpayers could simply assert that DOR adopted the challenged interpretation without using rulemaking procedures, just as Appellants have done here. If that sufficed to evade the Commission and proceed directly to circuit court, the Commission could lose its ability to review many tax cases based on little more than a pleading artifice.

So, even if the Commission could not consider a rulemaking claim like Appellants', the same procedure as in *Hogan* would be proper here—reservation of the rulemaking claim for consideration by the circuit court on judicial review. That would preserve the Commission's ability to address claims within its core jurisdiction, such as the statutory interpretation issue that underlies Appellants' entire case.

* * *

In sum, the circuit court properly dismissed this case on primary jurisdiction grounds. The Commission's entire purpose is to consider tax cases like this one, and Appellants cannot evade its jurisdiction simply by pleading constitutional and rulemaking claims. The Commission should be allowed to do the job that the Legislature created it to perform by resolving the scope of Wis. Stat. § 70.111(27).

II. If this Court concludes that the circuit court should have assumed jurisdiction, it should remand for further proceedings.

Dismissing this case based on the primary jurisdiction doctrine was well within the circuit court's discretion. But even if this Court concludes otherwise, it should decline Appellants' invitation to also decide the merits of their declaratory judgment claims. (App. Br. 18–19, 28.) Instead, a remand would be appropriate for the circuit court to resolve the merits first.

The circuit court dismissed this case on one basis only: the primary jurisdiction doctrine. (R. 33.) It did not reach the merits of Appellants' declaratory judgment claims. Given the general rule that "an appellate court should decide cases on the narrowest possible grounds," *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15, the proper course if the circuit court wrongly declined jurisdiction would be to reverse the judgment on those grounds alone and remand for further proceedings. Indeed, that is the exact course appellate courts have taken many times after deciding that the circuit court erroneously

dismissed a case on jurisdictional grounds.[10]

While an appellate court may, in its discretion, resolve an issue not presented to a circuit court, *see, e.g.*, *Estate of Miller v. Storey*, 2017 WI 99, ¶ 67, 378 Wis. 2d 358, 903 N.W.2d 759, or affirm a judgment on grounds different from the circuit court's, *see, e.g.*, *Vilas Cty. v. Bowler*, 2019 WI App 43, ¶ 30, 388 Wis. 2d 395, 933 N.W.2d 120, that is very different from what Appellants request. They do not want the Court to consider a new *issue*, they ask this Court to resolve entire *claims* that the circuit court has not yet considered. Moreover, they do not ask for *affirmance* on independent grounds; rather, they request *reversal* on grounds the lower court never addressed. Appellants offer no authority or explanation for why that would be appropriate here.

Wisconsin's three-tier judiciary is designed to let circuit courts decide claims first. Only then do appellate courts review circuit court judgments to ensure they did not err. Indeed, it makes little sense to talk about appellate "review" of a claim the circuit court never decided. That is likely why the supreme court in *Sundseth v. Roadmaster Body Corp.*, 74 Wis. 2d 61, 68, 245 N.W.2d 919 (1976), explained that an "issue [was] not properly before this court because it was not decided below."

Even if this Court did have discretion to act as a court of first resort on the merits, it should decline to do so.

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[10] *See, e.g.*, *Jones v. Jones*, 54 Wis. 2d 41, 46, 194 N.W.2d 627 (1972); *Shopper Advertiser, Inc. v. DOR*, 117 Wis. 2d 223, 236, 344 N.W.2d 115 (1984); *Haas v. City of Oconomowoc*, 2017 WI App 10, ¶ 29, 373 Wis. 2d 737, 892 N.W.2d 324; *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Directors*, 220 Wis. 2d 93, 101, 582 N.W.2d 122 (Ct. App. 1998), *aff'd and remanded*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

Although statutory interpretation cases like this one are reviewed de novo, the supreme court recognizes that this review "benefit[s] from the analyses" of the lower courts. *In re Commitment of Jones*, 2018 WI 44, ¶ 27, 381 Wis. 2d 284, 911 N.W.2d 97. It would invert the ordinary appellate process to proceed to the merits for the first time in this Court, without the benefit of any decision in the circuit court to review.

