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STATE OF WISCONSIN  
SUPREME COURT  
Appeal No. 2020AP485

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

Plaintiffs-Appellants-Petitioners,

Ozaukee County Circuit Court  
Case No. 19-CV-226

v.

WISCONSIN DEPARTMENT  
OF REVENUE,

Defendant-Respondent.

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**APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF  
OZAUKEE COUNTY CASE NO. 2019CV000226 THE  
HONORABLE SANDY A. WILLIAMS PRESIDING**

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**PETITION FOR REVIEW**

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## INTRODUCTION

Ultimately, the issue in this case—more formally stated below—boils down to a single question: Does the Tax Appeals Commission have jurisdiction to entertain a declaratory judgment action that seeks to determine whether the Department of Revenue complied with the rulemaking requirements of Chapter 227? Neither Wis. Stat.

§ 73.01(4)(a)—enumerating the jurisdiction of the Tax Appeals Commission—nor Wis. Stat. § 227.40—governing rulemaking challenges—extends the jurisdiction of the Tax Appeals Commission to declaratory judgment actions against the Department of Revenue for rulemaking or the lack thereof.

Nevertheless, the Court of Appeals in a published opinion held that the Tax Appeals Commission has concurrent jurisdiction—along with the circuit court—to hear Wis. Stat. § 227.40 declaratory judgment actions challenging rulemaking or the lack thereof. Because the Court of Appeals concluded that the Tax Appeals Commission had concurrent jurisdiction to consider rulemaking claims, it affirmed the Circuit Court's decision to dismiss the complaint based on the doctrine of primary jurisdiction. It is from this single holding

that Plaintiffs-Appellants-Petitioners Wisconsin Property Tax Consultants, Inc. (“WPTC”) and Wisconsin Manufacturers and Commerce, Inc. (“WMC”) petition this Court.

### **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

***Issue:*** In concluding that the Tax Appeals Commission had jurisdiction to entertain WPTC and WMC’s declaratory judgment action asserting the Department of Revenue failed to comply with the rule promulgation requirements of Chapter 227 when it denied the exemption enacted in Wis. Stat. § 70.111(27) to all manufacturers, did the Circuit Court improperly rely on the primary jurisdiction doctrine to dismiss WTPC and WMC’s declaratory judgment action under Wis. Stat. § 227.40?

***Circuit Court Answer:*** The Circuit Court did not explicitly address this argument.

***Court of Appeals Answer:*** The Circuit Court properly dismissed WTPC and WMC’s Wis. Stat. § 227.40 declaratory judgment action claim because the Tax Appeals Commission has concurrent jurisdiction to determine whether the Department of Revenue has complied with the rule promulgation requirements of Chapter 227.

***Standard of Review:*** Whether a circuit court has properly applied primary jurisdiction is a question of law which this Court has reviewed de novo. *Butcher v. Ameritech Corp.*, 2007 WI App. 5, ¶37, 298 Wis. 2d 468, 727 N.W.2d 546; *Employers Insurance Co., Inc. v. Tesmer*, 161 Wis. 2d 733, 741, 469 N.W.2d 203 (Ct. App. 1991).

### **CONCISE STATEMENT OF CRITERIA FOR REVIEW**

This petition satisfies the following criteria for review.

*A. A Decision by the Supreme Court Will Help Develop, Clarify and Harmonize the Law.*

A decision by the Supreme Court will further each of the objectives under Wis. Stat. § 809.62(1r).

1. The Case Presents a New Doctrine.

The Court of Appeals' holding that an administrative agency, *i.e.*, the Tax Appeals Commission, is the sole venue in which Wisconsin citizens can challenge the Department of Revenue's rulemaking -- or lack thereof -- is a novel concept and does not apply well-settled principles to the factual situation.



2. The Question Presented is Novel, the Resolution of Which Will Have Statewide Impact

As indicated above, the question presented is novel. The Court of Appeals' holding will have statewide impact because it will permit interested persons, whether represented by an attorney or not,<sup>1</sup> to make any number of rulemaking challenges under Chapter 227 to the Department of Revenue by petitioning the Tax Appeals Commission. By extension, the Court of Appeals' holding may allow rulemaking challenges to be brought before other administrative bodies. Furthermore, the holding will act to bar interested parties from bringing challenges to unlawful agency rules. As such, the Court of Appeals' holding will certainly have statewide impact.

