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In the Supreme Court of Wisconsin

APPEAL NO. 2022AP182

KOBLE INVESTMENTS,
Plaintiff-Respondent-Petitioner,

v.

ELICIA MARQUARDT,
Defendant,

v.

JAMES MILLER,
Intervenor-Appellant.

On Appeal from the Circuit Court of Marathon County
The Honorable Lamont K. Jacobson, Presiding Judge Case
Case No. 2020SC979

NON-PARTY BRIEF OF THE WISCONSIN BUILDERS ASSOCIATION

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INTRODUCTION

The Court of Appeals' decision in *Koble Investments v. Marquardt* abruptly upended fifty years of consistent legal interpretation when it applied the Wisconsin Consumer Act to landlord-tenant relationships and imposed a draconian penalty on landlords—twice all rent paid, regardless of harm. If allowed to stand, this ruling threatens to bankrupt small landlords and builder-members, destabilize affordable housing, and drive responsible housing providers out of the market. The Wisconsin Builders Association submits this brief to underscore the devastating policy consequences of this decision. This Court should restore clarity and stability by reaffirming that (1) the Wisconsin Consumer Act does not apply to rental housing, and (2) remedies under Wis. Admin. Code § ATCP 134.08 must be proportional to actual harm.

STATEMENT OF INTEREST

The Wisconsin Builders Association (the "Builders Association") is a nonprofit organization comprised of residential and commercial construction, remodeling, and real estate development professionals. It promotes excellence, ethical conduct, and sustainable practices in the industry for the benefit of its members, the communities they serve, and the broader public.

The Builders Association represents hundreds of builders, contractors, and developers who construct and maintain a wide range of residential housing—from luxury homes to affordable options like duplexes, triplexes, quadplexes, and other multi-unit residences that fit within neighborhoods. These members are not just builders but also small business owners who invest in, own, manage, develop, and remodel

two critical types of affordable housing: Naturally Occurring Affordable Housing ("NOAH") and Missing Middle Housing. NOAH comprises older, modestly priced homes and apartments that remain affordable without government subsidies, providing essential options for low- and moderate-income families. Abigail Corso et al., *Making Naturally Occurring Affordable Housing More Efficient: Outreach to Upgrade,* Elevate (Sep. 16, 2022), available at https://www.elevatenp.org/wp-content/uploads/Making-Naturally-Occurring-Affordable-Housing-More-Efficient.pdf. Missing Middle Housing includes a range of multi-unit or clustered housing types—such as duplexes, triplexes, bungalow courts, townhouses, and multiplexes—that are compatible with single-family homes and offer affordable, neighborhood-compatible living. *See* Opticos Design, *Missing Middle Housing is a transformative concept that highlights the need for diverse, affordable housing choices in sustainable, walkable places,* https://opticosdesign.com/missing-middle-housing/ (last accessed June 9, 2025).

The Court of Appeals' decision exposes small landlords—many of whom are Builders Association members—to severe and unpredictable liabilities. Like the eviction moratoriums during COVID-19, small landlords cannot absorb the financial losses that large corporate landlords can. Michelle Conlin, *Insight: Selling out: America's local landlords. Moving in: Big investors,* Reuters (July 29, 2021), https://www.reuters.com/business/finance/selling-out-americas-local-landlords-moving-big-investors-2021-07-29/. The draconian damage award under the *Koble* case will again push small Wisconsin landlords out of the market, likely selling to larger corporate landlords, which inevitably means higher rents and less affordable housing. *Id.* The Court

of Appeals' decision in *Koble* directly threatens the survival of small housing providers and the availability of affordable housing in Wisconsin. The Builders Association urges this Court to reverse the decision in *Koble Investments v. Marquardt* and restore the balanced, predictable framework for landlord-tenant relationships that existed prior to the Court of Appeals' disruptive ruling.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THREATENS WISCONSIN'S AFFORDABLE HOUSING ECOSYSTEM

A. Small Landlords Are the Backbone of Affordable Housing in Wisconsin

Small, independent landlords are the primary providers of Naturally Occurring Affordable Housing and Missing Middle Housing. *See* Corso et al.*, supra; See also,* Katherine Lucas McKay, et al., *Small Independent Landlords: At the Intersection of Affordable Housing and Business Ownership Strategies,* Asset Funders Network, https://assetfunders.org/resource/small-independent-landlords/ (last visited June 7, 2025). These landlords, who often own and manage older, modestly priced homes and small multi-family properties, supply affordable housing without government subsidies. *Id.*