Appellants themselves do not even make a full-throated argument on the merits of their rulemaking and constitutional claims. These issues are not even listed in their Statement of Issues (App. Br. 3–4), and they receive fewer than ten pages of briefing, most of which entail general rules of law. (App. Br. 19–25, 28–31.) Only one page analyzes in any depth the statutory interpretation issue underlying their rulemaking claim (App. Br. 23–24), and only one page analyzes the Uniformity Clause issue (App. Br. 30–31).

These borderline-undeveloped arguments tacitly recognize that it would be premature to resolve the merits now. *Cf. Techworks, LLC v. Wille*, 2009 WI App 101, ¶ 27, 318 Wis. 2d 488, 770 N.W.2d 727 (one-page argument on merits issue deemed undeveloped). That is likely why Appellants' Conclusion only asks this Court to "reverse the decision of the Circuit Court and remand for the determinations mandated by Wis. Stat. § 2[2]7.40." (App. Br. 32.) If this Court were to reverse the circuit court's decision, that is exactly the right result—a remand, not a decision on the merits.

III. If this Court proceeds to the merits, it should conclude that DOR prevails on Appellants' declaratory judgment claims.

Assuming this Court concludes that the circuit court should have assumed jurisdiction and also declines to remand

for consideration of the merits, DOR should still prevail on Appellants' rulemaking and Uniformity Clause claims.

A. DOR did not need to engage in rulemaking in order to apply Wis. Stat. § 70.111(27)'s plain terms.

Appellants first contend that DOR's administration of Wis. Stat. § 70.111(27) amounts to an unpromulgated rule. (App. Br. 18–25.) This claim fails for two main reasons.

First, the claim ultimately turns on whether DOR administers the statute according to its plain terms. If so, no rulemaking was required, and vice versa. But that means there is a threshold ripeness problem, because Appellants supply nothing more than hypothetical pieces of machinery—on appeal, they provide no examples until mentioning a copy machine on the last page of their brief—to help interpret the statute. Real pieces of manufacturing property are needed to resolve the statute's scope, and this case lacks them.

Second, setting aside ripeness (to the extent that is possible), Appellants' rulemaking claim fails because DOR administers the statute in accordance with its plain language.

1. When an agency applies a statute's plain terms, that does not require rulemaking.

Agencies need not always—or even necessarily often—engage in rulemaking when administering statutes. To know when they must, we first look to two relevant provisions in Wis. Stat. ch. 227. First, Wisconsin Stat. § 227.01(13) defines a "rule" as "a regulation, standard, statement of policy, or general order of general application which has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Second, Wisconsin Stat. § 227.10(1) provides that an

agency must "promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." If an agency implements a rule without complying with statutory rulemaking procedures, the rule is invalid. *See* Wis. Stat. § 227.40(4)(a).

When an agency applies a statute's plain language, that is not an "interpretation" that requires rulemaking under chapter 227, as the supreme court held in *Schoolway Transportation Co. v. Division of Motor Vehicles, Department of Transportation*, 72 Wis. 2d 223, 235, 240 N.W.2d 403 (1976). In *Schoolway*, an agency revised its administration of a statute to "bring its practices into conformity with the plain meaning of the statute." 72 Wis. 2d at 236. Even though regulated parties were affected by the agency's revised application, that fact "in no way modifie[d] the duty of the [agency] to administer the statute according to its plain terms." *Id.* Because the agency was merely administering the statute's plain terms, the court held that "there [was] no requirement that the department comply with the filing procedures mandated in connection with promulgation of administrative rules." *Id.* Put simply, the agency did not need to conduct rulemaking because it applied the statute's plain language; no "interpretation" was necessary.

Schoolway contrasted this kind of plain language application—which does not require rulemaking—with agency action that fills in statutory gaps—which does. The agency in *Schoolway* separately revised another policy that, while not expressly permitted by the statute's plain language, was permitted by reference to broader legislative purpose. *Id.* at 230–31. But because the statute's plain language did not expressly permit the revised policy, and because the agency had previously applied precisely the opposite policy, the new policy was an "interpretation" that had to go through administrative rulemaking. *Id.* at 237–38. Under *Schoolway*,

only this kind of gap-filling interpretation requires administrative rulemaking.

