No. 2022AP718

In the Supreme Court of Wisconsin

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

V.

WISCONSIN NATURAL RESOURCES BOARD,
WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
AND STEVEN LITTLE,
Defendants-Appellants-Petitioners.

On Appeal from the Waukesha County Circuit Court, the Honorable Michael O. Bohren, Presiding

BRIEF OF NON-PARTY WISCONSIN STATE LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION

The people of Wisconsin have empowered the State to protect not only their resources but also their rights, including their right to notice of laws that will be enforced against them. The government can—and should—do both at the same time. The Wisconsin Administrative Procedure Act ("APA") shows how. Under that law, when regulators wield their wide-ranging power to protect our air, water, and soil, they may not penalize anyone for failing to meet a requirement not already codified in a statute or rule. While these statutes and rules may be broad, their requirements nevertheless must be "explicit," which this Court has defined to mean "clear, open, direct, or exact" and "expressed without ambiguity or vagueness." Here, the Spills Law does not clearly, openly, directly, or exactly provide that perfluoroalkyl and polyfluoroalkyl substances ("PFAS")—at specified *exact* concentrations or in specified *exact* combinations—are "hazardous substance[s]." Nor has the Department of Natural Resources ("DNR") promulgated a rule saying as much. It follows that, until it does so, the DNR cannot enforce a new, uncodified, concentrate-specific PFAS requirement against a citizen for the first time in a costly, high-stakes administrative action.

Another bedrock principle of administrative law is that any agency-devised standard meeting the definition of a rule, such as one having the "force of law," must be promulgated as such. Here, the DNR has definitively spoken: certain PFAS in certain concentrations are hazardous substances, and failure to treat them as

such can result in civil penalties. The DNR is of course free to pursue the adoption of such a rule, but it must do so by following carefully delineated statutory procedures. Rulemaking in Wisconsin is not a matter of merely updating a .gov website.

STATEMENT OF INTEREST

The Legislature, as an exercise of its "legislative power," Wis. Const. art. IV, § 1, "may [ ] retract or limit any delegation of rulemaking authority, determine the methods by which agencies must promulgate rules, and review rules prior to implementation," *Koschkee v. Taylor*, 2019 WI 76, ¶ 20, 387 Wis. 2d 552, 929 N.W.2d 600. The Legislature, which exercised this power when it created the APA, Wis. Stat. ch. 227, has a strong interest in whether the relevant three statements made by the DNR should have been promulgated as rules under the Act. The Legislature may vindicate this interest even as a party. *See* Wis. Stat. § 803.09(2m); *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 13, 391 Wis. 2d 497, 942 N.W.2d 900.

ARGUMENT

I. SECTION 227.10(2M) REQUIRES RULEMAKING BEFORE DNR ENFORCES ANY HAZARDOUS-MATERIALS STANDARD, REQUIREMENT, OR THRESHOLD UNDER THE SPILLS LAW

"No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" the

APA. Wis. Stat. § 227.10(2m). Plainly read, this statute mandates that a statute or rule explicitly permit or require—in its text—a standard, requirement, or threshold before one is enforced by an agency.

Section 227.10(2m) gives Wisconsinites a right to notice of any standard, requirement, or threshold that an agency seeks to impose on them. The legislative history confirms as much. *See Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 21, 400 Wis. 2d 417, 970 N.W.2d 1 ("Legislative history, as the byproduct of legislation, is extrinsic evidence of a law's meaning and becomes relevant [ ] to confirm plain meaning . . . ."). Section 227.10(2m) was not passed as first drafted in 2011 A.B. 8. *Compare* 2011 A.B. 8, § 1, *with* 2011 Wis. Act 21, § 1R. Senate Amendment 1, adopted by the Senate and the Assembly, substantively changed the law.[1] As initially drafted, the limitation on enforcement of standards, requirements, and thresholds applied only to "a term or condition of any license issued by the agency." 2011 A.B. 8, § 1. Senate Amendment 1 expanded this to all standards, requirements, and thresholds by adding the term "including" before "as a term or condition of any license issued by the agency." *See* Wisconsin Legislative Council Amendment Memo, January 2011 Special Session

[1] *See* Senate Journal, Jan. 2011 Special Sess., at 112, *available at* https://docs.legis.wisconsin.gov/2011/related/journals/senate/20110210jr1/_5; Assembly Journal, Jan. 2011 Special Sess., at 341, *available at* https://docs.legis.wisconsin.gov/2011/related/journals/assembly/20110517jr1/_5; *see also Medlock v. Schmidt*, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965) ("The Legislative Journals are properly the subject of judicial notice.").

