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Case No. 2022-AP-000182

In the Supreme Court State of Wisconsin

KOBLE INVESTMENTS,
Plaintiff-Respondent-Petitioner,

v.

ELICIA MARQUARDT,
Defendant,

JAMES MILLER,
Intervenor Appellant-Respondent.

On Appeal from
the Circuit Court for Marathon County,
Case No. 2020-SC-979
The Honorable Lamont K. Jacobson, Presiding Judge

BRIEF OF NON-PARTY *AMICI CURIAE* WISCONSIN REALTORS® ASSOCIATION, RENTAL PROPERTY ASSOCIATION OF WISCONSIN, INC., APARTMENT ASSOCIATION OF NORTHEAST WISCONSIN, INC., FOX VALLEY APARTMENT ASSOCIATION, INC., KENOSHA LANDLORD ASSOCIATION, INC., APARTMENT ASSOCIATION OF SOUTH CENTRAL WISCONSIN, APARTMENT OWNERS AND MANAGERS ASSOCIATION OF WISCONSIN, AND NATIONAL APARTMENT ASSOCIATION

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INTEREST OF AMICI CURIAE

The *amici* described below are local, state, and national associations with operations in the State of Wisconsin representing rental property owners, property managers, real estate investors and real estate brokers with collectively over 100,000 members in Wisconsin and nationally, who in turn have tens of thousands of apartment homes within the state (the "Associations").

The Wisconsin REALTORS® Association ("WRA") is one of the largest trade associations in the state, representing and providing services to more than 17,500 practicing real estate sales agents, brokers, appraisers, inspectors, bankers, and other professionals who touch real estate. Legislatively, the WRA strives to keep members informed of important policymaking decisions at all levels of government. Additionally, the WRA works to protect the interests and rights of over two million homeowners in Wisconsin with legislation geared toward protecting private property rights, economic growth, and keeping housing affordable.[1]

The Rental Property Association of Wisconsin, Inc. (formerly known as the Apartment Association of Southeastern Wisconsin, hereinafter "RPA") is Wisconsin's oldest and largest non-profit rental property owner trade association with 765 current members. Founded in 1974, the RPA's motto is "ADVOCATING FOR SUSTAINABLE RENTAL HOUSING" through education, legislative

[1] Wisconsin REALTORS® Association, https://www.wra.org/ (last visited June 9, 2025).

support, and networking opportunities for rental property owners (landlords) in the greater Milwaukee, Wisconsin area.[2] The RPA believes that for owners to succeed, their tenants must also succeed. The RPA is a charter member of Milwaukee's *Rental Housing Resource Center*,[3] which is comprised of social service agencies, tenant advocacy organizations, and landlord interests. The partners in this coalition meet regularly to promote eviction alternatives such as mediation and advocate for more housing assistance for tenants.

The Apartment Association of Northeast Wisconsin, Inc., ("AANW") has 250 current members and was founded in 1995 as a non-profit association whose mission is to support and facilitate its members' success in ethical rental property ownership, property management, and real estate investment through leadership, education, and support of the government affairs needs of the rental property industry in Wisconsin. Since its inception, the AANW has been advocating for good owners and managers of rental properties, and good residents. The AANW creates and hosts various educational events to help owners, managers, and investors understand Wisconsin Landlord/Tenant Law and Fair Housing Laws. The AANW supports and advocates for common-sense local, state, and federal legislation that promotes the sustainability of rental housing.[4]

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[2] Rental Property Association of Wisconsin, www.aasew.org (last visited June 9, 2025).

[3] Milwaukee Rental Housing Resource Center, https://www.renthelpmke.org/ (last visited June 9, 2025).

[4] Apartment Association of Northeast Wisconsin, https://www.aanw.org/ (last visited June 9, 2025).

The Apartment Association of South Central Wisconsin ("AASCW") has 640 current members. The organization was founded in 1976 as a non-profit association where its mission is to unite and serve area apartment owners, managers, investors, and the community; and promote an environment in which members may successfully conduct their businesses while serving their residents and their communities with honesty, integrity, fairness, and the highest degree of professionalism. AASCW was developed for the purpose of improving the apartment industry. Recognizing the vital role its members play in meeting the housing needs within its communities, its members have committed to supplying and maintaining multiple dwellings which will provide residents with health and life safety, with the human values of pride, dignity, and security.