2. Because Appellants' rulemaking claim rests on hypotheticals, it is not ripe.

But before considering the merits of Appellants' rulemaking claim, this Court must ensure that it satisfies four threshold requirements:

> (1) There must exist a justiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it. (2) The controversy must be between persons whose interests are adverse. (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protect[a]ble interest. (4) The issue involved in the controversy must be ripe for judicial determination.

In re Estate of Laubenheimer, 2013 WI 76, ¶ 67, 350 Wis. 2d 182, 833 N.W.2d 735.

The missing element here is the fourth— ripeness— which "requires that the facts be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991).

Examining *Miller Brands*—a case strikingly similar to this one—illuminates why Appellants rulemaking claim rests on an abstract disagreement rather than a ripe dispute. At the time, Miller Brewing Company was engaging in so-called "trade spending," which can includes giving product samples to customers at retail stores to encourage sales. *Id.* at 690. When DOR got wind of this activity, it sent Miller a letter opining that this trade spending might violate Wisconsin law regulating financial entanglements between brewers,

wholesalers, and retailers.[11] *Id.* at 688–89. Before DOR could investigate further, Miller filed a declaratory judgment action asking the circuit court to hold that its trade spending complied with Wisconsin law. *Id.* at 689. But when the parties moved for summary judgment, no specific facts about Miller's trade spending existed in the record. Rather, Miller supplied only an affidavit with a generic definition of "trade spending" in the beer industry. *Id.* at 690–91.

The supreme court concluded that Miller's declaratory judgment claim was not ripe and should have been dismissed. It emphasized that "the 'facts' provided the court"—that is, the generic trade spending definition Miller had offered—"were merely hypothetical." *Id.* at 695. It contrasted Miller's hypothetical facts with *Tooley v. O'Connell*, 77 Wis. 2d 422, 253 N.W.2d 335 (1977), a ripe property tax dispute where the tax had "already been levied and collected" and thus "no future events were necessary to enlarge upon the circumstances of the controversy." *Miller Brands*, 162 Wis. 2d at 695. Because Miller's declaratory judgment claim did not rest on specific facts, it effectively "ask[ed] . . . for an advisory opinion" whereby the court would "assume various hypothetical states of fact and determine [Miller's] liability prospectively under each of these states of fact." *Id.* at 696. This meant that the "the facts of [the] case [were] too shifting and nebulous for the invocation of the remedy of declaratory judgment." *Id.* at 697 (citation omitted).

Appellants' rulemaking claim is not ripe for the same reasons as in *Miller Brands*. To be sure, this claim is nominally different, in that it is not a pure statutory interpretation claim like in *Miller Brands*. But *Schoolway* nests within its rulemaking test an analysis of plain statutory language—again, if the agency applies plain statutory text,

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[11] *See generally* Wis. Stat. § 125.33(1)(a) (the "tied-house" law).

no rulemaking is required. So, resolving Appellants' rulemaking claim requires a statutory interpretation analysis that must be ripe under the *Miller Brands* standard.

Here, just as in *Miller Brands*, the statutory interpretation dispute rests on a letter from DOR opining about how a statute *might* apply—there, that the tied-house law might prohibit Miller's trade spending; here, that DOR has a general view about the kinds of machinery that Wis. Stat. § 70.111(27) exempts. And unlike *Tooley*, which addressed a ripe property tax dispute, DOR here has not imposed the relevant tax on Appellants (nor could it, since Appellants are interest groups, not manufacturers who own taxable manufacturing property).

And, also just as in *Miller Brands*, this statutory dispute rests on hypothetical, not actual, facts. There, Miller's generic definition of "trade spending" rather than its actual trade practices did not suffice to support a ripe dispute. Here, the record contains no evidence about any actual pieces of manufacturing property that DOR has taxed. Instead, Appellants' complaint offers one hypothetical piece of property upon which to resolve the scope of Wis. Stat. § 70.111(27)'s exemption: a "forklift used by a manufacturer for inventory management and warehousing." (R. 2:10–11 ¶ 33.) Similarly, their appeal brief mentions only a copy machine that a manufacturer might own. (App. Br. 31.) These vague hypotheticals cannot support a ripe claim.

