SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-Respondent-Respondent,

v.

ALFRED TALYANSKY, SW TRANSMISSIONS MANAGER, LLC, REMANNS, LLC, REMANNS MANAGER, LLC, QUALITY USED ENGINES, LLC, ENGINE RECYCLER MANAGER, LLC, QUALITY USED TRANSMISSIONS, LLC, QUALITY USED TRANSMISSIONS MANAGER, LLC, QUALITY USED ENGINES MANAGER, LLC, MIDWEST AUTO RECYCLING, LLC, ENGINE SHOPPER, LLC, ENGINE SHOPPER MANAGER, LLC, ENGINE & TRANSMISSION WORLD, LLC, BELDEN MFG, LLC, APLS ACQUISITION, LLC AND ENGINE RECYCLER, LLC, SW ENGINES MANAGER, LLC, SW ENGINES, LLC, SW TRANSMISSIONS, LLC, U NEED ENGINES MANAGER, LLC, U NEED ENGINES, LLC,

Defendants-Respondents-Cross-Appellants-Petitioners.

On Appeal from the Circuit Court of Milwaukee County
Circuit Court Case No. 17-CX-04
The Honorable William Sosnay, Presiding

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This is a case of first impression in Wisconsin with incredibly far-reaching consequences. Here, the State of Wisconsin has, for the first time, attempted to bring suit under Wisconsin's Deceptive Trade Practices Act, seeking to enforce Wis. Stat. § 100.18(1) for online advertising received and acted upon outside the state.

The State has claimed the Wisconsin Department of Justice can sue under Wis. Stat. § 100.18(1) on behalf of a claimed violation occurring in Arkansas, California, or any other state, with the only caveat being that the business advertises in Wisconsin. In this case, only one Wisconsin consumer testified at trial, yet the State contends that it is entitled to recover on behalf of hundreds of consumers across the country who received advertising in other states and have virtually no connection to Wisconsin.

At the same time, the State acknowledged and endorsed an approach where any other State can sue the business for the exact same alleged conduct. In other words, for *one alleged fraudulent misrepresentation* a business advertising in Wisconsin could theoretically be sued by *all fifty states' attorneys general* (all 50 states have their own version consumer protection laws).

Recognizing the absurdity of the above scenario, and the numerous constitutional issues created by this interpretation, the Circuit Court and federal courts in the Eastern District of Wisconsin unanimously rejected the State's interpretation and concluded that a company's advertising conduct in Wisconsin cannot serve as the basis for regulation of its advertising in other locales.

Although both the Circuit Court and federal courts correctly understood that the State's attempted reach was too broad, the Court of Appeals, in what is recommended to be a published opinion, reversed and has now upheld the State's interpretation of Wis. Stat. § 100.18. As set forth in detail below, the Court's Decision is improperly based on a flawed textual analysis, fails to address the extraterritorial application of state statutes, and does not consider the economic impact this decision would have on any business that advertises in Wisconsin.

The State will use this decision as a test case to push the limits of how far it can extend the reach of Wisconsin law. Left untouched, the decision will allow the State of Wisconsin to apply its laws on a nationwide basis with devastating effects on interstate commerce and Wisconsin business all in the name of protecting consumers in other states. This result is plainly incorrect and permits a clear overreach of state power.

STATEMENT OF ISSUES

I. Whether the State has the authority to regulate advertising conduct which is received and acted upon by consumers in other states under Wis. Stat. § 100.18(1)?

Answer by the Circuit Court. No. The Circuit Court granted Midwest's motion for reconsideration of summary judgment motion, which limited the issues and State's witnesses at trial.

Answer by the Court of Appeals. Yes. The Court of Appeals reversed and remanded the case to the Circuit Court for a new trial.

II. Whether the State must establish that a consumer suffered a pecuniary loss under Wis. Stat. § 100.18?

Answer by the Circuit Court. Yes. The Circuit Court found that the State of Wisconsin had to prove a pecuniary loss.

Answer by the Court of Appeals. No. The Court of Appeals reversed and remanded the case to the Circuit Court for a new trial.

III. If the State is not required to prove pecuniary loss under Wis. Stat. § 100.18, was the Circuit Court's error harmless?

