FILED
04-19-2024
CLERK OF WISCONSIN
SUPREME COURT

In the Wisconsin Supreme Court

No. 2022AP718

WISCONSIN MANUFACTURERS AND COMMERCE, INC.,
and LEATHER RICH, INC.,
Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
WISCONSIN NATURAL RESOURCES BOARD, and PRESTON COLE,
Defendants-Appellants-Petitioners

On review of a decision by the
Wisconsin Court of Appeals, District II

RESPONSE TO PETITION FOR REVIEW

Lucas T. Vebber (SBN 1067543)
Luke N. Berg (SBN 1095644)
Wisconsin Institute for Law & Liberty, Inc.
330 E. Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202
Phone: (414) 727-7415
Fax: (414) 727-6385
E-mail: lucas@will-law.org

Scott E. Rosenow (SBN 1083736)
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
Phone: (608) 661-6918
Email: srosenow@wmc.org

Attorneys for Plaintiff-Respondent Wisconsin Manufacturers & Commerce, Inc.

Delanie M. Breuer (SBN 1085023)
Fredrikson & Byron, P.A.
44 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
Phone: (608) 453-5135
Email: dbreuer@fredlaw.com

Attorneys for Plaintiff-Respondent Leather Rich, Inc.

TABLE OF CONTENTS

Introduction ..... - 3 -

Argument ..... - 5 -

This Court should deny the petition for review. ..... - 5 -

A. This case does not raise a novel issue. ..... - 6 -

1. DNR may regulate substances under the Spills Law if they are designated as hazardous substances under Wisconsin or federal law. ..... - 6 -

2. By requiring DNR to provide fair notice to the public, the circuit court and court of appeals decisions avoided serious constitutional and policy concerns. ..... - 11 -

3. DNR's *ad hoc* regulation is contrary to government transparency and raises an issue not well suited for judicial resolution. ..... - 15 -

B. The claims in this case are fact specific and require application of settled law. ..... - 17 -

C. The court of appeals decision is correct. ..... - 19 -

1. DNR's announcements that emerging contaminants are hazardous substances have the force of law. ..... - 20 -

2. DNR's pause of the VPLE program is an unpromulgated rule. ..... - 22 -

3. Wisconsin Stat. § 227.10(1) required DNR to follow the rulemaking process before it determined that emerging contaminants are hazardous substances. ..... - 23 -

4. The Spills Law and the administrative code do not give DNR explicit authority to regulate emerging contaminants at specific quantities. ..... - 24 -

Conclusion ..... - 26 -

Certification ..... - 28 -

INTRODUCTION

This case concerns the public's right to know what the law requires. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶ 39, 389 Wis. 2d 486, 936 N.W.2d 573 (citation omitted).

Our state's Spills Law (Wis. Stat. § 292.01 et seq.) requires every person to report a hazardous-substance discharge and then conduct a costly investigation and remediation. Failure to comply subjects a person to penalties up to $5,000 per day. Under basic principles of administrative and constitutional law—and common sense—the public requires fair notice of when a substance is regulated as hazardous under the Spills Law. Yet DNR asserts that it may determine on an *ad hoc* basis—or, in the circuit court's words, on "a whim and a fancy"—when substances are considered hazardous. (R. 120:18.)

This *ad hoc* approach has been deeply troubling for Wisconsinites who are trying to comply with the Spills Law, including Joanne Kantor, who co-owned Leather Rich Inc. with her husband for 43 years until his death in 2018. (R. 71:1.) Joanne began exploring a sale of the Leather Rich property in anticipation of retiring. (R. 71:1.) In arranging a potential sale, Joanne discovered that the Leather Rich property may be contaminated with certain low-level volatile organic compounds. (R. 71:1.) Joanne did not expect to make that discovery because Leather Rich had installed an impermeable barrier under its facility during construction to prevent any potential contamination. (R. 71:1.) Joanne reported this potential contamination to DNR, which then opened a remediation case. (R. 71:2.) After Leather Rich submitted several reports to DNR, DNR instructed Leather Rich to investigate the possible presence of "emerging contaminants." (R. 71:3.) DNR subsequently instructed Leather Rich to collect and test "several additional soil samples for PFAS"[1] and "identify 'both individual and combined exceedances' of PFAS." (R. 71:3.) DNR did not explain to Leather Rich "which of the more than 4,000 known PFAS compounds [DNR]

[1] "PFAS" refers to perfluoroalkyl and polyfluoroalkyl substances.

considered hazardous substances, nor at what concentrations those substances would be considered in exceedance." (R. 71:3.) Leather Rich has spent more than $293,000 investigating potential contamination of its property (R. 71:4), but DNR has not yet provided clear standards to allow Leather Rich to complete remediation.

DNR's vague directives to Leather Rich regarding "PFAS" and "emerging contaminants" are not an isolated incident. On DNR's website and in letters to other persons engaged in various remediation efforts, DNR announced that "emerging contaminants," including "PFAS," are hazardous. In those announcements, DNR asserted that the Spills Law requires persons to report discharges of emerging contaminants. But DNR's announcements did not explain what "emerging contaminants" means, other than saying this term includes unspecified PFAS substances. This lack of clarity is highly problematic, given DNR's acknowledgment that "there are an estimated 9,000 individual PFAS compounds and thousands of PFAS mixtures." (R. 79:30.) PFAS were "invented in the 1940s" and "are used in hundreds of industrial and commercial applications." (R. 79:30.)

According to DNR, its authority to deem substances as hazardous on an *ad hoc* basis extends far beyond "emerging contaminants." According to DNR's website, "[e]ven common products such as milk, butter, pickle juice, corn, beer, etc., may be considered a hazardous substance." (R. 7:3.) DNR, however, has not adopted rules to explain the circumstances that would subject a spill of those common products to the Spills Law. In DNR's view, when someone discovers a discharged substance, that person must guess whether DNR will view that discovery as a hazardous-substance discharge. If the person guesses wrong and fails to report the discharge, she would be subject to ruinous fines.