These hypotheticals contrast sharply with the 55 similar cases pending before the Commission. Each one involves a manufacturer objecting to the taxability of specific manufacturing property on which DOR has assessed taxes. *See* Wis. Stat. § 70.995(8)(a), (c). This administrative process ensures that the Commission considers concrete facts about specific pieces of manufacturing property, including details about the nature of the property and its use. All such details are missing here.

Because a dispute over Wis. Stat. § 70.111(27)'s plain meaning is not ripe here for the same reasons as in *Miller Brands*, Appellants' rulemaking claim cannot proceed.

3. DOR administers Wis. Stat. § 70.111(27) in accordance with the exemption's plain text.

Setting aside how Appellants' rulemaking claim is not ripe, they frame the embedded statutory interpretation issue as whether DOR has added two "requirements" that do not exist in Wis. Stat. § 70.111(27)'s plain text. (App. Br. 24.) But that obscures the real nature of their claim, which rests on a sweeping argument that the two relevant exemptions interact to exempt *all* machinery in Wisconsin from taxation.

Their position misconstrues the two exemptions' plain text, which leave taxable machinery that is used in manufacturing but not "exclusively and directly in the production process." DOR properly taxes that category of machinery, and it permissibly administers that approach using certain tax forms. Because DOR's approach rests on plain statutory language, *Schoolway* teaches that no rulemaking was required.

a. The scope of the dispute.

Before examining the statutory language, it is critical to first understand Appellants' exact argument (not an easy task, given the short discussion in their opening brief). In their complaint, they assert that Wis. Stat. § 70.111(27) does not "does not apply to 'machinery, tools and patterns' that are 'used in manufacturing'" only because "such items used in manufacturing are already exempt under Wis. Stat. § 70.11(27). (R. 2:10–11 ¶ 33.) In other words, Appellants say that the only machinery Wis. Stat. § 70.111(27) does not exempt—that which is "used in manufacturing"—is the same machinery that Wis. Stat. § 70.11(27) already exempts.

Accepting their position would necessarily mean that *all* machinery in Wisconsin is now exempt. Because Wis. Stat. § 70.111(27) exempts all machinery *except* that which is "used in manufacturing," and because, in Appellants' view, Wis. Stat. § 70.11(27) covers all property that Wis. Stat. § 70.111(27) leaves out, the two exemptions would combine to exempt *all* machinery.

DOR disagrees. In its view, some machinery in Wisconsin remains taxable. Specifically, machinery remains taxable when it is "used in manufacturing" under Wis. Stat. § 70.111(27) but not used "exclusively and directly in the production process" under Wis. Stat. § 70.11(27). The exact property falling within that category must be resolved by case-by-case adjudication of the kind currently proceeding in the Commission. But this Court could conceivably affirm DOR's plain language view that this taxable category of machinery still exists.

b. The two exemptions leave some machinery in Wisconsin taxable, as their plain language shows.

Only three statutory interpretation principles are necessary to conclude that some machinery in Wisconsin remains taxable. First, "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, [a court] ordinarily stops the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Second, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes." *Id.* ¶ 46. And third, "[t]ax exemption statutes are to be strictly construed against granting an exemption." *Covenant Healthcare Sys., Inc. v. City of Wauwatosa*, 2011 WI 80, ¶ 22, 336 Wis. 2d 522, 800 N.W.2d 906.

Appellants' position errs because the plain language of the two exemptions differs in a critical way. The pre-existing exemption—Wis. Stat. § 70.11(27)—applies only to "[m]achinery . . . that [is] *used exclusively and directly in the production process in manufacturing tangible personal property*." By contrast, the new exemption—Wis. Stat. § 70.111(27)—applies to "machinery tools, and patterns not including such items *used in manufacturing*." By arguing that the new exemption only leaves out the exact same property the existing exemption already covered, Appellants wrongly assign the same meaning to the two italicized phrases.

