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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
Case No. 2020SC979

NONPARTY BRIEF OF THE NORTH CENTRAL STATES REGIONAL COUNCIL OF CARPENTERS

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INTRODUCTION

Stability. Predictability. Consistency. Clarity. The judiciary strives toward these goals in a rule-of-law system. When economic actors can understand the legal rules that regulate their conduct and can be confident that those rules will apply consistently across time resulting in predictable outcomes, economic activity flourishes. That rising tide lifts all boats, including those of the union carpenters.

The converse holds just as true. When courts purport to dust off legal rules supposedly lying dormant for decades in distant volumes of the statute books, only to bring about an abrupt sea change, the resulting market choppiness inhibits investment and impedes economic activity.

This appeal asks the Court to restore consistent application of stable legal rules that have long provided landlords and tenants clear guidance and predictable outcomes. Two holdings achieve this restoration:

(1) the Wisconsin Consumer Act's (WCA) public meaning, as liquidated over the past 50 years, renders it inapplicable to landlord-tenant relations; and

(2) the remedy under Wis. Stat. § 100.20(5) for a void lease is not automatically twice all past rent paid where no evidence causally links rent payments to the presence or absence of an unlawful provision.

STATEMENT OF INTEREST

The North Central States Regional Council of Carpenters ("Carpenters Union"), chartered by the United Brotherhood of Carpenters and Joiners of America union, represents nearly 27,000 skilled workers and their families across the Midwest, including Wisconsin. Those members—professional carpenters, millwrights, pile

drivers, and interior systems specialists—regularly perform construction, remodeling, and repair work on rental housing of all types, from single-family units to large multi-family developments. This appeal's outcome implicates the economic wellbeing of the Carpenters Union's members, whose livelihoods depend on a stable and prosperous rental housing market.

ARGUMENT

I. A HALF CENTURY OF CONTEMPORANEOUS & CONSISTENT UNDERSTANDING & PRACTICE HAS LIQUIDATED THE WISCONSIN CONSUMER ACT'S SCOPE.

More than half a century of consistent understanding and practice by landlords, tenants, state agencies, and courts since the WCA's enactment has settled its scope. These actors' original understanding that the WCA does not govern the typical landlord-tenant relationship—evidenced by decades of dormancy and non-application in an otherwise highly litigated field—liquidated the law's meaning.

A. Statutory Liquidation.

Judicial adherence to a law's contemporaneous, and thereafter constant, understanding by those most expected to implement it is a substantive interpretive canon dating to the founding. "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." The Federalist No. 37, at 235–37 (James Madison). Indeed, jurists across interpretive jurisprudences accept that a contemporaneous understanding of a law's

scope, uninterrupted for decades, offers strong evidence of statutory meaning:

- [T]he Government's failure for over 60 years to exercise the power . . . strongly suggests that it did not read the statute as granting such power." "[P]owerful weight" should be given to the "practical construction given it by the enforcing agencies over a 60 year span," where the "business community directly affected *and* the enforcing agencies *and* the Congress have read this statute the same way for 60 years." *Bankamerica Corp. v. United States*, 462 U.S. 122, 131–32 (1983).
- "[T]he construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. . . . A practice so long and so general, would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act . . . ." *United States v. State Bank of N. Carolina*, 31 U.S. 29, 39–40 (1832).
- "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. . . . [J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Bros.*, 312 U.S. 349,

351–52 (1941) (citing *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315).

- "[A] contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale." *Brown v. United States*, 113 U.S. 568, 571 (1884).
- "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject." *United States v. Moore*, 95 U.S. 760, 763 (citations omitted).
- "[C]ourts may examine the agency's past interpretations of the relevant statute," such that a "contemporaneous" and "long-held" interpretation of a statute "is entitled to some weight as evidence of the statute's original charge," as is a "half century of . . . never before adopt[ing]" a position or interpretation now asserted. *West Virginia v. EPA*, 597 U.S. 697, 747–48 (2022) (Gorsuch, J., concurring) (citing *United States v. Philbrick*, 120 U.S. 52 (1887); *NFIB v. OSHA*, 595 U.S. 109, 119 (2022); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 158–59 (2000)).

Wisconsin courts have likewise long employed this interpretive principle to affirm a law's contemporaneous and longstanding construction. "The general understanding of a law and constant practice under it" for a sufficiently long period "by all the officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle the construction in

the courts, ought to be very strong, if not conclusive, evidence of its true meaning and application." *Scanlan v. Childs*, 33 Wis. 663, 666 (1873). Conversely, Wisconsin courts disfavor interpretations that "would be a surprise to the legal profession, as well as the business community" where "such has never been the understanding or practice in any part of the state under the [relevant] laws, the provisions of which have been and remained substantially the same for a period of more than twenty years." *Id.* at 665–66.