Fortunately, the law does not work that way. The United States Environmental Protection Agency (EPA) has promulgated and regularly updates a lengthy list of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund. The Spills Law's notification requirements apply to discharges that are subject to CERCLA's notification requirements—in other words, to discharges of substances

that are deemed hazardous under CERCLA. And DNR may engage in rulemaking to supplement the federal list of hazardous substances.

Here, however, DNR is trying to regulate a broad category of unspecified substances even though they are not listed as hazardous substances in the state or federal administrative code. Today, the EPA finalized a rule to list two PFAS substances as hazardous under CERCLA. DNR may rely on those federal regulations if and when they become law, or DNR may adopt its own rule. But DNR may not apply the Spills Law to a vague group of "emerging contaminants" without any rulemaking happening first.

DNR's petition for review is full of mischaracterizations and conjures a non-existent crisis. Although the Respondents explained in multiple briefs that DNR may rely on the federal list of hazardous substances, DNR entirely ignores that crucial point in its petition for review.

Applying a well-established legal test to the facts of this case, the circuit court and court of appeals correctly held that DNR was unlawfully regulating currently unregulated substances. This Court should deny the petition for review.

ARGUMENT

This Court should deny the petition for review.

This Court should deny review because this case is not novel, it involves the application of a settled legal test to the specific facts of this case, and the court of appeals and circuit court both decided this case correctly. There is nothing unusual about expecting DNR to provide fair notice to the public about when a substance is regulated by either promulgating its own environmental standards or incorporating federal environmental standards, both of which are developed through established administrative processes. As the court of appeals held, allowing DNR to deem substances hazardous on a whim and a fancy is unlawful. This *ad hoc* approach also violates the public's constitutional right to fair notice and is bad policy.

A. This case does not raise a novel issue.

This Court is more likely to grant review if "[t]he question presented is a novel one, the resolution of which will have statewide impact." Wis. Stat. § (Rule) 809.62(1r)(c)2. Here, however, there is nothing novel about requiring DNR to go through rulemaking to determine the Spills Law is applicable to certain substances at certain concentrations or with certain specific and clear characteristics. In fact, DNR has done so on numerous occasions by promulgating various environmental standards. The EPA has also promulgated numerous environmental standards, some of which are incorporated into the Spills Law.

DNR's *ad hoc* regulation here is novel. In DNR's view, it may decide *without any rulemaking* at the state or federal level—without any fair notice to the public—that a previously unregulated substance is a "hazardous substance" and thus begin regulating it under the Spills Law. This includes substances like PFAS, which have been in wide use for decades and were not previously considered hazardous.

That view disregards how hazardousness has traditionally been determined by both state and federal regulators, and it is bad policy that contravenes the rulemaking requirements in Wis. Stat. ch. 227.

1. DNR may regulate substances under the Spills Law if they are designated as hazardous substances under Wisconsin or federal law.

In environmental law, agency rulemaking is the norm. DNR regularly promulgates, through rulemaking, environmental standards for several media, including groundwater, surface water, and air. For example, DNR has promulgated lists of hazardous air pollutants,[2] groundwater standards,[3] hazardous wastes,[4] and toxic pollutants.[5] The

[2] *See* Wis. Admin. Code ch. NR 465, Subch. 1, Table 1.
[3] *See* Wis. Admin. Code § NR 140.10, Table 1.
[4] *See* Wis. Admin. Code §§ NR 661.31, 661.0032, 661.0033.
[5] *See* Wis. Admin. Code § NR 215.03.

EPA similarly has promulgated lists of hazardous wastes,[6] toxic pollutants,[7] hazardous air pollutants,[8] and hazardous substances.[9]

In fact, the EPA has promulgated lists to enforce CERCLA, the federal counterpart to the Spills Law. Specifically, CERCLA incorporates environmental standards from other programs, including the Clean Water Act, the Solid Waste Disposal Act, the Clean Air Act, and the Toxic Substances Control Act. *See* 42 U.S.C. § 9601(14); *see also Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 984 & n.2 (1st Cir. 1995). "The EPA has codified a consolidated list of hazardous substances subsuming all of the statutory lists incorporated by CERCLA, at 40 C.F.R. § 302.4, Table 302.4 ('Table 302.4')." *Blackstone*, 67 F.3d at 984. Table 302.4 identifies the quantity at which a discharge of any given hazardous substance is reportable under CERCLA. Something is a hazardous substance under CERCLA if it is listed in Table 302.4 or "if it exhibits any of the characteristics identified in 40 CFR 261.20 through 261.24." 40 C.F.R. § 302.4(1)–(2).[10] Federal regulations provide specific definitions of those characteristics: ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.21–261.24. By looking at Table 302.4 and those other regulations, the public can determine with certainty when a substance is subject to CERCLA regulation. The definition of toxicity, for example, consists of a list of contaminants. 40 C.F.R. § 261.24, Table 1.

The notification requirement in Wis. Stat. § 292.11(2) applies to any discharge that is subject to CERCLA. Specifically, Wis. Admin. Code § NR 706.02(3) states that "[p]ersons and facilities subject to the release notification requirements in CERCLA [and certain other federal law] are required to comply with those requirements in addition to complying with the notification requirements of this chapter." The EPA's

---

[6] *See* 40 C.F.R. §§ 261.31–261.33.

[7] *See* 40 C.F.R. § 129.4; 401 C.F.R. § 40.15.

[8] *See* 40 C.F.R. § 61.01; *see also* 40 C.F.R. §§ 63.60–63.64.

[9] *See* 40 C.F.R. §§ 116.4, 117.3.

[10] The EPA issued a final rule on March 13, 1978, designating hazardous substances under the authority of the Clean Water Act. *See, e.g.*, Designation of Hazardous Substances; Designation, Reportable Quantities, and Notification, 76 FR 55583-01. Wisconsin's Spills Law took effect about two months later, on May 21, 1978. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 141, 580 N.W.2d 203 (1998).

promulgated rules under CERCLA provide the public with notice of which substances are regulated and under what circumstances.