Because those phrases use different language, they must mean different things. That is especially true because the narrower phrase in section 70.11(27) uses expressly defined terms that are absent from the broader phrase in section 70.111(27). In the former, to use "directly" means "to cause a physical or chemical change in raw materials or to cause a movement of raw materials, work in process or finished products," and to use "exclusively" means "to the exclusion of all other uses except for other use not exceeding 5 percent of total use." Wis. Stat. § 70.11(27)(a)7.–8. And the "production process" means "the manufacturing activities beginning with conveyance of raw materials from plant inventory to a work point of the same plant and ending with conveyance of the finished product to the place of first storage on the plant premises." Wis. Stat. § 70.11(27)(a)5.[12]

By contrast, section 70.111(27) uses the simple phrase "used in manufacturing." It does not mention "exclusive" or "direct" use, nor does it mention the "production process." That phrase therefore applies to a broader range of activity than does section 70.11(27)—"manufacturing" generally, rather than the "production process" specifically. And a more

[12] Even this lengthy quotation leaves out over a hundred more words this subsection uses to define the "production process."

forgiving kind of "use" qualifies—"use" of any kind, not just "exclusive" or "direct" use.

The only possible conclusion from this comparison is that some machinery can be "used in manufacturing" and yet not be "used exclusively and directly in the production process." Appellants are thus wrong that the two phrases refer to the same property and thus result in *all* machinery in Wisconsin being exempt from taxation.

c. Denying the exemption to some machinery reported by manufacturers comports with the exemptions' plain language.

Presumably recognizing that the plain language of these two statutes does not exempt *all* machinery, Appellants try to shift attention to the forms DOR uses to administer the exemptions. (App. Br. 24.) They say that denying the new Wis. Stat. § 70.111(27) exemption to machinery listed on Form M-P—again, the form businesses use to report their manufacturing property to DOR—adds an unstated "requirement" to the statute based on the property's owner rather than its use. (App. Br. 24.)[13]

The problem with Appellants' argument is that all machinery listed on Form M-P is "used in manufacturing" and thus is ineligible for the Wis. Stat. § 70.111(27) exemption. And because that "requirement" simply reflects how DOR

[13] Appellants also say DOR has imposed a second requirement that property must not be "used by" or "owned by" a manufacturer. (App. Br. 24.) But none of the evidence they cite use those words. Rather, DOR has said that the "new exemption does not apply to manufacturers" (App'x 3), that it "does not apply to manufacturing property" (App'x 4), and that it "does not apply to DOR assessed manufacturing personal property" (App'x 5). Those are all slightly different ways of saying the same thing—that property reported on Form M-P is not eligible for the Wis. Stat. § 70.111(27) exemption.

administers the statute's plain text, no rulemaking was required.

Recall that DOR must "prescribe a standard manufacturing property report form that shall be submitted annually . . . by all manufacturers whose property is assessed under this section." *See* Wis. Stat. § 70.995(12)(a). DOR fulfills that requirement through the Form M-P, which explains that taxpayers should use it for "only personal property classified as manufacturing by DOR." (R. 24:4.) Put simply, Form M-P only contains "manufacturing property," as defined by Wis. Stat. § 70.995.

And, critically, all "manufacturing property" necessarily is "used in manufacturing." That is because Wis. Stat. § 70.995(1)(a) defines "manufacturing property" as "all personal property owned or used by any person engaged in this state in [manufacturing activity] *and used in the activity*, including . . . machinery . . . *when located at the site of the activity*." Wis. Stat. § 70.995(1)(a). That is, anything classified as "manufacturing property" that appears on a Form M-P is "used in the [manufacturing] activity"—a phrase that expressly includes machinery "located at the site of the activity." Such property is therefore "used in manufacturing" under Wis. Stat. § 70.111(27) and falls outside that exemption.