The Fox Valley Apartment Association, Inc. ("FVAA"), with 188 current members, was founded to unite the owners and managers of residential rental property for the purpose of advancing the general welfare of the rental housing industry, while also promoting an environment conducive to the business success of its members. The FVAA's mission statement says that it "is committed to providing its members with opportunities of education in all areas of rental property," "will endeavor, promote, and foster an environment of free enterprise and private property ownership rights," and "pledges to promote the highest ethics in pursuit of its goals with the utmost respect and concern for the welfare of [its] tenant customers."[5]

[5] Fox Valley Apartment Association, https://www.fvaa.info/ (last visited June 9, 2025).

The Kenosha Landlord Association, Inc. ("KLA") was established in 1987 as a local chapter of the Wisconsin Real Estate Investor's Association, the former Wisconsin Apartment Association. It currently has 68 members. The KLA aims to promote and educate a network of local real estate investors on legislative issues, property management, and real estate investment. KLA's goal is to keep its members up-to-date with the most current information available to its industry.[6]

The Apartment Owners and Managers Association of Wisconsin ("AOMA") is the largest apartment association in the state of Wisconsin. The AOMA was formed in 1974, and its purpose is to support an industry that offers safe, affordable housing to the public. The AOMA currently represents over 1,100 members serving 135,000 apartment homes throughout the state of Wisconsin. The AOMA members represent all facets of the apartment housing industry: apartment owners, management executives, developers, investors, property managers, leasing consultants, maintenance personnel, suppliers, and related business professionals. The AOMA is affiliated with the National Apartment Association, the Global leading advocate for quality apartment homes representing 12.5 million apartment homes globally and 95,000 members.

The National Apartment Association ("NAA") serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state and local affiliates, NAA

[6] Kenosha Landlord Association, Inc, http://www.kenoshalandlordassociation.org/ (last visited June 9, 2025).

encompasses over 94,000 members representing more than 13 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community and emphasizes integrity, accountability, collaboration, community responsibility, inclusivity, and innovation. NAA and its network of affiliated apartment associations seek the fair governmental treatment of multifamily housing organizations, including by advocating for the interests of the rental housing business community at large in legal cases of national concern.

ARGUMENT

INTRODUCTION

This case raises novel questions that have already had widespread impact on landlord-tenant relationships throughout Wisconsin. This amicus brief informs the Court of the tremendous harm that the Court of Appeals decision, if not overturned, will cause to Wisconsin's rental housing industry. This brief also expands upon legal arguments not fully addressed by the parties' briefing which demonstrate further grounds for reversing the Court of Appeals decision.

The Court of Appeals held that the tenant's rent payments were a pecuniary loss under Wis. Stat. § 100.20(5) and that the Wisconsin Consumer Act (the "WCA") applies to residential leases. These conclusions are in error for several reasons as addressed below and as further addressed in both the Petitioner's briefing and the Motion to File Amicus/Non-Party Brief dated June 6, 2024, accepted November 8, 2024.

I. THE COURT OF APPEALS' DECISION, IF NOT OVERTURNED, WILL LEAD TO ABSURD OUTCOMES AND TREMENDOUS HARM TO THE WISCONSIN RENTAL HOUSING INDUSTRY.

Since the Court of Appeals' decision, there has been a remarkable number of actions filed against Wisconsin landlords seeking recovery of rent pursuant to Wis. Stat. § 100.20(5) based on an allegedly unenforceable lease. (*See*, *e.g.*, Amicus Mot. Suppl. App., filed November 8, 2024.) Over fifteen additional similar cases have been filed since the Supplement. *See, e.g., Sally Clarke v. N. Mgmt. LLC,* No. 2025CV000502 (Wis. Cir. Ct. Waukesha Cnty. Mar. 10, 2025).

The Court of Appeals decision has inappropriately relieved tenants from showing any actual damages. The complaints in these cases demand that the landlord refund all rent paid during the tenancy AND then pay an equivalent amount to the tenant as double damages.