Like the EPA, DNR may adopt rules identifying which substances it thinks are hazardous and explaining at which quantities their discharges must be reported. *See* Wis. Stat. § 227.11(2)(a) (authorizing "rules interpreting the provisions of any statute enforced or administered by the agency"). In fact, DNR has "adopt[ed] by administrative rule notification requirements for discharges of hazardous substances . . . pursuant to [§§] 227.11 (2) and 292.11, Stats." Wis. Admin. Code § NR 706.01. These additional state standards include a rule that provides the public with notice as to when certain discharges must be reported to DNR. *See* Wis. Admin. Code § NR 706.07.

However, DNR is not obligated to promulgate rules to regulate substances already declared hazardous under CERCLA. A federal rule is currently underway to list two PFAS compounds—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS)—as hazardous substances under CERCLA.[11] Those two substances are the "most well studied PFAS compounds" (R. 79:30), but courts have held they are not hazardous substances under CERCLA. *See, e.g.*, *Penna v. United States*, 153 Fed. Cl. 6, 15 (2021) (noting "PFOS and PFOA are not 'hazardous substances' as defined in [CERCLA]"); *Giovanni v. United States Dep't of the Navy*, 433 F. Supp. 3d 736, 744 n.7, 746 (E.D. Pa. 2020) (noting PFOS and PFOA are not "included in CERCLA's list of hazardous substances

[11] On April 19, 2024, the EPA finalized this proposed rule. U.S. Env't Prot. Agency, "Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances," https://www.epa.gov/superfund/designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos-cercla (last accessed April 19, 2024).

The EPA states that this "rule will be effective 60 days after publication in the Federal Register." U.S. Env't Prot. Agency, "Questions and Answers about Designation of PFOA and PFOS as Hazardous Substances under CERCLA," https://www.epa.gov/superfund/questions-and-answers-about-designation-pfoa-and-pfos-hazardous-substances-under-cercla (last accessed April 19, 2024).

The docket for this rulemaking effort is available at https://www.regulations.gov/docket/EPA-HQ-OLEM-2019-0341.

This proposed rule is available at https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-18657.pdf.

appearing at 40 C.F.R. § 302.4," and the toxicity table in 40 C.F.R. § 261.24 "does not list PFOS or PFOA"). Pursuant to Wis. Admin. Code § NR 706.02, if and when that proposed federal rule becomes law, anyone required to report a hazardous-substance discharge of PFOS and PFOA under CERCLA will also be required to comply with the notification requirements in Wisconsin's Spills Law.

So DNR may regulate a discharge under the Spills Law if it is designated as a hazardous-substance discharge under federal law or in the NR series of Wisconsin's administrative code. But, and critically important for this case, DNR may not regulate an otherwise unregulated substance, for which the public has received no notice, under the Spills Law.

There is nothing novel about requiring DNR to promulgate a rule before it adopts a policy that certain substances are hazardous and subject to regulation under the Spills Law. *See, e.g.*, *Giovanni*, 433 F. Supp. 3d at 744 n.7 (holding that PFOS and PFOA are not hazardous substances under Pennsylvania law because they "are not hazardous substances pursuant to CERCLA's definition of the term" and because "the [Pennsylvania] Environmental Quality Board has not promulgated any regulations listing PFOS or PFOA as hazardous substances").

DNR effectively created a rule when it announced on its website and in certain letters that PFAS are hazardous substances. But that rule adoption was illegal because it indisputably did not comply with rulemaking requirements under Wis. Stat. ch. 227.

DNR asserts that it has been regulating some "emerging contaminants"—polychlorinated biphenyls (PCBs), tetrachloroethylene (PCE), and methyl tert-butyl ether (MTBE)—although "no administrative rule" lists them as hazardous substances. (Pet. 12; *see also id.* at 26.) But those three substances are listed as CERCLA hazardous substances in Table 302.4. Because the EPA engaged in rulemaking to identify those substances as hazardous, DNR may apply

the Spills Law to them. *See* Wis. Stat. § 292.11(12)(b); Wis. Admin. Code § NR 706.02(3).[12]

In its petition for review, DNR ignores that it may rely on the federal list of hazardous substances—although the Respondents raised this crucial point in multiple briefs. For example, the Respondents noted that the "substances the EPA has designated as hazardous under CERCLA are already incorporated into Wisconsin's definition of 'hazardous substance.'" (R. 128:6.) They conceded that "DNR may regulate the hazardous substances that are designated as such under federal law." (R. 135:7.) They also noted that the EPA was undergoing a rulemaking effort to list two types of PFAS as hazardous substances. (R. 126:6 n.3; 135:8.)

By ignoring those points, DNR mischaracterizes this case. DNR asserts, for example, that the court of appeals "decision below would transform the Spills Law by rendering it inert without [DNR] rulemaking." (Pet. 22.) That assertion is false because DNR may regulate the EPA's promulgated list of hazardous substances, without DNR rulemaking.

DNR similarly asserts that "[r]egulated parties will surely try to extend the court of appeals' reasoning beyond PFAS, given how the court's logic could apply equally to any other substance covered by the Spills Law." (Pet. 26.) DNR is wrong again. The court of appeals' reasoning would not extend to substances that are designated as hazardous under the Spills Law or CERCLA.

DNR also claims that "what constitutes a hazardous substance and at what concentration cannot be comprehensively enumerated." (Pet. 27.) That claim is belied by the existence of federal administrative code provisions under CERCLA and by the EPA's recently finalized rule listing two PFAS as hazardous substances. *See supra* at 7–9. It is also belied by the various promulgated lists mentioned above. *See supra* at 6–7. And if DNR cannot definitively determine which substances are

[12] Similarly, Table 302.4 includes chromium, the hazardous substance at issue in *State v. Mauthe*, 123 Wis. 2d 288, 366 N.W.2d 871 (1985).

hazardous and at what concentration, then how is the average Wisconsinite supposed to make that determination?

In short, DNR is applying the Spills Law to substances that are not designated as hazardous under state or federal law. It may not do so. Instead, it must adopt a rule to designate an emerging contaminant as a hazardous substance or wait for the EPA to do so. The main thrust of DNR's petition for review—that the court of appeals decision requires *DNR* to undergo rulemaking to list PFAS as hazardous substances—is not accurate. A federal rule to list two PFAS as hazardous substances was finalized today.