To illustrate, consider Appellants' hypothetical inventory management forklifts, the only machinery mentioned in their complaint. (R. 2:10–11 ¶ 33.) A manufacturer would report those forklifts on Form M-P as "manufacturing property," even if they were not used directly in the manufacturing production process. That is because machinery "used in the [manufacturing] activity" under Wis. Stat. § 70.995(1)(a) includes "machinery . . . when located at the site of the [manufacturing] activity," language that easily covers the hypothetical forklifts. And because those forklifts are "used in the [manufacturing] activity" under Wis. Stat.

§ 70.995(1)(a), the only reasonable conclusion is that they are also "used in manufacturing" under Wis. Stat. § 70.111(27) and thus fall outside that exemption.[14]

So, by denying the new exemption to machinery reported on Form M-P, DOR hinges applies the exemption based on use (not simply ownership), just as the plain language of Wis. Stat. § 70.111(27) requires. Under *Schoolway*, that method of administering the exemption's plain language did not require rulemaking.

B. No Uniformity Clause problem exists here because Wis. Stat. § 70.111(27) wholly exempts certain machinery from taxation.

Appellants also contend that DOR's administration of Wis. Stat. § 70.111(27) violates the Wisconsin Constitution's Uniformity Clause, which provides (in relevant part) that "[t]he rule of taxation shall be uniform." Wis. Const. art. 8, § 1. In Appellants' view, declining to exempt machinery that is used in manufacturing improperly discriminates against manufacturers, in that the same machine might be taxable when used in one way but not taxable when used in another.[15] (App. Br. 30–31.)

Appellants' argument fails because the Uniformity Clause allows absolute exemptions of certain property from taxation, which is exactly how DOR administers Wis. Stat. § 70.111(27). "While there can be no classification of property

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[14] This same analysis applies to the hypothetical copy machine they reference in their opening appellate brief. (App. Br. 31.)

[15] Appellants frame the argument slightly differently, saying DOR is improperly discriminating against property "owned by" manufacturers. (App. Br. 30–31.) As explained above, that misunderstands how Form M-P, which DOR uses to administer the exemption, necessarily only contains machinery "used" in manufacturing.

for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness." *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967). The Uniformity Clause directs only that when property is taxed, "[t]he valuation must be uniform, the rate must be uniform." *Id.* at 419. In other words, "[t]here cannot be any medium ground between absolute exemption and uniform taxation." *Id.* (citation omitted).

The absolute exemption here complies with these basic Uniformity Clause principles. Under Wis. Stat. § 70.111(27), machinery is "wholly exempt" when not used in manufacturing and vice versa. The Uniformity Clause allows that kind of categorical treatment. And although Appellants wrongly say DOR administers the exemption based on machinery's ownership, that dispute does not matter here. Either way, Wis. Stat. § 70.111(27) operates as an absolute exemption, which the Uniformity Clause allows.

The supreme court illustrated in *Northwest Airlines* how the Uniformity Clause allows differential treatment through absolute exemptions. There, a statute exempted air carriers that operated a hub facility in Wisconsin from paying *any* property taxes. *Northwest Airlines v. DOR,* 2006 WI 88, ¶¶ 3–5, 293 Wis. 2d. 202, 717 N.W.2d 280. Of course, that meant that the same property would be exempt if owned by an airline *with* a hub facility but taxable if owned by an airline *without* a hub facility. An airline that could not use the exemption sued, arguing—much like Appellants do here—that the statute treated them differently from hub operators and thereby violated the Uniformity Clause.

Even though the exemption clearly discriminated among airline carriers, the supreme court found no Uniformity Clause problem. Citing *Gottlieb*, the court explained that "[t]he Uniformity Clause grants the legislature

the right to select some property for taxation and to totally omit or exempt other property" and that "[t]he only limitation upon the legislature's authority to exempt property is that the distinction between taxed and wholly exempt property must bear 'a reasonable relation to a legitimate purpose of government[.]'" *Id.* ¶ 66 (citation omitted). Because granting the exemption to some airline carriers but not others served the "legitimate governmental purpose of ensuring the vitality of the Wisconsin economy," the Uniformity Clause allowed the airline carriers to be treated differently. *Id.*

This case is not meaningfully different from *Northwest Airlines*. Even if DOR did apply Wis. Stat. § 70.111(27) based on machinery's ownership—and it does not—*Northwest Airlines* shows that the Uniformity Clause allows that treatment. There, the same set of airline property was either taxable or not, based on who owned it—exempt if owned by an air carrier with a Wisconsin hub and taxable if not. Just as the Uniformity Clause allowed that treatment, it allows machinery to be taxable when owned by manufacturers and exempt when not.