3. The Question Presented is Likely to Recur Unless Resolved by the Supreme Court

As indicated above, if the Court of Appeals' holding stands, there will continue to be issues as to whether the

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<sup>1</sup> Unlike practice before circuit court, petitioners appearing before the Tax Appeals Commission need not be attorneys. Aside from appearing pro se, petitioners routinely appear by accountants, tax consultants and their employees.

pleading requirements of Wis. Stat. § 227.40 (*e.g.*, the requirement to serve the petition on the Joint Committee for the Review of Administrative Rules under Wis. Stat. § 227.40(5)) applies to the Tax Appeals Commission, as well as the effect of a declaratory judgment on parties to a dispute. On the latter point, if the Commission—or another administrative agency—declares a rule or guidance invalid, does the Commission have the authority to enforce that order, or does the petitioner need to ask the circuit court to compel compliance? These are just some of the issues that need to be resolved if the Court of Appeals' holding stands.

*B. The Court Of Appeals Holding Conflicts With Wisconsin Statutes and Controlling Decisions of the Courts.*

As explained in greater detail below, the Court of Appeals' holding is at odds with Wis. Stat. §§ 73.01(4)(a) and 227.40(1), as neither statute extends the Tax Appeals Commission jurisdiction to declaratory judgment actions seeking redress for violations of rulemaking mandates found in Chapter 227. (*See*, Sections I.C and I.E., *infra*.) Moreover, the Court of Appeals' holding is at odds with prior decisions of the Court of Appeals that refused to extend the jurisdiction

of the Commission to class action tax suits (*Dep't of Revenue v. Hogan*, 198 Wis. 2d 792, 543 N.W.2d 825 (Ct. App. 1995)) and intergovernmental tax assessment suits (*Village of Silver Lake v. Dep't of Revenue*, 87 Wis. 2d 463, 275 N.W.2d 119 (Ct. App. 1978)). (See, Section I.C., *infra*.)

### STATEMENT OF THE CASE

Plaintiff-Appellant-Petitioner Wisconsin Property Tax Consultants, Inc., (“WPTC”) is a property tax consulting firm based in Ozaukee County representing scores of Wisconsin manufacturers in challenging property tax assessments of real and personal property used in the manufacturing process. (App. 15, 31-32.) Plaintiff-Appellant-Petitioner Wisconsin Manufacturers and Commerce, Inc. (“WMC”) is the largest business trade association in Wisconsin with member businesses of all sizes and across all sectors of Wisconsin’s economy, approximately one-half of which are manufacturers. (App. 15-16, 28-29.)

WPTC and WMC filed a declaratory judgment action against the Department of Revenue in Ozaukee County Circuit Court pursuant to Wis. Stat. § 227.40. (App. 14-27.) The Complaint arose out of guidance that the Department of

Revenue issued following the enactment of Wis. Stat.

§ 70.111(27) which exempted machinery, tools and patterns from the personal property tax. This statute did not apply to machinery tools and patterns “used in manufacturing.” The Department of Revenue’s guidance provided that the exemption “does not apply to manufacturers” regardless of whether the property was actually used in manufacturing. (App. 18, 27, 35-36.)

The complaint stated three claims for declaratory and/or injunctive relief:

Claim one asserted that the Department of Revenue’s guidance holding that the machinery, tools and patterns exemption in Wis. Stat. § 70.111(27) constituted a rule as defined by Wis. Stat. § 227.01(13) because it was “a regulation, standard, statement of policy or general order of general application which has the effect of law and which was issued to implement, interpret, or make specific legislation enforced or administered by the [Department of Revenue] to govern the organization or procedure of the Department of Revenue and, as such, was not valid unless the Department complied with the rulemaking process.” (App. 19-21, ¶¶ 23-30.)

Claim two asserted that the Department of Revenue's guidance was inconsistent with the language of Wis. Stat. § 70.111(27). (App. 21-22, ¶¶ 31-37.)

Claim three asserted that the Department of Revenue's guidance violated Article I, §§ 1 and 13 and Article VIII, § 1 of the Wisconsin Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. (App. 23, ¶¶ 38-42.)

WPTC and WMC sought relief that included an order directing the Department of Revenue to engage in rulemaking consistent with Chapter 227 and to enjoin enforcement of the guidance until the Department properly promulgates such a rule. (App. 24.)

Following cross motions for summary judgment, the Circuit Court issued a one-page decision, dismissing the complaint based on the doctrine of primary jurisdiction, holding that the "Tax Appeals Commission can determine all questions of law and fact arising under the tax laws of the state." (App. 12.)