2. By requiring DNR to provide fair notice to the public, the circuit court and court of appeals decisions avoided serious constitutional and policy concerns.

"Due process requires that the law set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." *State v. Silverstein*, 2017 WI App 64, ¶ 29, 378 Wis. 2d 42, 902 N.W.2d 550 (quoting *State v. Popanz*, 112 Wis. 2d 166, 172, 332 N.W.2d 750 (1983)). If a law fails to do so, it "is void for vagueness." *Id.* (quoting *State v. Curiel*, 227 Wis. 2d 389, 415, 597 N.W.2d 697 (1999)).

The requirement of fair notice is especially important in a complex environmental law that applies to everyone. "A complicated regulatory regime like CERCLA . . . cannot function effectively unless citizens are given fair notice of their obligations." *Blackstone*, 67 F.3d at 983. The same is true of the Spills Law—Wisconsin's counterpart to CERCLA—which imposes notification and remediation obligations on any "person." Wis. Stat. § 292.11(2)(a) & (3).

Here, DNR's *ad hoc* regulation of "emerging contaminants" under the Spills Law raises serious constitutional fair-notice concerns. On its website and in letters that it sent, DNR instructed Wisconsinites that the Spills Law imposes investigation, notification, and remediation obligations on them with respect to "emerging contaminants," including unspecified PFAS substances. But DNR did not explain which PFAS substances—a class of more than 9,000 compounds and thousands of

mixtures—and at what quantities it was deeming to be hazardous and subject to the Spills Law.

For example, DNR announced on its website, "[w]hen discharged to the environment, PFAS compounds meet the definitions of a hazardous substance and/or environmental pollution under state statutes (s. 292.01, Wis. Stats.)." (R. 10:2.) DNR further stated that "persons who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment . . . must also immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards for the PFAS compounds in each media impacted (e.g., soil, groundwater, surface water and sediment) and conduct the necessary response actions." (R. 10:2.)

Similarly, in August 2020, DNR sent letters to all responsible parties (RPs) with an open remediation site in the Remediation and Redevelopment (R&R) program, "remind[ing]" them "to assess emerging contaminants and their potential impacts as early in the cleanup process as possible." (R. 14:2.) DNR announced in these letters that "[e]merging contaminants include perfluoroalkyl and polyfluoroalkyl substances (PFAS), 1,4-dioxabe and others" and asserted that "[i]t is the responsibility of [RPs] to evaluate hazardous substance discharges and environmental pollution including emerging contaminants under the Wis. Admin. Code NR 700 rule series." (R. 14:2.) Like on DNR's website, DNR announced in the letters that "[e]merging contaminants discharged to the environment, including certain PFAS, meet the definition of hazardous substance and/or environmental pollution under Wis. Stat. § 292.01." (R. 14:2.)

Yet DNR did not explain on its website or in these letters which emerging contaminants or PFAS substances it was deeming hazardous. As one of DNR's affiants in this case recognized, "there are an estimated 9,000 individual PFAS compounds and thousands of PFAS mixtures." (R. 79:30.) Which of those thousands of substances was DNR deeming hazardous, in what quantities, and in what media (soil, groundwater, etc.)? In affidavits filed in this case, two DNR employees offered a list of about 18 PFAS substances that they consider to be hazardous (R. 79:30, 35; 81:3–4), but an affidavit in a lawsuit is not a substitute for notice-

and-comment rulemaking. An affidavit does not provide fair notice to the public. (And neither do the blog posts on DNR's website.)

A few examples highlight the vagueness and sheer unworkability of DNR's *ad hoc* regulatory approach. If a person sprays PFAS-containing cooking spray on his outdoor grill, must he report that discharge to DNR? If a person washes a nonstick pan in his kitchen sink, must he notify DNR that he may have caused some PFAS to enter his municipal sewer system? If a person puts a PFAS-containing food wrapper into a garbage can at a park, must he notify DNR of that discharge? Under DNR's apparent view of the law, all those discharges must be reported to DNR. After all, the Spills Law's notification requirement has no *de minimis* exemption for PFAS. *See* Wis. Admin. Code § NR 706.07(2).

The absurdity of DNR's *ad hoc* approach is not limited to PFAS substances. According to DNR's website, "[e]ven common products such as milk, butter, pickle juice, corn, beer, etc., may be considered a hazardous substance if discharged to a sensitive area." (R. 7:3.) If a person accidentally spills a keg of beer onto the ground during an outdoor barbecue, must he notify DNR of the discharge? What if he spills only a single can of beer—or part of a can? Under DNR's logic, those discharges must be reported to DNR. After all, there is no *de minimis* notification exemption for beer. *See* Wis. Admin. Code § NR 706.07(2).

DNR suggests that a person must report "a tanker truck of milk spilled into a trout stream." (Pet. 11.) But no statute or rule provides that "a tanker truck" or any other quantity of milk is hazardous when discharged into "a trout stream" or any other surface water. What if a toddler spills a bottle of milk into a trout stream? Where does DNR draw the line between a toddler's spilled milk and a tanker trunk worth of milk? DNR's *ad hoc* approach to spilled milk provides no clear direction to the public.

If DNR wants the Spills Law to apply to things like beer, milk, corn, or PFAS, it must promulgate a rule to that effect (or wait for the EPA to do so). If the Spills Law's notification and remediation

requirements were not limited to ascertainable standards in federal and state law, they would be unconstitutionally vague.