Landlords already operate at thin margins. The National Apartment Association reports Wisconsin owners receive a 9% return on income. *See* National Apartment Association website, https://naahq.org/wisconsin-where-does-1-rent-go (last visited June 9, 2025). The remaining 91% supports mortgage payments, operating expenses, property taxes, employee payroll, and capital expenditures reserves. *See id*.

Affordable public housing has already been endangered by the Court of Appeals decision. The lease used by the Housing Authority of the City of Milwaukee was ruled void and unenforceable, and the Housing Authority's claim for $5,728.00 in rent was dismissed. *Merrill Park LLC v. Party Sealed by Judge*

Morales-42, No. 2024AP002465 (Wis. Ct. App. filed Dec. 4, 2024). Because Wisconsin housing authorities likely use the same lease form for all tenants, they may have to repay or forfeit untold amounts of rent. This will greatly increase the economic challenges facing these governmental agencies.

This case, and the fallout of the decision, does not pit corporate interests against consumer protection. Institutional landlords are not the norm. A 2017 study by Avail, a property management software company, found that 55% of rental units in nationally were owned by "independent landlords" who have full-time jobs and manage their rental on the side. *See* Avail website, https://www.avail.co/education/articles/state-independent-landlords-2017 (last visited June 9, 2025).

Smaller landlords must often purchase lease forms, without the sophistication to know whether they fully comply with Wisconsin law. If landlords face the consequence of the lease being void, that is understandable. But if courts are compelled to award double the amount of all rent paid, these landlords will face extreme economic consequences, insolvency, and loss of their properties. Opportunistic tenants may target smaller landlords with the goal of finding a lease with some nominal violation—only to later to seek recovery of double rent and overwhelm landlords with legal costs.

An example of the actual harm facing a small landlord was presented to the Assembly Committee on Housing and Real Estate on May 15, 2025. Steve Lehman, who owns a single-family residential property in Milwaukee, testified that a former

tenant is suing him based on the Court of Appeals decision and seeks $150,000 in damages, consisting of twice the amount of rent the tenant paid over five years. WisconsinEye, *Executive Session & Public Hearing: Assembly Committee on Housing & Real Estate.* at 03:08:32 (May 15, 2025), https://wiseye.org/2025/05/15/assembly-committee-on-housing-and-real-estate-16/. This is more than the fair market value of the single-family home. *See id.* According to Mr. Lehman, the tenant admitted under oath that he was not damaged by any defect in the rental agreement. Lehman noted his attorney's fees had reached $27,000 before trial. *See id.*

In the same hearing, Representative Piwowarczyk posed a hypothetical: If he mistakenly failed to put the domestic abuse clause in a lease and collected $72,000 in rent over six years, would he be responsible for damages of $144,000? WisconsinEye, *Executive Session & Public Hearing: Assembly Committee on Housing & Real Estate*, at 02:18:17 (May 15, 2025), https://wiseye.org/2025/05/15/assembly-committee-on-housing-and-real-estate-16/. Legal Action of Wisconsin acknowledged that he would. *See id.*

Larger landlords using the same lease for all units risk having to repay double rent to *all* their tenants going back multiple years if even one of their lease provisions is found to be unenforceable. Following the Court of Appeals' holding, the landlord will be forced to prove a negative: that the prohibited provision did not cause pecuniary harm.

Tenants too will feel harmful effects as landlords' financial hardship will inevitably lead to the dilapidation of rental properties and increased rents. Tenants in lower income communities, where aged rental properties require greater maintenance, will be impacted severely.

Third parties will be harmed. The US Census reports that on average every rental unit creates $2,100 in direct wages per unit per year. *See* US Census Bureau website, https://www.census.gov/data-tools/demo/rhfs/#/?s_byGroup1=12&s_tableName=TABLE4 (last visited June 9, 2025). Wages and jobs will diminish as landlords are forced to pay double rent to their tenants for lease violations that otherwise cause no financial harm. Municipalities will suffer reduced property tax collections and foreclosures of tax delinquent rental properties.