Statewide, unsubsidized affordable housing accounts for a substantial share of Wisconsin's affordable housing stock. For example, in Dane County, 67% of the affordable housing supply is unsubsidized, making NOAH critical for meeting the housing needs of low- and moderate-income residents. *See* Corso et al.*, supra,* at 1. According to a study by the University of Wisconsin–Madison, the majority of low-

income renters in the City of Madison, Wisconsin reside in 2-4 unit properties, which tend to have lower and more stable rents than other housing types. María Jose Davila Martinez*, Assessing Threats and Opportunities of 2-4 Unit Rental Properties in Five City of Madison Neighborhoods,* Univ. of Wis.–Madison, Dep't of Planning and Landscape Architecture, at 4 (2021), available at https://dpla.wisc.edu/academics/graduate-programs/ms-urban-and-regional-planning/professional-project-resources/professional-project-archive/. The City of Neenah, Wisconsin, similarly found that small landlords are critical in providing affordable housing. City of Neenah, *Neenah Housing Study and Needs Assessment* at 68 (Dec. 3, 2024), https://www.ci.neenah.wi.us/wp-content/uploads/2025/03/Neenah-Housing-Study-and-Needs-Assessment-Draft.pdf.

B. The Court of Appeals' Decision Exposes Small Landlords to Catastrophic Financial Risks

In *Koble Investments v. Marquardt*, the Wisconsin Court of Appeals held that a tenant is entitled to the return of all payments made under a void and unenforceable lease, even though the tenant benefited from living in the rental premises. *Koble Investments v. Marquardt*, 2024 WI App 26, ¶ 50, 412 Wis. 2d 1, 7 N.W.3d 915. Specifically, the Court affirmed that because Koble's lease violated Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), it was void and unenforceable. *Id*. As a result, the tenant, Marquardt, was entitled to recover all payments made under the lease without any offset for the value of the housing she received. *Id.* The Court emphasized that the landlord's failure to respond to the tenant's argument was deemed a concession. *Id.* ¶ 49.

Moreover, the Court of Appeals held that because the lease was void, Marquardt was entitled to recover double damages under Wis. Stat. § 100.20(5), which allows for recovery of twice the amount of pecuniary loss caused by a violation of Wis. Admin. Code ch. ATCP 134. *Koble Investments*, 419 Wis. 2d 1, ¶ 50. The Court of Appeals further determined that Marquardt's pecuniary loss was the rent she paid, which meant that Marquardt was entitled to twice the amount of all rental payments Marquardt had made under the entire lease. *Id.* Finally, Marquardt was also entitled to recover her reasonable attorney fees and costs, including those incurred on appeal. *Id.* (citing *Shands v. Castrovinci*, 115 Wis. 2d 352, 359, 340 N.W.2d 506 (1983)).

The financial consequences of the Court of Appeals' decision are not theoretical—they are devastating and disproportionate. Landlords typically use the same lease form across all of their units. A landlord with a modest four-unit building in Madison charging $1,000 per month per unit could face a class action lawsuit by current and former tenants. If the lease is deemed void due to a technical violation—such as a disclosure error—the landlord could be ordered to repay double the rent paid to all current and former tenants. In this example, that amounts to $96,000 in damages per year, with no offset for the value of the housing provided. On top of that, the landlord could be liable for substantial attorney fees—likely more than $100,000—owed to the tenants' lawyers and their own lawyers. These costs could easily surpass the value of the property itself, despite the absence of any proven financial harm to the tenants.

No other consumer protection law imposes such extreme remedies. For example, if a lender violates the Truth in Lending Act's disclosure requirements, the borrower does not get to keep the house, receive a refund of all payments made, and walk away free of the debt. Yet under *Koble Investments v. Marquardt*, the tenant is entitled to recover all rent paid—without any deduction for the housing received. The decision mandates that landlords repay twice the total rent collected, even when tenants lived in the property and suffered no actual harm. This creates a draconian penalty, untethered from any measure of real-world injury.

C. This Decision Will Devastate Wisconsin's Affordable Housing Supply

The Court of Appeals' decision exposes small landlords to severe financial liability over minor lease technicalities, even when tenants receive full use of their housing. This outcome poses a direct threat to Wisconsin's affordable housing supply.

The Asset Funders Network explains, "[m]ore than half of small, independent landlords lack the savings and credit they need to maintain financial stability when faced with unexpected challenges." McKay, et al., *supra,* at 11. Over 70% of these landlords carry mortgages. They often share the same financial challenges as their tenants, and most lack the liquid savings needed to cover significant expenses. *Id.* This makes them particularly vulnerable to financial shocks such as extreme damage rewards for using an improper lease.