Blackstone is highly instructive here. In *Blackstone*, Massachusetts sought to recover response costs from Blackstone for the removal of ferric ferrocyanide (FFC) from a waste site. *Blackstone*, 67 F.3d at 983. That effort "turn[ed] largely on the question of whether FFC is a 'hazardous substance' within the meaning of CERCLA." *Id.* The court noted that the EPA had not added FFC to the CERCLA hazardous-substance list in Table 302.4. *Id.* at 984. Instead, Massachusetts argued that FFC was encompassed in "a broad category of compounds—'cyanides'"—that was included in Table 302.4. *Id.*

The court held that "neither CERCLA nor the existing EPA regulations clearly establish whether FFC is a hazardous substance." *Id.* at 983. The court noted that "[t]he EPA has clearly not acted . . . to promulgate a rule specifically listing FFC as a 'hazardous substance'" under CERCLA. *Id.* The court further noted that "[t]he EPA has also never issued a rule specifically for the purpose of defining the scope of the term 'cyanides.'" *Id.* "The EPA has in the past resorted to its rulemaking authority to provide clear guidance to the public as to the scope of at least six other substances or classes of substances listed as [Clean Water Act] toxic pollutants, *see* 40 C.F.R. § 129.4, but it never has done so with respect to the term 'cyanides.'" *Blackstone*, 67 F.3d at 988.

The court emphasized that "[a] complicated regulatory regime like CERCLA . . . cannot function effectively unless citizens are given fair notice of their obligations." *Id.* at 991. "Congress delegated to the EPA the continuing task of defining which substances are 'hazardous substances' to which CERCLA liability can attach." *Id.* The EPA's approach for determining whether the broad term "cyanides" in Table 302.4 included FFC did not provide "fair notice to the public." *Id.*

Here, DNR is advancing a view that is even more extreme than the argument that failed in *Blackstone*. Notably, in *Blackstone*, the state did not argue that a compound could be deemed a hazardous substance without being legally designated as such. Instead, it argued that the compound at issue there (FFC) was encompassed within a designated

hazardous substance (cyanides). By contrast, DNR is arguing that it may deem a compound to be a hazardous substance even if no federal or state rule or statute designates it as a hazardous substance. That position is even more troubling than the state's argument in *Blackstone*. DNR's *ad hoc* regulatory approach "is not fair notice to the public." *See id.*

Regarding the Spills Law, DNR argues that Wisconsin citizens "must read the statute and determine whether and how it applies to them." (Pet. 22.) In a dissenting opinion, Judge Neubauer similarly argued that the Spills Law "leaves it to responsible parties, in the first instance, to identify and notify the DNR of discharges of [hazardous] substances." (Pet. App. 146.) True, the notification requirement falls on every person in Wisconsin, but the law does not require the average Wisconsinite to determine in the first instance whether a substance is hazardous and thus subject to the Spills Law. Most Wisconsinites are not toxicologists. The EPA and DNR must use rulemaking to provide fair notice to the public as to which substances are hazardous and thus subject to CERCLA and the Spills Law.

3. DNR's *ad hoc* regulation is contrary to government transparency and raises an issue not well suited for judicial resolution.

In addition to raising serious due process concerns, DNR's *ad hoc* regulation of "emerging contaminants" under the Spills Law is bad policy for at least four reasons. It avoids public input, discourages compliance, encourages erratic enforcement, and burdens the courts with making complex scientific determinations.

First, if DNR may regulate substances under the Spills Law on an *ad hoc* basis, as DNR claims it can, the benefits of notice-and-comment rulemaking would be lost. "The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner." *Mack v. DHFS*, 231 Wis. 2d 644, 649, 605 N.W.2d 651 (Ct. App. 1999) (citation omitted). Another "purpose of a public hearing is to give interested parties not only a chance to be heard, but to have an influence in the final form of the regulations involved." *Brown Cnty. V. DHSS*, 103

Wis. 2d 37, 54–55, 307 N.W.2d 247 (1981) (citation omitted). Here, if DNR had undergone the rulemaking process, it could have received public input on which of the thousands of PFAS compounds and mixtures are hazardous, in what quantities, and in what media (e.g., soil or surface water).

Second, DNR's *ad hoc* regulation is counterintuitive because it discourages voluntary compliance with the law. Fair notice "enables individuals to conform their conduct to the requirements of law." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984). If DNR wants every person in Wisconsin to remediate and notify DNR about PFAS discharges, it must promulgate one or more rules that explain which PFAS substances are hazardous and in what quantity and media. (Or DNR may wait for the EPA to adopt such a rule.) DNR's alternative to public rulemaking—issuing cryptic directives on its website and in certain letters—does not promote compliance with the law.

Third, vague regulation, including DNR's *ad hoc* approach here, "encourages arbitrary and erratic enforcement." *Walworth Cnty. v. Tronshaw*, 165 Wis. 2d 521, 526, 478 N.W.2d 294 (Ct. App. 1991). With no standards in place for PFAS or other unspecified "emerging contaminants" under the Spills Law, adjudicators have virtually no standards to apply. Also, if the current DNR administration may deem certain but unspecified PFAS to be hazardous substances without rulemaking, then a future administration may decide to *stop regulating* PFAS under the Spills Law without rulemaking. An official rule in the administrative code would bind future administrations much more so than DNR's *ad hoc* enforcement would. Rulemaking by DNR would promote "uniformity in regulation." *See Blackstone*, 67 F.3d at 992.

Fourth, the judiciary "is ill-suited" for determining whether a substance is hazardous. *Id.* "That determination is much better left to the EPA." *Id.* This Court has similarly recognized that the legislature and DNR, rather than the courts, should set environmental policy. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 157–58, 580 N.W.2d 203 (1998). "[T]he D.N.R. is the state agency with the staff, sources and expertise in environmental matters . . . ." *Id.* (alterations in original) (citation omitted). But under DNR's *ad hoc* approach here, the courts

would ultimately need to determine whether a given "emerging contaminant" is a hazardous substance subject to the Spills Law. Under DNR's logic, the courts may eventually need to determine which of the 10,000-plus PFAS compounds and mixtures are hazardous, in what quantities, and in what media. Our state's courts would be very busy deciding Spills Law cases for a very long time.

The much better (and legally required) policy is for DNR to do what the EPA is doing with respect to PFAS under CERCLA: use the public rulemaking process. Or simply wait for the EPA to promulgate rules designating the conditions under which a substance is hazardous under CERCLA.[13] DNR's preferred approach—regulating unspecified PFAS substances on an *ad hoc* basis with no rules in place—is bad policy and raises serious due process concerns.