Courts will also be inundated with cases addressing how to apply a new regulatory structure (i.e., the WCA) to an industry that has had no reason to assume it applied since those regulations were created over fifty years ago. This will cause widespread confusion both on substantive questions about whether landlords now face exemplary damages—as in the instant case—but also procedural questions. For example, courts will have to navigate whether the specific WCA venue statute (Wis. Stat. § 421.401) now applies to landlord-tenant cases. The surface has not been scratched on the inevitable inconsistencies between the existing landlord-tenant regulatory structure (Chapter 704 of the Wisconsin Statutes and

Administrative Code Chapter 134) and the WCA regulatory structure (Chapters 421-27 of the Wisconsin Statutes and Administrative Code Chapter DFI-WCA 1).

Based on the potential economic and humanitarian impact of the decision alone, this Court should reverse the Court of Appeals decision.

II. BECAUSE A PERIODIC TENANCY ARISES IN THE ABSENCE OF AN ENFORCEABLE LEASE, THE TENANT FAILED TO ESTABLISH A PECUNIARY LOSS UNDER WIS. STAT. § 100.20(5).

The Court of Appeals errs when it agrees with the tenant's proposition that "if Marquardt's lease was a legal nullity and had no legal effect, then it follows that Koble was not entitled to any payments under the lease." *See* Ct. App. Decision, ¶ 46. If allowed to stand, this holding would be the single most damaging decision in the history of the Wisconsin residential housing industry. The holding rests on the faulty premise that a voided lease ends the landlord-tenant relationship. Yet the relationship did not vanish. The tenant still resided at the landlord's property and paid rent in exchange for housing. Wisconsin law codifies this relationship as a "periodic tenancy." *See* Wis. Stat. § 704.01(2).

The terms "tenancy" and "lease" are not synonymous. A "lease" is defined as an oral or written agreement for transfer of possession of real property for a definite period of time. §704.01(1), Stats. A "tenancy" may be created by a "lease" but also includes a periodic tenancy or a tenancy at will where no "valid lease" exists. *See* Wis. Stat. §§ 704.01(4) & 704.01(5).

A voided lease does not extinguish the landlord-tenant relationship. Instead, if a lease is found to be unenforceable, the tenant is a periodic tenant. *See* Wis. Stat.

§ 704.01(2) (defining a "periodic tenant" as one who holds possession without a valid lease and pays rent on a periodic basis). The tenant is not allowed to both reside at the leased premises and demand a return of rent. *See*, *e.g.*, *Dawson v. Goldammer*, 2006 WI App 158 at ¶¶ 15-19.

When a periodic tenancy exists, the rent payments are not a pecuniary loss—they are the tenant's primary obligation. *See*, *e.g.*, Wis. Stat. § 704.17(1p)(a) (allowing for termination of a month-to-month periodic tenancy when the tenant "fails to pay rent"). There is no legal basis for the tenant to recover rent payments, let alone *twice* the value of the rent paid. Yet this will be the result of the Court of Appeals' decision. *See* Ct. App. Decision, ¶¶ 45-51.

The Dane County Circuit Court already addressed the argument in *Hoffman v. Gribble*, 2020-CV-686.[7] There the applicable lease agreement contained multiple violations and was "undisputedly illegal." *See Hoffman v. Gribble, No.* 2020-CV-686, at 2, 5 (Wis. Cir. Ct. Dane Cnty. Mar. 30, 2021), *aff'd,* No. 2021AP1355, 2023 WL 2027824 (Wis. Ct. App. Feb. 16, 2023), *petition for review denied, 2024 WI 1, 14 N.W.3d 11*. Nevertheless, the court concluded—while citing *Huff and Morse, Inc. v. Riordan*, 118 Wis. 2d 1, 9, 345 N.W.2d 504 (Ct. App. 1984)[8]—that the tenant, Hoffman, was not entitled to double damages based on rent paid:

> In this case, the facts do not show, and Hoffman does not allege, that he paid more for rent than what he agreed to. As the customer could not collect double damages in *Riordan* because he permitted repairs,

[7] Wis. Stat. § 809.23(3) does not prohibit citation to circuit court decisions. *See Brandt v. LIRC,* 160 Wis. 2d 353, 362-65 (Ct. App. 1991).

[8] *Riordan* was abrogated by *Baierl*, 2001 WI 107, ¶¶ 16-17, on other grounds.

> Hoffman cannot collect double damages because he agreed to pay and paid rent for the unit.

Id. at 9-10. As in the *Hoffman***.** case, there is no evidence Marquardt paid more than the rent to which she agreed or suffered any pecuniary loss.