WPTC and WMC appealed the Circuit Court's decision to the Court of Appeals. However, WPTC and WMC did not challenge the Circuit Court's primary

jurisdiction decision with respect to Claim two (*i.e.*, the Department of Revenue's guidance is inconsistent with the language of the Wis. Stat. § 70.111(27)). On appeal, WPTC and WMC challenged the Circuit Court's deferral to the Tax Appeals Commission on claim one (*i.e.*, failure to make rules) and claim three (*i.e.*, constitutional claim) on the basis of primary jurisdiction. WPTC and WMC argued the Circuit Court abused its discretion in dismissing claims one and three because the Tax Appeals Commission lacks jurisdiction over the rulemaking and constitutional claim.

In a published decision, the Court of Appeals held that the Circuit Court had not abused its discretion in relying on primary jurisdiction because the Tax Appeals Commission has jurisdiction to decide whether the Department of Revenue failed to comply with the rulemaking requirements of Chapter 227 and the constitutional claims. (App. 8-9; ¶¶ 13-14.)

This petition seeks only to appeal the Court of Appeals' decision with respect to claim one: WPTC and WMC's declaratory judgment claim that the Department failed to follow the rulemaking requirements of Chapter 227.

## ARGUMENT

### **I. THE COURT OF APPEALS' DETERMINATION THAT THE TAX APPEALS COMMISSION HAS JURISDICTION OVER WIS. STAT § 227.40 DECLARATORY JUDGMENT ACTIONS INVOLVING RULE PROMULGATION MANDATES IS CONTRARY TO THE STATUTES AND CASE LAW.**

#### **A. *WPTC and WMC Case in Brief***

To provide context, WPTC and WMC offer this concise description of the substance of their rulemaking claim.

##### *1. The Department's Guidance*

The legislature enacted Wis. Stat. § 70.111(27) as part of 2017 Wisconsin Act 59. The statute exempts machinery, tools and patterns from general property taxation. The statute provides the following exemption:

Beginning with the property tax assessments as of January 1, 2018, machinery, tools, patterns, not including such items used in manufacturing.

Wis. Stat. § 70.111(27)(b). The statute defines machinery as:

A structure or assemblage of parts that transmits force, motion, or energy from one part to another in a predetermined way by electrical, mechanical, or chemical means. "Machinery" does not include a building.

Wis. Stat. § 70.111(27)(a). The statute does not define manufacturing, nor does it exclude manufacturers from the exemption. Wis. Stat. § 70.111(27).

While the Department of Revenue took no steps to promulgate a rule interpreting Wis. Stat. § 70.111(27), the Department issued guidance denying an exemption for any machinery, tools or patterns that are owned by a manufacturer assessed under Wis. Stat. § 70.995:

- On December 15, 2017, the Department of Revenue released a fact sheet regarding the machinery tools and patterns exemption asserting:

The exemption only applies to property that was or would be reported on Schedule C – Machinery, Tool, and Patterns, pursuant to sec. 70.30, Stats. The property is exempt starting with January 1, 2018 assessments. The exemption does not apply to manufacturing property.

(App. 35.)

- In a letter to WMC dated January 22, 2018<sup>2</sup> former Secretary Revenue Secretary Chandler referred to the “interpretation of the Department” and wrote that “the new exemption does not apply to manufacturers.”

(App. 27.)

- The Department also revised the 2018 Wisconsin Manufacturing Personal Property Return, Form M-P, instructions with the following language:

The new machinery tools and patterns exemption, created in sec. 70.111(27), Wis. Stats., applies only to locally assessed

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<sup>2</sup> The stated date of the letter is “January 22, 2107.” Given that 2017 Wisconsin Act 59 was enacted on September 21, 2017, context dictates that the letter’s correct date should have been January 22, 2018.



personal property. The exemption does not apply to DOR assessed manufacturing personal property.

(App. 36.)

2. *The Department of Revenue's Obligation to Promulgate Rules*

Wisconsin Statutes section 227.10(1) mandates that every State “agency shall 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.” This statute has been interpreted to mean that “any statement of general policy or interpretation of a statute adopted to govern enforcement or administration of that statute must be promulgated as a rule.” *See, Cholvín v. DHFS*, 2008 WI App 127, ¶ 21, 313 Wis. 2d 749, 760, 758 N.W.2d 118, 123.

Chapter 227 defines a rule as:

A regulation, standard, statement of policy, or general order of application that 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.