B. The claims in this case are fact specific and require application of settled law.

Settled law establishes the requirements for rulemaking. The court of appeals and circuit court correctly applied that law to the specific facts of this case.

Wisconsin law authorizes "an action for declaratory judgment as to the validity of [a] rule." Wis. Stat. § 227.40(1). A rule is invalid if it "was promulgated or adopted without compliance with statutory rule-making or adoption procedures." Wis. Stat. § 227.40(4)(a). A litigant may bring a declaratory judgment action to challenge the validity of an administrative rule even if it was not promulgated as one. *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 820, 280 N.W.2d 702 (1979); *Frankenthal v. Wisconsin Real Est. Brokers' Bd.*, 3 Wis. 2d 249, 257c, 89 N.W.2d 825 (1958).

The analytical framework for addressing an "unpromulgated rule claim" is well settled. *Wisconsin Prop. Tax Consultants, Inc. v. DOR*, 2022 WI 51, ¶ 13, 402 Wis. 2d 653, 976 N.W.2d 482. The analysis "requires only interpreting and applying the statute that defines an

[13] As noted above, the EPA's final rule designating PFOA and PFOS as hazardous substances under CERCLA is expected to take effect in 60 days. *See* note 11, *supra*.

administrative rule (Wis. Stat. § 227.01(13)) and its related procedural prerequisites." *Id.*

The definition of a rule is also well settled. *See* Wis. Stat. § 227.01(13). Case law provides a five-factor test for applying that definition: an agency action is a rule if it is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency as to govern the interpretation or procedure of such agency." *Citizens for Sensible Zoning*, 90 Wis. 2d at 814.

Whether a particular agency action meets the definition of a rule "is an extraordinarily case-specific endeavor." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). "An agency directive meeting the statutory definition of an administrative rule may appear in various forms." *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR*, 172 Wis. 2d 299, 320, 493 N.W.2d 744 (Ct. App. 1992). "An agency's directive may contain both rules and non-rules." *Id.* (citing *Frankenthal*, 3 Wis. 2d at 257a–257b).

For example, Wisconsin courts have held that the following were invalid because they were unpromulgated rules under the facts of those cases: an agency's policy for recouping overpayments of Social Security Income benefits,[14] an agency employee's memorandum on "good time" credit for parolees,[15] an agency's written instructions for county workers to use when determining applicants' eligibility for Wisconsin's Medicaid program,[16] and chlorine limits used in wastewater-discharge permits issued by the DNR.[17] Those cases all hinged on the specific facts presented there.

---

[14] *Mack v. DHFS*, 231 Wis. 2d 644, 648–50, 605 N.W.2d 651 (Ct. App. 1999).

[15] *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769 (Ct. App. 1986).

[16] *Cholvin v. DHFS*, 2008 WI App 127, ¶¶ 1, 23–29, 313 Wis. 2d 749, 758 N.W.2d 118.

[17] *Wisconsin Electric Power Co. v. DNR*, 93 Wis. 2d 222, 232–36, 243–45, 287 N.W.2d 113 (1980).

Under different facts, Wisconsin courts have held that the following were *not* rules: a state agency's guide for determining beneficiaries under the Wisconsin Retirement System,[18] a witness's testimony and several exhibits at a jury trial,[19] and an agency attorney's letter explaining the agency's decision denying an application to be a bus driver.[20]

DNR warns that the court of appeals decision would apply beyond the Spills Law and require executive agencies to promulgate rules before enforcing many statutes. (Pet. 32–35.) That concern is overblown because it ignores the fact-specific nature of rulemaking claims, as shown in the previous two paragraphs. When deciding such claims, "analogizing to prior cases is often of limited utility in light of the exceptional degree to which decisions in this doctrinal area turn on their precise facts." *Am. Hosp. Ass'n*, 834 F.2d at 1045.

Here, as in other cases, the unpromulgated rule analysis is fact specific. It hinges on whether certain statements that DNR made on its website and in certain letters meet the definition of a rule. This Court should not review the court of appeals' "application of well-settled principles to the factual situation" presented here. Wis. Stat. § (Rule) 809.62(1r)(c)1.

C. The court of appeals decision is correct.

Without going too deep into the merits at the petition stage, the Respondents briefly address the arguments in DNR's petition for review. Specifically, DNR argues that (1) its announcements regarding emerging contaminants did not have the force of law and thus were not rules, (2) its pause of the Voluntary Party Liability Exemption (VPLE) program was discretionary and thus not a rule, (3) it is merely enforcing an open-ended statute, and (4) Wis. Stat. § 227.10(2m) did not require rulemaking here. Each argument fails under settled law.

---

[18] *Jackson v. Employe Tr. Funds Bd., Dep't of Employe Tr. Funds*, 230 Wis. 2d 677, 691 n.5, 602 N.W.2d 543 (Ct. App. 1999).

[19] *Cnty. of Dane v. Winsand*, 2004 WI App 86, ¶¶ 9–13, 271 Wis. 2d 786, 795, 679 N.W.2d 885.

[20] *Gibson v. Transportation Comm'n*, 103 Wis. 2d 595, 603–06, 309 N.W.2d 858 (Ct. App. 1981), *aff'd*, 106 Wis. 2d 22, 315 N.W.2d 346 (1982).

1. DNR's announcements that emerging contaminants are hazardous substances have the force of law.

"[W]hether or not interpretative rules of an administrative agency have the effect of law is really a question of degree." *Barry Laboratories, Inc. v. Wisconsin State Bd. of Pharmacy*, 26 Wis. 2d 505, 514, 132 N.W.2d 833 (1965). Several factors determine whether an agency's statement has the effect of law.

One factor is whether the content of the statement is "within the expertise of the [agency]." *See id.* at 515. "[T]he degree of authoritative effect of an interpretative regulation is likely to be high when the regulation depends heavily upon skills of the kind that the judges do not possess, and that the degree of authoritative effect is likely to be low when the judges and not the administrators are the experts, as on constitutional issues." *Id.* at 514 (citation omitted).