Assembly Bill 8, at 7 (Feb. 11, 2011).[2] More importantly, this amendment changed "expressly required or permitted" to "explicitly required or explicitly prohibited." *Id.* The term "explicitly" requires more clarity than the term "expressly." While the term "express" requires that something simply be "[c]learly and unmistakably communicated," *Express*, Black's Law Dictionary (12th ed. 2024), the term "explicit" requires that something be "[e]xpressed without ambiguity or vagueness; leaving no doubt," *Explicit*, Black's Law Dictionary (12th ed. 2024). *See also Explicit*, American Heritage Dictionary (5th ed. 2022) ("Fully and clearly expressed; leaving nothing implied"). In other words, the standard, requirement, or threshold must not only be "express[ed]," it must also be expressed in a way that "leav[es] no doubt" as to what is "permitted" or "required." Wis. Stat. § 227.10(2m).

This Court's decisions in *Clean Wisconsin I* and *Clean Wisconsin II* underscore that the explicitness standard in Wis. Stat. § 227.10(2m) demands clarity. *See Clean Wis., Inc. v. Wis. Dep't of Nat. Res.* ("*Clean Wisconsin I*"), 2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346; *Clean Wis., Inc. v. Wis. Dep't of Nat. Res.* ("*Clean Wisconsin II*"), 2021 WI 72, 398 Wis. 2d 433, 961 N.W.2d 611. Although *Clean Wisconsin I* holds that the term "explicitly" does not require specificity, it nevertheless requires that the standard, requirement, or threshold be "'clear, open, direct, or exact' and 'expressed without ambiguity or vagueness.'" 2021 WI 71, ¶ 24

[2] *Available at* https://docs.legis.wisconsin.gov/2011/related/lcamendmemo/jr1_ab8.pdf.

(quoting *Explicit*, Black's Law Dictionary 725 (11th ed. 2019)); *see also id.* ("explicit" is also defined as "'fully and clearly expressed; leaving nothing implied' and 'fully developed or formulated.'" (quoting *Explicit*, American Heritage Dictionary (5th ed. 2011))); *see also Clean Wisconsin II*, 2021 WI 72, ¶ 22 (same). And although the Court ultimately held that the particular standard, threshold, or requirement need not be "specifically" spelled out in advance, the Court affirmed that it nevertheless must be "clearly expresse[d]." *Clean Wisconsin II*, 2021 WI 72, ¶ 24.

The Spills Law does not itself explicitly articulate any standard, requirement, or threshold for a "hazardous substance," for which the statute supplies a definition that is far from "exact." *Clean Wisconsin I*, 2021 WI 71, ¶ 24. The Spills Law defines "hazardous substance" as:

> *any substance or combination of substances* including any waste of a solid, semisolid, liquid or gaseous form which *may cause or significantly contribute to* an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which *may pose* a substantial *present or potential* hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives as determined by the department.

Wis. Stat. § 292.01(5) (emphases added). This open-ended definition, without the benefit of further refinement through rulemaking, could apply to literally *any* substance. Indeed, even water can

be hazardous to human health.[3] Because the law does not "explicitly require[ ] or explicitly permit[ ]" "any standard, requirement, or threshold," the DNR may not "implement or enforce any standard, requirement, or threshold" based on the Spills Law alone. Wis. Stat. § 227.10(2m).

Because the Spills Law fails to explicitly articulate a standard, requirement, or threshold, the DNR must do so by rule. *Cf. Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶ 37, 393 Wis. 2d 1, 946 N.W.2d 17 (turning to examine the Department of Health Service's ("DHS") promulgated rules after determining the plain language of the statue "does not explicitly require or permit DHS to enforce a Perfection Policy"). Section 227.10(2m) allows the DNR to implement or enforce standards, requirements, and thresholds if they are "explicitly required or explicitly permitted . . . by a rule." Thus, so long as DNR promulgates a rule with enough clarity to meet the definition of "explicit," it may impose standards, requirements, and thresholds to enforce the Spills Law.