To the extent any pecuniary loss exists, the injured party must show it was a "loss *because of* a violation" to recover damages. Wis. Stat. §100.20(5) (emphasis added). But the decision below erroneously shifted this burden to the landlord to show that the causal connection did not exist. *See* Ct. App. Decision, ¶ 49 (holding that Koble "fails to develop an argument that the claimed pecuniary loss was not caused by Koble's violation.") Under Wis. Stat. §100.20(5), the burden should have been on Marquardt to show causation. A tenant does not agree to pay rent *because of* an unenforceable provision in the lease. If anything, the existence of a violative provision in a lease makes the lease less attractive to a tenant. It would be nonsensical to conclude that the alleged pecuniary loss (*i.e.*, the rent payments) were *caused by* the inclusion of an unenforceable provision.

For all of these reasons, the Court of Appeals decision must be overturned.

III. THE WISCONSIN CONSUMER ACT DOES NOT APPLY TO RESIDENTIAL RENTAL AGREEMENTS IN WISCONSIN.

This Court should determine that (1) the Legislature never intended to regulate residential tenancies with the WCA; (2) a residential tenant does not fall within the definition of a "customer" under the WCA; and (3) a standard residential lease calling for monthly payments of rent does <u>not</u> qualify as an "agreement to defer payment" under the WCA.

The WCA does not expressly include "residential lease agreements" within the definition of a consumer transaction. *See* Wis. Stat. § 421.301(13). However, the Wisconsin Administrative Code, Chapter DFI-WCA 1.05, entitled Wisconsin Consumer Act, expressly excludes leasehold interests while notably citing Chapter 704 for the regulation of real estate leasing:

> **DFI-WCA 1.05 General definitions; consumer credit transactions.** Acquisition of a leasehold interest in real property by a customer from a merchant is not a consumer lease within the meaning of s. 421.301 (11), Stats. *For laws governing the leasing of real estate see ch. 704, Stats.*
>
> (Emphasis added).

A. The WCA does not Apply to Residential Leases because a Residential Tenant is not a Customer.

A "customer" is a person seeking or *acquiring* real or personal property for personal, family, or household purposes. *See* Wis. Stat. § 421.301(17) (emphasis added). The plain and ordinary meaning of "acquire" is "to get as one's own." *See Acquire*, https://www.merriam-webster.com/dictionary/acquire (last visited June 9, 2025). A tenant does not acquire the leased property as their own.

The Court of Appeals cites *Pines v. Perssion*, 14 Wis. 2d 590, 594-95, 111 N.W.2d 409 (1961), for the proposition that "[a] tenant is a purchaser of an estate in land." Ct. App. Decision ¶ 15. This statement, to the extent relevant to the WCA at all, supports Koble. If a tenant is purchasing an *estate* in land (specifically a leasehold estate), then the tenant is not, by definition, *acquiring* real property. *See* Wis. Stat. § 704.01(1) (defining a "lease" as a transfer of *possession* of real property

for a definite period of time) (emphasis added.) The tenant receives only limited, temporary *possession* of real property. The Court of Appeals decision is directly at odds with the plain meaning of the word "acquire" within the definition of "customer."

The Court of Appeals also determined that a real property lease must be eligible as a consumer transaction because "consumer approval transaction" excludes "a sale or lease or listing for sale of real property." Wis. Stat. § 423.201(1); Ct. App. Decision ¶ 16. However, the definition of "consumer approval transaction" simply excludes *any* type of transaction involving real property.

Similarly, the decision's analysis of "consumer lease" is not sound. *See* Ct. App. Decision ¶ 17. Because a consumer lease includes a "lease of goods between a merchant and a customer," Wis. Stat. § 421.301(11), the Court of Appeals concluded that if an individual can "acquire" personal property through a consumer lease, an individual must also be able to "acquire" real property through a residential lease. *See* Ct. App. Decision ¶ 17. However, a lease for personal property (or consumer lease) is inherently different from a real property lease as it relates to making the leased property one's own—there is no fee simple estate or leasehold estate in personal property. Lessors of real property retain rights and obligations including property taxes, assessments, insurance, statutory maintenance obligations, and collateral rights. These rights and obligations do not pass to tenants. Conversely, lessees of personal property, such as an automobile, take full ownership responsibility during the lease term, including insurance and maintenance. For all

practical purposes, a lessee of a consumer product becomes the full owner for a set period of time whereas the lessee of real estate does not.