A statement is also likely to have the force of law if the agency has "the means to enforce it as law." *See id.* at 516; *see also Schoolway Transp. Co. v. DMV*, 72 Wis. 2d 223, 234–35, 240 N.W.2d 403 (1976) (noting in *Barry Laboratories* the agency "statements did not have the effect of law, in that the question addressed was not within the board's expertise, nor did the board have the authority to enforce compliance with the opinion expressed by the statements").

An agency statement also has the force of law if the agency uses "express mandatory language," indicating "the agency speaks with an official voice intended to have the effect of law." *Cholvin v. DHFS*, 2008 WI App 127, ¶ 29, 313 Wis. 2d 749, 758 N.W.2d 118 (citation omitted).

Finally, an agency policy has "the 'effect of law' where criminal or civil sanctions can result as a violation; where licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action." *Cholvin*, 2008 WI App 127, ¶ 26 (collecting cases).

Here, DNR's policy statement at issue has the effect of law. This statement was within DNR's expertise, DNR has the power to enforce it, DNR used mandatory language, and this mandate carries potential civil penalties.

First, the statement at issue was within DNR's expertise. On its website and in letters that DNR sent to persons engaged in remediation efforts, DNR announced its view that unspecified PFAS substances and other unspecified emerging contaminants meet the definition of a hazardous substance and/or environmental pollution under Wis. Stat. § 292.01 when they are discharged to the environment. (R. 10:2; 14:2.) "[T]he D.N.R. is the state agency with the staff, sources and expertise in environmental matters . . . ." *Chrysler Outboard*, 219 Wis. 2d at 157–58 (alterations in original) (citation omitted). Because this policy statement is "within the expertise of" DNR, this fact supports the conclusion that DNR's policy statement has the effect of law. *See Barry Laboratories*, 26 Wis. 2d at 515.

Second, DNR has "the power to enforce" the Spills Law's remediation requirement. *State v. Block Iron & Supply Co.*, 183 Wis. 2d 357, 364, 515 N.W.2d 332 (Ct. App. 1994). Specifically, DNR "may issue an emergency order or a special order to the person possessing, controlling or responsible for the discharge of hazardous substances to fulfill the duty imposed by sub. (3)." Wis. Stat. § 292.11(7)(c). Because DNR has "the means to enforce" this policy statement, this fact indicates that this policy statement has the effect of law. *See Schoolway Transp.*, 72 Wis. 2d at 235 (quoting *Barry Laboratories*, 26 Wis. 2d at 516).

Third, DNR's mandatory language further shows that this policy statement has the effect of law. DNR announced on its website that all persons in Wisconsin "who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment, *are responsible for taking appropriate actions*." (R. 10:2 (emphasis added).) DNR also stated on its website that "[t]hose individuals *must* also immediately notify the state, conduct a site investigation, determine the appropriate clean-up standards for the PFAS compounds in each media impacted … and conduct the necessary response actions." (R. 10:2 (emphasis added).) Similarly, in letters that DNR sent to persons engaged in remediation efforts, DNR stated that those persons have "the responsibility" to evaluate unspecified "emerging contaminants." (R. 14:2.) Because DNR used "mandatory language" in these statements, it spoke "with an official voice intended

to have the effect of law." *See Cnty. of Dane v. Winsand*, 2004 WI App 86, ¶ 11, 271 Wis. 2d 786, 679 N.W.2d 885 (citation omitted).

Fourth and finally, civil penalties may apply to anyone who violates the Spills Law, which requires reporting of a discharge of a hazardous substance and subsequent remediation of the environment. Wis. Stat. § 292.11(2)–(3). Indeed, as DNR's website warns, Wis. Stat. § 292.99 "[a]uthorizes penalties up to $5,000 for each violation of the notification requirement." (R. 7:3.) Because potential civil penalties back up DNR's policy statement, this fact further shows it has "the force of law." *See Wisconsin Elec. Power Co. v. DNR*, 93 Wis. 2d 222, 235, 287 N.W.2d 113 (1980).[21]

2. DNR's pause of the VPLE program is an unpromulgated rule.

DNR argues that it may pause the VPLE program because it has discretion when applying that program. (Pet. 30–31.) But DNR has no statutory authority to pause the entire VPLE program, which was enacted by the legislature. And even if DNR could pause this program, an agency erroneously exercises its discretion if it bases a decision on an unpromulgated and thus invalid rule. *See, e.g.*, *State ex rel. Clifton v. Young*, 133 Wis. 2d 193, 200, 394 N.W.2d 769 (Ct. App. 1986). "When a party files an application for a license with an administrative agency and the [agency] points to some announced agency policy of general application as a reason for rejecting the application, such announced policy constitutes a rule...." *Wisconsin Elec.*, 93 Wis. 2d at 236–37 (quoting *Frankenthal*, 3 Wis. 2d at 257b). DNR's pause of the VPLE program fits that description because it is an announced agency policy of general application that DNR will cite as a reason for denying a certificate of completion to certain VPLE participants.

[21] DNR contends that the court of appeals decision creates a constitutional problem under *Service Employees International Union v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35. DNR is wrong because the present case, unlike *Vos*, involves unpromulgated rules rather than guidance documents.

3. Wisconsin Stat. § 227.10(1) required DNR to follow the rulemaking process before it determined that emerging contaminants are hazardous substances.

Regardless of whether DNR's announcements about emerging contaminants meet the definition of a rule in Wis. Stat. § 227.01(13), DNR was required under Wis. Stat. § 227.10(1) to promulgate that interpretation of the Spills Law as a rule. "[E]very agency must 'promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.'" *Lamar*, 2019 WI 109, ¶ 15 (quoting Wis. Stat. § 227.10(1)).

Section 227.10(1) prohibits "*ad hoc* interpretations of ambiguous statutes." *See id.* ¶ 21. This statute requires rulemaking when an agency engages in interpretation—i.e., when a statute is not "clear and plain." *See id.* ¶ 25. In other words, notice-and-comment rulemaking is required "if the relevant statute or regulation 'consists of vague or vacuous terms—such as 'fair and equitable,' 'just and reasonable,' 'in the public interest,' and the like." *Cath. Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (citation omitted); *see also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 n.6 (D.C. Cir. 1997) (noting rulemaking is required where an agency's interpretation "gives content" to "very general" statutory language).