Small landlords do not have the legal or professional resources necessary to avoid every legal pitfall that may exist. A study by the American Bar Foundation, *The Impact of COVID-19 on Small Rental*

Property Management (2021), based on interviews with 69 small-scale landlords in Chicago, underscores that owners of naturally occurring affordable housing often operate without formal legal or professional support structures. Anna Reosti & Allison Suppan Helmuth, *The Impact of COVID-19 on Small Rental Property Management: Insights from a Chicago Case Study*, Am. Bar Found. (Dec. 2021), available at https://www.americanbarfoundation.org/resources/the-impact-of-covid-19-on-small-rental-property-management-insights-from-a-chicago-case-study/. The study found that small residential property owners did not retain legal counsel when filing evictions, and that they "lack[ed] the means, and in many cases the desire, to file evictions or hire private attorneys as a way to resolve nonpayment issues." *Id.* at 25. Instead, they relied on informal, personalized approaches to management, including negotiation and flexibility in rent collection—highlighting the absence of institutional resources common to larger landlords. *Id.* at 10-11.

This study highlights the often-overlooked humanity of the owners of small rental properties. These owners are not bad actors. These owners are not landlords that are uncaring about their tenants. In fact, these are the landlords that we want—landlords that are more flexible, avoid turnover, and charge lower rents. They operate on thin margins, often live alongside their tenants, and rely on day jobs to make ends meet. They make case-by-case decisions rooted in personal relationships, not corporate policy. Policies that treat them like institutional landlords—imposing rigid penalties and assuming bad faith—risk driving these small-scale providers out of the market entirely, accelerating the loss of naturally occurring affordable housing and replacing it with higher-cost, professionally managed units. The same

financial fragility exists among small Wisconsin landlords. Small landlords face heightened risks in Madison, where many Naturally Occurring Affordable Housing (NOAH) units exist in 2-4 unit buildings. As a University of Wisconsin-Madison study explains, these properties are "vulnerable to economic shocks." Davila Martinez, *supra*, at 5. Landlords of 2-4 unit properties earn less than owners of single-family homes or large multi-family buildings and have the largest share of owners of color. *Id.* (citing Jung Hyun Choi & Caitlin Young, *Owners and Renters of 6.2 Million Units in Small Buildings are Particularly Vulnerable during the Pandemic,* Joint Center for Housing Studies of Harvard University (Aug. 10, 2020) https://www.urban.org/urban-wire/owners-and-renters-62-million-units-small-buildings-are-particularly-vulnerable-during-pandemic. Across Wisconsin, this pattern repeats. Small landlords—landlords who provide much of the state's affordable housing—operate on thin margins and are highly susceptible to being pushed out of the market by even minor financial disruptions.

Unlike large corporate landlords, who aggressively pursue profits by raising rents or converting properties to market-rate housing, small landlords generally prioritize stable tenant relationships. According to the Asset Funders Network, small landlords often prefer to keep consistent tenants rather than face the costs and uncertainties of turnover. McKay, et al., *supra,* at 4. Many will be forced to sell their properties, while others may respond by raising rents, increasing move-in fees, or tightening tenant screening criteria in an attempt to mitigate perceived risks. *See* Reosti & Helmuth, *supra*, at 4. These shifts would undermine the very affordability and accessibility that small rental

properties are known for, eroding one of the most important sources of naturally occurring affordable housing in the market. *Id.*

When small landlords sell, the consequences for affordable housing are severe. "NOAH assets are also typically older and more likely to be redeveloped when sold, increasing the rate at which NOAH units are being lost and further shrinking the supply of affordable housing." Steve Kling, et al., *Preserving the Largest and Most At-Risk Supply of Affordable Housing*, McKinsey & Co. (Feb. 23, 2021), https://www.mckinsey.com/industries/public-sector/our-insights/preserving-the-largest-and-most-at-risk-supply-of-affordable-housing. Consolidation of rental housing ownership has been associated with increased rent levels, more frequent evictions, and stricter, less flexible property management practices. *See* Reosti & Helmuth, *supra*, at 4. Corporate landlords, who often acquire these properties, prioritize profit maximization. They often increase rents or redevelop the units to target higher-income tenants.

The outcome is clear: affordable housing will sharply decline, leaving low- and moderate-income families with fewer options. As small landlords exit the market, the affordable units they once provided transform into market-rate rentals or luxury housing. These sales are not neutral events. They accelerate the loss of affordable housing and deepen the housing crisis. Kling, et al., *supra*.

II. THE COURT OF APPEALS ERRED BY EXTENDING THE WISCONSIN CONSUMER ACT TO RESIDENTIAL LEASES AND AWARDING DOUBLE RENT WITHOUT REQUIRING PROOF OF CAUSATION.

The Court of Appeals' decision rests on a series of critical legal errors. Each error distorts Wisconsin law, threatens the availability of affordable housing, and undermines the stability of landlord-tenant relationships.