The principle of statutory liquidation is a substantive canon of construction. It uses "historical and governmental contexts" as interpretive aids and—even for a devout textualist—properly "advance[s] values external to a statute." *Biden v. Nebraska*, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) (quoting Frank Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv. L. Rev. 1876, 1913 (1999)); *see also id.* at 519 ("A longstanding 'want of assertion of power by those who presumably would be alert to exercise it' may provide some clue that the power was never conferred." (quoting *Bunte Bros.*, 312 U.S. at 352)). Those external values are stability, predictability, consistency, and clarity, all of which promote government legitimacy in the eyes of the regulated public:

> This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive, and administrative.

United States v. Hill, 120 U.S. 169, 182 (1887).

B. Consistent Practice Liquidated the WCA's Scope.

Here, the record offers no evidence that the Wisconsin Department of Financial Institutions (DFI)—the WCA administering agency—ever asserted authority under Wis. Stat. chs. 421 to 427 over landlord-tenant relations or referred a landlord for prosecution under those chapters. Rather, the five-decades-long historical record reveals that the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) exclusively regulates landlord-tenant relationships under Wis. Stat. ch. 704, and Wis. Adm. Code chs. ATCP 125 & 134.[1]

The historical context of DATCP actively developing a separate, comprehensive body of landlord-tenant law while DFI promulgated no landlord-tenant specific regulations or otherwise acquired expertise in regulating landlord-tenant relations cuts strongly against the sudden interlope of Wis. Stat. chs. 421 to 427 into an already exhaustively regulated area. *See Bunte Bros.*, 312 U.S. at 350–55; *Nebraska*, 600 U.S. at 518–19 (Barrett, J., concurring) (collecting cases rejecting interpretations that would afford an agency authority "outside its wheelhouse").

Likewise, despite many experienced tenant-side legal organizations and attorneys routinely litigating disputes over residential leases throughout the past 50 years, this record documents no prior instance of tenants challenging an attempt to collect unpaid rent as a prohibited debt-collection practice under Wis. Stat. ch. 427. This legal community had no incentive to sit for decades on their clients' supposed

[1] "Landlord-tenant relations in Wisconsin are regulated by Wis. Stat. ch. 704, and by Wis. Adm. Code ch. ATCP 134. In addition, Wis. Adm. Code ch. ATCP 125 further regulates manufactured home community operator-tenant relations." Wis. DATCP, *Tenants' Rights and Responsibilities*, https://datcp.wi.gov/Pages/Publications/LT-TenantsRights143.aspx.

rights under the WCA if its provisions actually applied. Instead, as evidenced by the Petitioner's brief and those of many amici, the WCA's application to a residential lease comes as "a surprise to the legal profession, as well as the business community" because "such has never been the understanding or practice in any part of the state" under that law, "the provisions of which have been and remained substantially the same for a period of more than [fifty] years." *Scanlan*, 33 Wis. at 665–66.

C. The Liquidated Meaning Prevails.

"The general understanding of a law and constant practice under it" for half a century "by all the officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle the construction in the courts, ought to be very strong, if not conclusive, evidence of its true meaning and application." *Id.* at 666. This "contemporaneous and uniform interpretation . . . ought to turn the scale" against the Court of Appeal's doubtful, ahistorical interpretation. *See Brown*, 113 U.S. at 571. As others have explained, the decision's likening of a typical residential lease to "an agreement to defer payment" fails as a conceptual matter. *See Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 547 (7th Cir. 2005); *CFPB v. Snap Fin. LLC*, No. 2:23-cv-00462-JNP-JCB, 2024 WL 3625007, at *7 (D. Utah Aug. 1, 2024).

Five decades of uninterrupted contrary practice and original understanding shouldn't be tossed aside in favor of the Court of Appeals' alternative reading derived not from explicit text but rather gleaned from inferences draw out of tangential provisions. *See Koble Invs. v. Marquardt*, 2024 WI App 26, ¶¶ 16–17, 412 Wis. 2d 1, 7 N.W.3d 915. *But see State Bank of N. Carolina*, 31 U.S. at 39–40 (holding that even where

a liquidated interpretation could be doubted in favor of another, "so long an acquiescence in" a "practice so long and so general" would "justify . . . yielding to it as a safe and reasonable exposition").

This Court should ratify the WCA's scope as liquidated by the relevant agencies, legal professionals, and business community's half century of consistent understanding and practice and hold that the WCA does not apply to residential leases.

II. SECTION 100.20(5) REQUIRES PROOF OF ACTUAL PECUNIARY DAMAGES CAUSED BY THE VIOLATIVE LEASE PROVISION.

As with the WCA's sudden application to a residential lease following 50 years of undisturbed dormancy, this Court should meet with skepticism the Court of Appeals' unprecedented judicial graphing of a WCA remedy provision (Wis. Stat. § 425.305) onto a distinctly worded landlord-tenant remedy provision (Wis. Stat. § 100.20(5)). The atextual amalgamation creates a dramatic and ruinous remedy in no way tethered to the latter's text, creating a disproportionate windfall: "twice the amount of all payments . . . made under [a] void and unenforceable lease" without any need to prove a pecuniary loss caused by the violation.