Such a rule by DNR may still be broad—*if* it is "explicit." As this Court explained, a grant of authority sufficient to satisfy Section 227.10(2m) can be "broad," so long as it is "clear[ ]." *Clean Wisconsin II*, 2021 WI 72, ¶¶ 24–25; *Clean Wisconsin I*, 2021 WI 71, ¶ 23. And, to be sure, DNR has fleshed out clear but broad standards, requirements, or thresholds in numerous other rules. For example,

[3] *See* Cleveland Clinic, *Water Intoxication*, *available at* https://my.clevelandclinic.org/health/diseases/water-intoxication ("In some people, water intoxication symptoms can develop after drinking about a gallon (3 to 4 liters) of water over an hour or two.").

the DNR has, by rule, adopted the federal standards for notification of the release or discharge of hazardous substances by cross-referencing those standards in the rule. *See* Wis. Admin. Code § NR 706.02(3). This is a broad standard, but it is also explicit and clear. The DNR also broadly but clearly articulates what constitutes as a hazardous waste, providing an industry and EPA hazardous waste number and a narrative description of what is hazardous, *see* Wis. Admin. Code § NR 661.0032, or specifying a hazardous waste number and chemical abstract number of hazardous wastes, *see* Wis. Admin. Code § NR 661.0033.[4] And the DNR similarly provides threshold emissions points for a variety of substances, identifying at which point each substance becomes a hazardous air contaminant. Wis. Admin. Code § NR 445.07, Tables A–B.[5]

But the DNR has not adopted a rule that would permit it to implement or enforce a standard, requirement, or threshold for PFAS under the Spills Law. The DNR therefore cannot implement or enforce any such standard, requirement, or threshold amount without rulemaking. And, of course, any rule that DNR promulgates may be broad, but it must be clear enough to give Wisconsinites notice of when they must comply with the notification and other requirements of the Spills Law.

[4] The tables that set forth many of these standards may be viewed in the pdf version of the administrative code, *available at* https://docs.legis.wisconsin.gov/code/admin_code/nr/600/661.pdf.

[5] These tables may be viewed in the pdf version of the administrative code, *available at* https://docs.legis.wisconsin.gov/code/admin_code/nr/400/445.pdf.

This common-sense approach articulated by the Legislature and clarified by this Court balances, on the one hand, the need for clarity before the people of this State that are subject to government-imposed requirements and penalties with, on the other hand, the need for flexibility in lawmaking. It avoids the parade of horribles articulated by both sides here: the DNR will give notice by articulating some discernable standards by which Wisconsinites may measure and determine if the presence and concentration of a substance triggers the requirements of the Spills Law. But the DNR is still afforded flexibility in how it articulates these standards, and it may use broad (but clear) language to articulate them. This is precisely the point of Wis. Stat. § 227.10(2m): it provides flexibility to both agencies and the Legislature, but still ensures that Wisconsinites will receive fair notice before standards are enforced against them.

II. A RULE HAS "THE EFFECT OF LAW" WHEN THE STATUTES PROVIDE THE ENFORCEMENT MECHANISM

A rule is "a regulation, standard, statement of policy, or general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency." Wis. Stat. § 277.01(13). This definition is broken down to a five-part test. *See Citizens for Sensible Zoning, Inc. v. Dep't of Nat. Res., Columbia Cnty.*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979) (setting forth the five-part test); *Palm*, 2020 WI 42, ¶ 22 (same).