A. The Wisconsin Consumer Act does not apply to residential leases.

For over fifty years, Wisconsin courts, lawmakers, and practitioners have not applied the Wisconsin Consumer Act ("WCA") to residential leases. That understanding is reflected in the creation of a separate statutory framework—Wis. Stat. ch. 704 and Wis. Admin. Code ch. ATCP 134—specifically tailored to landlord-tenant matters. This Court should maintain that settled distinction and avoid expanding the WCA into an area long governed by separate, purpose-built laws.

The WCA, enacted in 1971, does not mention landlords, tenants, or "residential lease agreements," and no appellate court has extended its provisions to residential tenancies in the decades since. *See* Wis. Stat. § 421.301(13). The Court's interpretation stretches the WCA far beyond its intended scope, imposing a novel and unjust form of liability on landlords who are not creditors. In this case, the Court of Appeals held that Marquardt was entitled to recover all the rent she paid over the life of the lease, despite having received full value through uninterrupted occupancy. Under this approach, even small errors in lease drafting could result in ruinous financial consequences for small landlords—many of whom are Builders Association members providing naturally affordable housing and who do not have the resources of large corporate operators.

B. Recovery Under Wis. Stat. § 100.20(5) Requires a Causal Connection Between the Violation and the Pecuniary Loss

Section 100.20(5) of the Wisconsin Statutes allows for recovery when a person suffers a "pecuniary loss because of a violation." The statute's plain language, interpreted consistently by Wisconsin courts for decades, requires a demonstrated causal connection between the regulatory violation and the claimed financial harm. *See Grand View Windows, Inc. v. Brandt*, 2013 WI App 95, ¶ 21, 349 Wis. 2d 759, 837 N.W.2d 611.

In *Kaskin v. John Lynch Chevrolet-Pontiac Sales Inc.*, 2009 WI App 65, 318 Wis. 2d 802, 767 NW.2d 394, the consumer recovered damages only for unauthorized repairs—the precise financial harm caused by the ATCP violation. And in *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 24, 308 Wis. 2d 103, 746 N.W.2d 762, the Supreme Court affirmed that the plaintiffs' entire loss was recoverable because it was induced by misrepresentations in violation of the Home Improvement Practices Act. The Court emphasized the "clear causal connection" between the violation and the financial harm, which brought the claim squarely within § 100.20(5). *Id.*

On the other hand, courts have denied recovery where no such causal connection is shown. In *Grand View Windows*, the Court of Appeals held that Brandt failed to provide evidence that the violation of Wis. Admin. Code § ATCP 110.02(7)(c)—Grand View's failure to give notice of a delay—caused any pecuniary loss. *See Grand View,* 349 Wis. 2d 759, ¶ 35. In *United States v. Schumacher*, 154 F. Supp. 425 (E.D. Wis. 1957), the court dismissed a § 100.20(5)-based claim because the

defendants failed to offer any evidence of actual pecuniary loss stemming from the regulatory violation. Although the siding was defective and the seller may have violated Wis. Admin. Code § ATCP 110.02, the court found that without evidence of economic harm—such as repair costs or diminished value—there could be no recovery. *Schumacher*, 154 F. Supp. at 430.

Marquardt's claim for double damages fails because there is no evidence that the landlord's failure to provide the required notice caused her to enter into the lease or suffer any financial harm. Nothing in the record suggests that the alleged violation induced the tenancy or led to any loss. To the contrary, Marquardt received the full benefit of the bargain—housing in exchange for rent paid. Under Wisconsin law, a tenant cannot recover under Wis. Stat. § 100.20(5) without proving that the violation caused an actual pecuniary loss.

CONCLUSION

The Court of Appeals' decision in *Koble Investments v. Marquardt* abruptly overturns five decades of settled law and imposes a draconian penalty scheme untethered from actual harm. By retroactively applying the Wisconsin Consumer Act to residential leases—despite the Act's silence on landlord-tenant relationships and the existence of a separate, comprehensive statutory regime—the decision destabilizes Wisconsin's rental housing market and exposes small landlords to catastrophic liability. If allowed to stand, this decision will accelerate the loss of Naturally Occurring Affordable Housing and Missing Middle Housing, push small landlords out of the market, and further concentrate rental

housing in the hands of large corporate owners—at the expense of Wisconsin's working families.

This Court should restore clarity and stability to Wisconsin landlord-tenant law by reaffirming that (1) the Wisconsin Consumer Act does not apply to residential leases, and (2) remedies under Wis. Stat. § 100.20(5) and Wis. Admin. Code § ATCP 134.08 must be proportionate to actual, demonstrated harm caused by the alleged violation. Reversal is necessary to protect the legal predictability on which thousands of small landlords and tenants have relied for over fifty years.

Dated: June 9, 2025.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief. The length of those portions of the brief referred to in Wis. Stat. § (Rule) 809.19(1)(d), (e) and(f) is 2,979 words.

Dated: June 9, 2025

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