Wis. Stat. § 227.01(13). Rulemaking procedures were enacted to ensure that the legal rights and privileges of Wisconsin's citizens are protected, and that interested parties

have the opportunity to participate in public hearings and commentary on the rules made by agencies. Wis. Stat. § 227.40(4)(a) directs the courts to “declare the rule invalid if it . . . was promulgated or adopted without compliance with the statutory rulemaking procedures.”

The Department’s interpretation was clearly a rule within the meaning of Wis. Stat. § 227.01(13). Secretary Chandler’s letter is a standard or statement of policy that was issued by the Department to interpret Wis. Stat. § 70.111(27). The letter clearly states that it represents “the interpretation of the Department.” The letter further states that the Department has taken action in accordance with this interpretation to update the 2018 Form M-P. (App. 27.) Similarly, in the fact sheet and the revised form, the Department established a standard or statement of policy by communicating a consistent interpretation. (App. 35-36.) Thus, the Department’s guidance meets the definition of a rule under Chapter 227.

Because the Department of Revenue’s interpretation and actions met the definition of a rule under Chapter 227, the Department was required to promulgate the interpretation as a rule under Chapter 227. It is undisputed that the Department

failed to undertake the necessary steps to promulgate a rule interpreting Wis. Stat. § 70.111(27).<sup>3</sup>

***B. Primary Jurisdiction Applies Only Where the Administrative Agency to which the Court Defers has Jurisdiction Over the Issue.***

Primary jurisdiction applies where both an administrative agency and the court have jurisdiction. In such cases, the doctrine provides that “where an administrative remedy is provided by statute, relief should first be sought from the administrative agency . . . before bringing the matter to the court.” *State ex rel. Terry v. Traeger*, 60 Wis. 2d 490, 499, 211 N.W.2d 4(1973); *see also, Sawejka v. Morgan*, 56 Wis. 2d 70, 79-80, 201 N.W.2d 528, 531 (1972).

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<sup>3</sup> The steps to promulgate a rule include the following:

1. Preparing a statement of scope (Wis. Stat. § 227.135(1));
2. Approval of a statement of scope by the Governor (Wis. Stat. § 227.135 (2));
3. Adhering to appropriate rule drafting protocols (Wis. Stat. § 227.14 (1));
4. Preparing an economic impact analysis (Wis. Stat. § 227.137 (2));
5. Review by the Legislative Council Rules Clearinghouse (Wis. Stat. § 227.15 (1));
6. A public hearing (Wis. Stat. § 227.16 (1));
7. An initial regulatory flexibility analysis (Wis. Stat. § 227.17 (3)(f));
8. Comparing similar provisions in neighboring states (Wis. Stat. § 227.14 (2)(a)4);
9. Submitting final draft rules to the Governor for approval (Wis. Stat. § 227.185); and
10. Submitting the rule to the Legislature for its review (Wis. Stat. § 227.19).

Moreover, this Court has held primary jurisdiction is applied “only in cases where there is concurrent jurisdiction in the administrative agency and in the courts.” *Browne v. Milwaukee Bd. of School Directors*, 69 Wis. 2d 169, 175, 230 N.W.2d 704, 707 (1975). Thus, in order for primary jurisdiction to apply in this case, the Tax Appeals Commission must have concurrent jurisdiction to entertain declaratory judgment actions brought under Wis. Stat. § 227.40 seeking redress for the failure of the Department of Revenue to engaged in rulemaking. The unambiguous language of the statutes involved makes it clear that the Tax Appeals Commissions has no such jurisdiction.

***C. The Tax Appeals Commission Has No Jurisdiction Over Declaratory Judgment Actions Brought Under Wis. Stat. § 227.40.***

As an administrative agency, the Tax Appeals Commission “has only such powers as have been expressly granted to it by the legislature or which necessarily may be implied from the statutes under which it operates...” *See, Jackson v. Employee Trust Funds Board*, 230 Wis. 2d 677, 688, 602 N.W.2d 543 (Wis. App. 1999). The jurisdiction of the Commission is explicit and limited:

(4) POWERS AND DUTIES DEFINED. (a) Subject to the provisions for judicial review contained in s. 73.015, the commission shall be the final authority for the hearing and determination of all questions of law and fact arising under sub. (5) and s. 72.86 (4), 1985 stats., and ss. 70.38 (4) (a), 70.397, 70.64, and 70.995 (8), s. 76.38 (12) (a), 1993 stats., ss. 76.39 (4) (c), 76.48 (6), 77.26 (3), 77.59 (5m) and (6) (b), 78.01, 78.22, 78.40, 78.555, 139.02, 139.03, 139.06, 139.31, 139.315, 139.33, 139.76, 139.78, 341.405, and 341.45, subch. XIV of ch. 71, and subch. VII of ch. 77. . . .