Answer by the Circuit Court. This issue did not arise in the Circuit Court.

Answer by the Court of Appeals. No. The Court of Appeals reversed and remanded the case to the Circuit Court for a new trial.

CRITERIA FOR REVIEW

This Petition warrants review by the Wisconsin Supreme Court under Wis. Stat. § 809.62(1r). Principal among those reasons is the following:

(a) This case contains significant questions of federal and state constitutional law meriting review. See Wis. Stat. § 809.62(1r)(a). The Court of Appeals decision allows for extraterritorial application of a Wisconsin statute to a nationwide class of consumers and produces unconstitutional results. The Court of Appeals plain language interpretation of Wis. Stat. § 100.18(1) is also inconsistent with multiple recent Wisconsin federal district court decisions that are in direct contradiction to the Court of Appeals' interpretation, and which held extraterritorial application of § 100.18 was not intended or permitted. *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020); *Hydraulics Int'l, Inc. v. Amalga Composites, Inc.*, No. 20-CV-371, 2022 WL 4273475 (E.D. Wis. Sept. 15, 2022).

(b) This case requires the Supreme Court to develop, clarify or harmonize the law meriting review. Wis. Stat. § 809.62(1r)(c). Up until the recent Court of Appeals' decision, which has been recommended for publication, there have been no other Wisconsin decisions interpreting the application of Wis. Stat. § 100.18(1) to those that receive an alleged false advertisement from a Wisconsin business, outside of Wisconsin. The Supreme Court decision will help "develop" and "clarify" whether the State of Wisconsin has the authority to regulate a company's activities beyond the boundaries of Wisconsin. This is a "novel," but significant issue that will likely impact all Wisconsin businesses, and one of first impression in Wisconsin. This case also presents a question of law that is likely to recur unless resolved by the Supreme Court. Wis. Stat. § 809.62(1r)(c)(2)-(3).

The impact of the issues presented here goes far beyond the confines of this case and are likely to impact any Wisconsin business. The State of Wisconsin brought this case as a consumer protection action pursuant to Wis. Stat. § 100.18, the Deceptive Trade Practices Act, similar lawsuits are likely to be brought against other businesses in the future.

The Court of Appeals has determined that the plain language of Wis. Stat. § 100.18(1) empowers the State to bring an action against any business

for making false advertisements and/or misrepresentations regardless of whether the recipient of said false advertising was located outside of Wisconsin. Thus, any business engaged in nationwide advertising, including online advertising, would be directly impacted by the Court of Appeals decision and would be subject to Wisconsin consumer protection law even while engaging in transactions wholly outside the State of Wisconsin.

Concerningly, under the Court of Appeal's Decision, Wisconsin consumer protection law becomes the de facto national law for all businesses who engage in some degree of advertising in Wisconsin, regardless of whether their advertising is received outside the boarders of this state by consumers in other locales. Under the Court of Appeal's interpretation, the Wisconsin statute is improperly elevated to national application.

Review is proper to prevent an overreach of the State of Wisconsin's authority to impose Wisconsin laws outside of Wisconsin, which would pose serious constitutional and policy questions for all businesses that advertise in Wisconsin.

STATEMENT OF THE CASE

The State of Wisconsin filed this complex forfeiture action against the Petitioners pursuant to Wis. Stat. § 100.18, the Deceptive Trade Practices Act (hereinafter, "100.18"). The State alleged Petitioners (hereinafter, "Midwest") made false and misleading advertisements over the telephone and in online advertisements.

On July 27, 2018, Midwest filed a motion for partial summary judgment concerning whether the State could seek forfeitures and restitution on behalf of out-of-state consumers who received the advertising outside of the State of Wisconsin. The motion was denied. *State v. Alfred Talyansky, et al.*, No. 2022AP788, slip op., 2023 WL 4743199, ¶ 9 (Wis. Ct. App. July 25, 2023) (recommended for publication). On March 1, 2021, Midwest filed a motion for reconsideration relating to the motion for partial summary judgment based on Judge Adelman's recent decision in *T&M Farms v. CNH Indus. Am., LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020). *Talyansky*, ¶ 13. The Circuit Court granted the motion ruling that "incidents that occurred outside Wisconsin, meaning dealing with residents of other states, is not