Moreover, many tax exemptions expressly on ownership, all of which would be unconstitutional under Appellants' idiosyncratic and unsupported view of the Uniformity Clause. *See, e.g.*, Wis. Stat. § 70.111(6) (exempting "[f]eed and feed supplements owned by the operator or owner of a farm"); Wis. Stat. § 70.111(11) (exempting "[n]atural cheese owned by the Wisconsin primary manufacturer"); Wis. Stat. § 70.111(24) (exempting "[p]rojection equipment, sound systems and projection screens that are owned and used by a motion picture theater"); Wis. Stat. § 70.111(25) (exempting "[d]igital broadcasting equipment owned and used by a radio station, television station, or video service network"). Appellants do not carry their heavy burden to explain why this Court should cast into doubt the validity of all those exemption statutes. *See Northwest Airlines*, 293 Wis. 2d 202,

¶ 26 (challengers must "must prove . . . beyond a reasonable doubt" that a tax exemption is unconstitutional).

In any event, DOR administers Wis. Stat. § 70.111(27) based on how machinery is used, not simply who owns it. When an item of machinery, tools, or patterns is "used in manufacturing," it is *not* exempt (unless it is used exclusively and directly in the production process); when a similar item is not "used in manufacturing," it *is* exempt. Appellants provide no authority that prevents the legislature from exempting an item of property based on its use. Again, a long list of exemptions turns on how an item of property is used; Plaintiffs' baseless position would invalidate all of them. *See, e.g.*, Wis. Stat. § 70.111(9) (exempting "[t]he tools of a mechanic if those tools are kept and used in the mechanic's trade"); Wis. Stat. § 70.111(20) (exempting "[a]ll equipment used to cut trees, to transport trees in logging areas or to clear land of trees for the commercial use of forest products"); Wis. Stat. § 70.111(21) (exempting "[a]ny temporary structure in the hands of a grower of ginseng used or designed to be used to provide shade for ginseng plants").

In fact, Plaintiffs' theory would invalidate the pre-existing exemption that manufacturers have long enjoyed for machinery "used exclusively and directly in the production process in manufacturing tangible personal property." Wis. Stat. § 70.11(27)(b). That exemption treats similar items differently based on who owns them; a machine owned and used by a manufacturer could be exempted, but the same machine owned and used by anyone else could not. This scheme resulted in the same kind of differential treatment about which Plaintiffs now complain, only in reverse—that is, in favor of manufacturers. Of course, the Uniformity Clause is not a one-way ratchet. It does not only permit exemptions that advantage manufacturers.

Rather, the Uniformity Clause permits categorical exemptions that reflect the legislature's "reasonable" tax

policy choice. *Gottlieb*, 33 Wis. 2d at 424. Every tax exemption strikes a balance between encouraging certain activities and maintaining adequate tax revenue; this one is no different. Exempting *all* machinery in Wisconsin would cost significant tax revenue and thus require tax hikes or spending cuts elsewhere. The Legislature therefore reasonably decided to leave some machinery used in manufacturing taxable. Plaintiffs offer no evidence whatsoever to demonstrate the unreasonableness of this policy decision.

CONCLUSION

This circuit court's order dismissing this case on primary jurisdiction grounds should be affirmed. If that order is reversed, the case should be remanded for further consideration of Appellants' declaratory judgment claims. If this Court proceeds to the merits, it should confirm that DOR administers Wis. Stat. § 70.111(27) in accordance with its plain terms such that no rulemaking was required and does not violate the Uniformity Clause.

Dated this 10th day of July, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 11,450 words.

Dated this 10th day of July, 2020.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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