Wis. Stat. § 73.01(4)(a). Nowhere in this statute does the Tax Appeals Commission's jurisdiction extend to declaratory judgment actions under Wis. Stat. § 227.40.

Despite the fact that Wis. Stat. § 73.01(4)(a) does not expressly provide jurisdiction over rulemaking challenges, the Court of Appeals pointed to the Commission's authority to address questions of law:

We reject WMC's argument that Wis. Stat. § 73.01(4)(a), which does not expressly mention rulemaking, effectively strips the TAC of concurrent jurisdiction to consider rulemaking challenges for several reasons. WMC fails to address the "broad" language providing the TAC with authority to address "all questions of law" arising under the tax code. *See* Sawejka, 56 Wis. 2d at 75. 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.

(App. 9-10, n.7.) However, contrary to the Court of Appeals' broad interpretation of Wis. Stat. § 73.01(4)(a), appellate courts have repeatedly refused to extend the Tax Appeals Commission's jurisdiction to tax controversies that do not

arise from the statutes explicitly listed in in Wis. Stat.

§ 73.01(4)(a).

In *Village of Silver Lake v. Dep't of Revenue*, 87 Wis. 2d 463, 275 N.W.2d 119 (Ct. App. 1978), the Court of Appeals had to decide “whether the Wisconsin Tax Appeals Commission had subject matter jurisdiction to hear a petition by a town or a village requesting a redetermination of the 1975 state tax assessment made by the Department of Revenue pursuant to sec. 70.57 and sec. 70.575, Stats.” *Id.* at 467. Despite the fact that the petition at issue constituted a clear question of law arising under the tax code, the Court of Appeals held that the Commission had no jurisdiction to entertain the petition. *Id.* at 469-70.

Similarly, the Court of Appeals in *Dep't of Revenue v. Hogan*, 198 Wis. 2d 792, 543 N.W.2d 825, (Ct. App. 1995), dealt with a class action suit in which the class argued that Wisconsin's income tax was inconsistent with the U.S. Supreme Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). Again, despite the fact that *Hogan* presented a question of tax law, the Court of Appeals held that the “Tax Appeals Commission lacks authority to entertain a class-

action proceeding seeking refunds of state income taxes collected on the pension income of retired federal government employees living in Wisconsin.” *Id.* at 797.

***D. The Existence of Tax Appeals Commission Cases Challenging the Interpretation of the Application of the Department of Revenue’s Actions Does Not Preclude a Declaratory Judgment Action Based On An Asserted Failure to Comply with Chapter 227.***

To support its conclusion, the Court of Appeals observed that there were more than 50 cases pending before the Tax Appeals Commission concerning the exemption in Wis Stat. § 70.111(27) and that the Commission issued a decision in one of these cases. (App. 10, ¶ 16.) The Court of Appeals goes on to note that WPTC and WMC do not own property at issue under the exemption statute. (*Id.*) For at least three reasons, the existence of these other cases and the single decision does not preclude WPTC and WMC’s declaratory judgment action.

*1. None of the Cases Pending Before the Tax Appeals Commission Seek an Order Invalidating the Department of Revenue's Un-Promulgated Rule.*

First, there is no evidence in the record that any of the other cases pending before the Tax Appeals Commission include a declaratory judgment claim seeking an order striking down the Department of Revenue's guidance as an invalid rule under Chapter 227. Moreover, the singular decision of the Tax Appeals Commission cited by the Court of Appeals does not address the Department of Revenue's failure to promulgate rules. (App. 60-77.)

*2. The Court of Appeals' Decision Potentially Leaves Interested Persons Who Are Not Subject to a Present Assessment by the Department of Revenue with No Redress.*

Second, the fact that WPTC and WMC do not own machinery, tools and patterns, the assessments of which can be appealed to the Tax Appeals Commission, is not only irrelevant but proves the Petitioners' point. It is undisputed that WPTC and WMC, by virtue of their clients and members, are interested persons who have standing to challenge the failure of the Department of Revenue to



promulgate rules that impact those clients and members.