Only one part of the five-part test is at issue at this stage of the appeal: whether any of the three challenged statements have the "force of law." A statement has the "force 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 v. Wis. Dept. of Health and Fam. Servs.*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118; *id.* (collecting cases). More, an agency statement has the "force of law" "when the agency uses 'express mandatory language' that is 'more than informational' and 'speaks with an official voice intended to have the effect of law.'" *Midwest Renewable Energy Ass'n v. Pub. Serv. Comm'n of Wis.*, 2024 WI App 34, ¶ 71, 412 Wis. 2d 698, 8 N.W.3d 848 (quoting *Milwaukee Area Joint Plumbing Apprenticeship Comm. v. Dep't of Indus., Lab. & Hum. Rels.*, 172 Wis. 2d 299, 321 n.12, 493 N.W.2d 744, 753 (Ct. App. 1992)).

The DNR's statements that emerging contaminants are hazardous substances under the Spills Law and that specific concentrations of emerging contaminants trigger the Spills Law's notification requirements have the "force of law." Failure to comply with either of these statements can result in civil penalties. *See* Wis. Stat. § 292.99(1). And the interests of individuals as a class, anyone with emerging contaminants and in certain thresholds, are legally affected: the DNR may require "preventive measures" for hazardous substances and is authorized in certain circumstances to "contain, remove or dispute" hazardous substances. Wis. Stat. § 292.11(4), (7). These statements are more than informational.

The DNR has spoken definitively: certain substances in certain concentrations are hazardous substances, which triggers a variety of duties and obligations of Wisconsinites. *See* Wis. Stat. § 292.11 (setting forth a variety of obligations surrounding "hazardous substances").

The DNR asserts that these statements do not have the "force of law" because the exact same result would follow regardless of its statements because the statute provides everything: the requirements, the prohibitions, and the penalties. Op. Br. 37–38. This is essentially an argument that these statements are guidance documents, not rules. The APA defines a "[g]uidance document," subject to certain exceptions, to mean "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that" either "[e]xplains the agency's implementation of a statute or rule enforced or administered by the agency" or "[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule." Wis. Stat. § 227.01(3m)(a). Yet "[a] guidance document cannot affect what the law is, cannot create a policy, cannot impose a standard, and cannot bind anyone to anything." *Serv. Empls. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶ 105, 393 Wis. 2d 38, 946 N.W.2d 35 (Kelly, J., separate op.); *see also* Wis. Stat. § 227.01(3m)(b) (defining what is not a guidance document). And the statements at issue here do just this: they create a policy, impose standards, and bind all Wisconsinites to follow them. That the statutes do much of the heavy lifting here is of no moment. The

statements set forth a policy and impose standards that individuals must comply with to follow the Spills Law and avoid any penalties for failure to do the same. *See supra* 11–12.

Finally, the DNR's argument that requiring rulemaking in this circumstance is unconstitutional is a red herring. *See* Reply Br. 10–12. The DNR contends that requiring rulemaking in this instance infringes on the DNR's "core executive power to interpret the Spill Law." *Id.* at 11. And, in so arguing, DNR relies solely on Justice Kelly's separate opinion in *SEIU*. *See id.* at 10–12 (citing *SEIU*, 2020 WI 67, ¶¶ 96, 99, 102, 106–107, 120, 125, 134 (Kelly, J., separate op.)). But the DNR omits the key context for this discussion. The Court clearly noted that its "analysis on this point necessarily begins with the undisputed understanding that a guidance document does not have the force or effect of law" and that "unlike a rule, the executive branch needs no borrowed authority from the legislature to create a guidance document." *Id.* ¶ 100. Simply stated, the Court explained that certain statutes regulating the creation and publication of guidance documents—*not rules*—unconstitutionally infringed on the core power of the executive branch. *See id.* ¶¶ 107–08, 135. Thus, if the Court declares, as it should, that the challenged statements should be promulgated as rules, such a declaration will not run afoul of the constitutional principles articulated in *SEIU*, which was explicitly limited to discussion of guidance documents. *Id.* ¶ 100.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated: December 4, 2024.

Respectfully submitted,

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WIS. STAT. § 809.19(8g) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (bm) for a brief produced with proportional serif font. The length of this brief is 2,830 words.

Dated: December 4, 2024

Electronically signed by Ryan J. Walsh
Ryan J. Walsh

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2024, I caused the foregoing to be filed with the Court's e-filing system, which will send notice to all registered users.

Dated: December 4, 2024

Electronically signed by Ryan J. Walsh
Ryan J. Walsh