Any argument about superfluous language in Chapter 423 or some comparison between a consumer lease and a residential lease, is outweighed by (1) the Legislature having not provided some greater degree of clarity as to its intent to apply the WCA to residential leases other than the attenuated connections drawn by the court of Appeals; (2) residential leases already being specifically and heavily regulated by Chapter 704 of the Wisconsin Statutes and Administrative Code Chapter 134, and (3) the fifty-year absence of any case law supporting the application of the WCA to residential leases. Choosing to suddenly apply the WCA to residential leases after half-a-century of silence creates unintended and unfair risks to the Wisconsin housing industry.

B. The WCA Does Not Apply To Residential Leases Because A Lease Is Not An Agreement to Defer Payment.

Even if a residential tenant was a customer for purposes of a consumer transaction under the WCA (which they are not), a lease is not an "agreement to defer payment." Wis. Stat. § 427.104(1); *see* Ct. App. Decision ¶¶ 18-23. Unlike deferred payment transactions, no actual debt exists for future monthly rent payments. "In Wisconsin, a landlord is entitled to recover rent as it matures, not before." *Kersten v. H.C. Prange Co.*, 186 Wis. 2d 49, 65-66, 520 N.W.2d 99, 106 (Ct. App. 1994), *citing Schaaf v. Nortman*, 19 Wis. 2d 540, 547, 120 N.W.2d 654, 658 (1963). Even if a tenant prepays, because the rent is not yet due, any prepaid

amount in excess of one month's rent is a security deposit that remains the tenant's property. *See* WIS. ADMIN. CODE § ATCP 134.02(11).

Not only does future rent not accrue until the month it becomes due, it *cannot* accrue any faster. *See* Wis. Stat. § 704.44(3m) and WIS. ADMIN. CODE § ATCP 134.08(3) (prohibiting acceleration of rent payments or any other provision waiving the landlord's obligation to mitigate damages under Wis. Stat. § 704.29). Even when a tenant violates a lease, the future rent payments cannot be accelerated. *See* Wis. Stat. § 704.44(3m). This prohibition is consistent with—and arises out of—the landlord's nonwaivable duty to mitigate damages under Wis. Stat. §704.29. Under that provision, a residential landlord must make "reasonable efforts" to re-let the property if the tenant vacates prior to the end of the lease term. Wis. Stat. § 704.29(2). If the landlord immediately re-lets the property, the tenant does not become responsible for additional rent payments at all. *See* Wis. Stat. § 704.29(2) ("[i]n any claim against a tenant for rent and damages . . . the amount of recovery is reduced by the net rent obtainable by reasonable efforts to rerent the premises").

Applying the WCA to residential leasing is not only a legal misstep – it undermines the foundational structure of the landlord-tenant code. The Court should reverse the Court of Appeals decision and hold that the WCA does *not* apply to residential lease agreements.

CONCLUSION

For the reasons described above, this Court should reverse the Court of Appeals decision in this action. The Court should specifically hold that: (1) if a

lease is deemed void or unenforceable, a periodic tenancy is created for the period during which the tenant resides at the property; (2) rent payments are not a pecuniary loss under Wis. Stat. § 100.20(5); (3) the tenant has the burden to prove any pecuniary loss and that such loss is caused by the alleged violation; and (4) the WCA does not apply to residential leases.

Dated this 9th day of June, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that this brief (and accompanying Certifications) has been filed through the Court's electronic filing system and served on all registered parties thereby.[9] This brief has also been served by email on the interested parties identified below.

Dated: June 9, 2025.

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[9] No address for Defendant Marquardt appears on the Court's docket, and the docket has several entries for orders having been returned as undeliverable. The parties to this brief will attempt service by mail on the following address taken from public records that appears to be a recent address for Defendant Marquardt: 2155 County Road X TRLR A16, Kronenwetter, WI 54455.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief confirms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a petition produced with a proportional serif font. The length of this brief is 2,998 words.

Dated: June 9, 2025.

Electronically signed by
Robert S. Driscoll