A. Interpretation-by-Forfeiture Is Flawed.

While the remedy is breathtaking, its basis is anything but. The decision below justifies this ominous punishment not on a meaningful analysis of text but instead on an interpretation-by-forfeiture theory. *See Koble Invs.*, 412 Wis. 2d 1, ¶¶ 45–50. Even if an interpretive argument is forfeited, that does not grant the judiciary license to rewrite statutes in any fashion the other side fancies. Courts still have an independent duty to declare what a law says and faithfully apply that declared meaning. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *State v. Frear*,

142 Wis. 320, 125 N.W. 961, 970 (1910) ("It is [courts] sworn duty to interpret the law as they find it" and courts should not "usurp the functions of the lawmaking power, and by inadmissible construction, or otherwise, defeat its will."). Interpretation-by-forfeiture abandons this basic judicial role; such an approach should not produce results unsupported by statutory text. This Court should neither embrace nor endorse the interpretation-by-forfeiture approach adopted below.

B. Section 100.20(5)'s Meaning Is Plain.

Rather, the Court should faithfully construe § 100.20(5)'s plain message: a tenant is only entitled to double the pecuniary loss *caused by* a violation of law promulgated under § 100.20. Section 100.20(5) says:

> Any person suffering pecuniary loss *because of* a violation by any other person of . . . any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney fee.

(Emphasis added.) Courts invariably interpret the phrase "because of" as denoting a required but-for causal connection between the clause that precedes it and the one that succeeds it. "As a matter of textual interpretation, the phrase—"because of"—is generally described in essential terms as but-for causation . . . ." *Bracken v. S. Dakota Dep't of Lab. & Regul., Reemployment Assistance Div.*, 991 N.W.2d 89, ¶ 18 (S.D. 2023) (citing *United States v. Miller*, 767 F.3d 585, 591 (6th Cir. 2014)); *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 398 P.3d 556, 564 (Cal. 2017) ("'Because of' is a term in common usage. It connotes a causal link." (quoted source omitted)); *see also Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009). The sole linguistically supportable read of § 100.20(5) is that it provides relief only where the violation is shown to be the claimed pecuniary loss' but-for cause.

And that is precisely the construction courts have given § 100.20(5). For example, the Court of Appeals in *Grand View Windows, Inc. v. Brandt* confirmed that pecuniary damages, to be awardable under § 100.20(5), must be "be proven by statements of facts" and cannot be sustained "by mere conclusions of the witnesses" or "a claimant's mere statement or assumption that he has been damaged." 2013 WI App 95, ¶ 21, 349 Wis. 2d 759, 837 N.W.2d 611. The claimant also bears the burden of "show[ing] that there is a causal connection between a prohibited trade practice . . . and the damage incurred." *Id.*

Here, the record lacks any statements of facts evincing either a pecuniary loss or a causal connection of any such loss to the exclusion of the required lease provision. The violation and resulting voiding of the lease caused the tenant to revert to a month-to-month tenancy. *See* Wis. Stat. § 704.01(2) & 704.03(2). No evidence in this record suggests that she would have never rented her apartment but for the missing domestic abuse notice. As a result, she occupied the rented premises as a periodic tenant who was still obliged to pay rent. Wis. Stat. § 704.05(2). Those payments were thus not losses caused by a violation but an agreed-upon exchange for which she received the full benefit of the bargain.

C. A Train of Serious Mischief Looms.

A contrary holding portends dire mischief. Abandoning any evidentiary burden on damages in favor of an automatic award of all past rent payments constitutes a sharp break in decades of otherwise consistent application of the law. The abrupt about-face rattles the foundation of Wisconsin's rental and multifamily residential construction markets. This judicial earthquake was accompanied by

none of the traditional protections or opportunity to be heard afforded by the legislative and executive branches' lawmaking procedures.

Predictably, this new low barrier to windfall recoveries has instigated an opportunistic race to the courthouse to cash in on nominal lease violations with no discernable harm to any tenants. The resulting explosion of litigation risk reduces return on investment, which chases away new investment for desperately needed new housing projects. Landlords need to consolidate assets, raise rents, and cut costs on new development to address higher liability insurance premiums as insurers price in the cost of this expansive novel risk. *Cf.* Joanna M. Shepherd, Products Liability and Economic Activity, 66 Vand. L. Rev. 257, 287–90 (2013).

This retraction in economic activity particularly hurts union professionals. The Court of Appeals' decision does not spare the Carpenters Union's members from its already unfolding fallout. The better course is for this Court to return § 100.20(5)'s remedy to its textual confines and restore the uncontroversial holding that pecuniary damages "because of" a violation requires proof of an actual monetary loss caused by an improper lease.

CONCLUSION

Stable legal rules, predictable outcomes, consistent application across cases, and clear laws on which the public can reasonably rely are paramount interests in a rule-of-law system. To those ends, a half century of consistent practice since enactment settles the original understanding that the WCA does not extend to landlord-tenant relations. These values equally compels restoration of § 100.20(5)'s textual perquisite of a causal link between claimed pecuniary losses and

the regulatory violation. To hold otherwise damages the rule of law, disregards legislative text, and destabilizes the rental and construction markets on which Carpenters Union members depend.

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 this brief is 2,999 words.

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