Because these entities do not own property that is subject to the Department's guidance, WPTC and WMC cannot appeal an assessment to the Tax Appeals Commission. Therefore, a declaratory judgment action in circuit court under Wis. Stat. § 227.40 is the only route WPTC and WMC have to challenge the failure of the Department of Revenue to engage in rulemaking.

Under the Court of Appeals' holding the Department of Revenue—unlike other agencies—would be immune from declaratory judgment actions challenging its rulemaking, or lack thereof, unless or until the Department issues an assessment based on such a rule and only by those parties subject to the assessment. In permitting agencies to be subject to declaratory judgment actions under Wis. Stat. § 227.40, the legislature could not have intended such a result.

3. *The Court of Appeals May Have Misconstrued Petitioners' Claim.*

Finally, it appears that the Court of Appeals may have misconstrued the issues presented on appeal. The Court of

Appeals wrote, “[t]he question is whether the TAC has authority to review a claim that DOR interpreted and applied a statute under the tax code improperly, either under its plain language or through application of a rule, promulgated properly or not.” (App. 9, ¶ 14.) Petitioners have never argued that the Commission lacks the authority to invalidate an assessment that was based on a rule or guidance that is inconsistent with the statutes. Moreover, in their initial appellants’ brief, WPTC and WMC clearly stated, they were “not asking this Court to determine whether the Department’s application of Wis. Stat. § 70.111(27) is inconsistent with the statute.” (Appellant’s Brief at 2.) Rather, WPTC and WMC are seeking an order directing the Department of Revenue to engage in rulemaking in accordance with Chapter 227 so that interested parties and the legislature can have input.

For these reasons, the existence of the cases pending before the Tax Appeals Commission is not a bar to WPTC and WMC commencing a declaratory judgment action under Wis. Stat. § 227.40.

***E. Wis. Stat. § 227.40 Unambiguously Limits Jurisdiction Over Declaratory Judgment Actions Challenging Rulemaking, Or Lack Thereof, to the Circuit Court.***

The unambiguous language of Wis. Stat. § 227.40(1) limits the jurisdiction to hear declaratory judgment actions challenging the invalidity of a rule or guidance document to the circuit court:

**227.40 Declaratory judgment proceedings. (1)**

Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the *circuit court for the county where the party asserting the invalidity of the rule or guidance document resides or has its principal place of business* or, if that party is a nonresident or does not have its principal place of business in this state, in the circuit court for the county where the dispute arose.

Wis. Stat. § 227.40(1) (emphasis supplied). The exceptions provided in Wis. Stat. § 227.40(2) do not apply to the facts of this petition.<sup>4</sup> The statute could not be clearer; the circuit

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<sup>4</sup> Wis. Stat. § 227.40(2) provides:

(2) The validity of a rule or guidance document may be determined in any of the following judicial proceedings when material therein:

(a) Any civil proceeding by the state or any officer or agency thereof to enforce a statute or to recover thereunder, provided such proceeding is not based upon a matter as to which the opposing party is accorded an administrative review or a judicial review by other provisions of the statutes and such opposing party has failed to exercise such right to review so accorded.

(b) Criminal prosecutions.

(c) Proceedings or prosecutions for violations of county or municipal ordinances.

(d) Habeas corpus proceedings relating to criminal prosecution.

court is the exclusive venue for commencing actions for declaratory judgment under Wis. Stat. § 227.40 and there is no opportunity to bring such an action before the Tax Appeals Commission.

## CONCLUSION

Chapter 227 establishes requirements for rulemaking and provides procedures for interested parties and the legislature to have input into such rules. The Court of Appeals' holding would create a separate set of requirements and procedures for the Department of Revenue's rules and guidance that finds no support in the statutes. This Court should grant this petition for review so that it can resolve the problems created by the Court of Appeals' published decision.

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(e) Proceedings under s. 66.191, 1981 stats., or s. 40.65 (2), 106.50, 106.52, 303.07 (7) or 303.21 or ss. 227.52 to 227.58 or under ch. 102, 108 or 949 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.

(f) Proceedings under s. 227.114 (6m).

Dated this 1<sup>st</sup> day of July, 2021.

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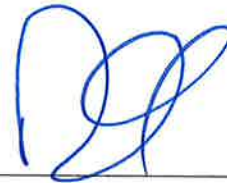
**FORM AND LENGTH CERTIFICATION**

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this petition is 3,670 words.

Dated this 1<sup>st</sup> day of July, 2021.

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**CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § 809.19(12)**

I hereby certify that I have submitted an electronic copy of this petition, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic petition is identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 1<sup>st</sup> day of July, 2021.

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