The definition of "hazardous substance" in Wis. Stat. § 292.01(5) is very general, uses vague and vacuous terms, and does not have a clear and plain meaning. This statute requires DNR to determine whether a substance is hazardous by making policy decisions and interpreting judgment-laden terms like "significantly," "serious," and "substantial." It provides no threshold at which those terms are satisfied.

DNR argues that rulemaking was not required here because Wis. Stat. § 292.01(5) has "an open-ended definition." (Pet. 21.) But rulemaking is required when an agency interprets "open-ended" statutory text. *See Cath. Health Initiatives*, 617 F.3d at 495 (quoting *United States v. Picciotto*, 875 F.2d 345, 346, 349 (D.C. Cir. 1989)).

DNR also argues that the Spills Law does not require it to engage in rulemaking to identify which substances are hazardous. (Pet. 23–24.) But Wis. Stat. ch. 227 requires DNR to engage in rulemaking before deeming a substance hazardous under the Spills Law.

DNR complains that "promulgating permanent rules often takes years." (Pet. 27.) That assertion is problematic for several reasons. For starters, there is no inconvenience exception to general rulemaking requirements. Also, DNR could have proposed a rule to identify PFAS as hazardous substances when it began regulating them around 2018. That proposed rule could have been finalized by now, given that the permanent rulemaking process typically takes about 7.5 to 13 months.[22] In addition, DNR may adopt an emergency rule to identify PFAS as hazardous substances while the permanent rulemaking process occurs. *See* Wis. Stat. § 227.24.

4. The Spills Law and the administrative code do not give DNR explicit authority to regulate emerging contaminants at specific quantities.

The legislature made "significant revisions to Wis. Stat. ch. 227" in 2011, including by creating an explicit-authority requirement. *Clean Wisconsin, Inc. v. DNR*, 2021 WI 72, ¶ 20, 398 Wis. 2d 433, 961 N.W.2d 611. This requirement provides: "No agency may implement or enforce any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a [promulgated] rule...." *Papa v. DHS*, 2020 WI 66, ¶ 32, 393 Wis. 2d 1, 946 N.W.2d 17 (alterations in original) (quoting Wis. Stat. § 227.10(2m)). Section 227.10(2m) "requires courts to strictly construe an agency's authorizing statute as granting the agency no implicit authority." *Clean Wisconsin*, 2021 WI 72, ¶ 24. Explicit authority is "'clear, open, direct, or exact' and 'expressed without ambiguity or vagueness.'" *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 24, 398 Wis. 2d 386, 961 N.W.2d 346 (citation omitted).

[22] *See* "Overview of Administrative Rulemaking Process," https://docs.legis.wisconsin.gov/misc/lc/misc/rule_making_process_flowchart.pdf (last accessed April 19, 2024).

Here, no statute or promulgated rule gives DNR explicit authority to apply the Spills Law's notification requirement to PFAS and other unspecified emerging contaminants at certain quantities. DNR asserted on its website that all persons in Wisconsin "who own properties that are the source of PFAS contamination, or who are responsible for discharges of PFAS to the environment" must "immediately notify the state" of the discharge. (R. 10:2.) That announcement creates a reporting standard of any detectable level of PFAS. (*See* R. 10:2.) But DNR has no explicit authority in any statute or promulgated rule to enforce that numeric threshold. DNR may promulgate a rule to create such a threshold, but it has not done so.

By contrast, there is a federal list that designates about 800 substances as hazardous under CERCLA.[23] Specifically, Table 302.4 lists the quantities at which discharges of hazardous substances must be reported under CERCLA. *See* 40 C.F.R. § 302.4, Table 302.4. And the Spills Law applies to releases for which notification must be made under CERCLA. *See* Wis. Admin. Code § NR 706.02. Like federal law, state law has notification standards for certain substances, including notification exemptions for discharges that fall below certain numeric thresholds. *See, e.g.*, Wis. Admin. Code § NR 706.07.

But no statute or promulgated rule sets a threshold for when a person must report a discharge of PFAS or other unspecified "emerging contaminants." This omission is not surprising, given that PFAS are not deemed hazardous under the state or federal administrative code. Until reporting standards for PFAS become law at the state or federal level, Wis. Stat. § 227.10(2m) bars DNR from enforcing a notification threshold for PFAS.

* * *

The EPA finalized a rule today identifying two types of PFAS as hazardous substances under CERCLA. DNR may enforce that rule if and when it becomes law, or DNR may promulgate its own rule. But DNR

[23] U.S. Env't Prot. Agency, "CERCLA Hazardous Substances Defined" (last updated Feb. 2, 2024), https://www.epa.gov/epcra/cercla-hazardous-substances-defined.

may not determine on an *ad hoc* basis whether a substance is hazardous and thus subject to the Spills Law. The court of appeals and circuit court both got it right. This Court's review is not warranted.

CONCLUSION

This Court should deny the petition for review.

Dated this 19th day of April 2024.

Respectfully submitted,

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow (SBN 1083736)
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Lucas T. Vebber (SBN 1067543)
Luke N. Berg (SBN 1095644)
Wisconsin Institute for Law & Liberty, Inc.
330 E. Kilbourn Avenue, Suite 725
Milwaukee, Wisconsin 53202
Phone: (414) 727-7415
Fax: (414) 727-6385
E-mail: lucas@will-law.org

Attorneys for Plaintiff-Respondent Wisconsin Manufacturers and Commerce, Inc.

Electronically signed by

Delanie M. Breuer

Delanie M. Breuer (SBN 1085023)
Fredrikson & Byron, P.A.
44 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703
Phone: (608) 453-5135
Email: dbreuer@fredlaw.com

Attorneys for Plaintiff-Respondent Leather Rich, Inc.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,982 words.

Electronically signed by

Scott E. Rosenow

Scott E. Rosenow