admissible," and therefore, out-of-state consumer testimony was not permitted as it would be "unfairly and unduly prejudicial." *Talyansky*, ¶ 19. On November 29, 2021, a jury trial commenced. *Talyansky*, ¶ 20. At trial, the State called only one Wisconsin consumer to testify regarding the alleged misrepresentations. (R. 338:161-211.) A jury found Midwest's advertisements to Wisconsin residents were not untrue, deceptive or misleading, and that Midwest did not make untrue, deceptive or misleading representations concerning testing or mileage, but that Midwest published a misrepresentation as to the business location on four websites. *Talyansky*, ¶ 23. The jury also found that State failed to prove a Wisconsin consumer had suffered a monetary loss due to a misrepresentation of the business location. *Id.*

The State appealed alleging raising the following issues: (1) whether the Circuit Court erred in precluding the State from applying 100.18(1) to out-of-state consumers, and (2) whether the Circuit Court erred in requiring the State to establish a pecuniary loss.[1] *Talyansky*, ¶ 25.

As set forth in detail below, the Court of Appeals reversed the Circuit Court on both issues. Specifically, the Court of Appeals determined that the State had authority to enforce 100.18 regardless of where the advertising was received or acted upon. *Talyansky*, ¶ 30. The Court of Appeals also determined that the Circuit Court erred when it instructed the jury that the State had to prove a pecuniary loss under 100.18, and that such error was not harmless. *Talyansky*, ¶ 42, 44. The case was then remanded back to the Circuit Court for a new trial. *Talyansky*, ¶ 45.

ARGUMENT

I. The Court of Appeals Erred in Holding that 100.18 Empowers the State to Regulate Conduct Occurring Outside Wisconsin.

The plain language of 100.18 requires that a representation be "made, published, disseminated, circulated, or placed before the public" in

[1] Midwest filed a cross-appeal relating to the Circuit Court's decision denying costs under Wis. Stat. §§ 814.03 & 804.04. This issue is not the subject of this Petition.

Wisconsin before a violation exists. *Gilson v. Rainin Instrument, LLC*, No. 04-C-852-S, 2005 WL 955251, at *12 (W.D. Wis. Apr. 25, 2015) ("However convoluted the language of the statute [100.18] one thing is clear: in order for liability to attach there must be some statement made in Wisconsin. . . .").

The statute contains two clauses. The first clause lists the methods by which the prohibited conduct may occur stating, "make, publish, circulate, or place before the public." The second clause modifies the first and provides a territorial limitation applicable to each of the foregoing methods restricting application of the statute to the State of Wisconsin through the use of the language, "in this state." Wis. Stat. § 100.18.

The phrase "in this state" is not ambiguous, and clearly refers to the state of Wisconsin. Under a plain language interpretation, 100.18 simply does not regulate advertisements placed before the public in states other than Wisconsin. Despite this clear territorial limitation imposed by the statute, the Court of Appeals determined that the State may enforce 100.18 with respect to advertisements received or placed in other states.

A. The Court of Appeals Erred by Determining that 100.18 Could be Applied Extraterritorially

The Court of Appeals determined that 100.18 could be applied to Midwest's conduct in other states noting that the legislature could have included specific language in the statute restricting its application only to consumers who receive the advertisement in Wisconsin. *See Talyansky*, 2023 WL 4743199 at ¶ 32 ("the legislature could have added language that limited a violation of Wis. Stat. § 100.18(1) to a consumer based in Wisconsin, but chose not to do so"). However, this argument turns the statutory presumption against extraterritorial application of statutes on its head and is inconsistent with Wisconsin's framework for statutory interpretation.

It is well settled that a state's ability to shape policy through enforcement of its laws necessarily begins and ends at its borders. It is axiomatic that no single state is entitled to elevate its policy choices above those of other states and no state may usurp the federal government's exclusive ability to create nation-wide legislation. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) ("an elementary principle[] that the laws of one State

have no operation outside of its territory except so far as is allowed by comity").

Recognizing the limits of state authority, the Wisconsin State Constitution declares that "[t]he sovereignty and jurisdiction of this state extend to all places within the boundaries declared in article II of the constitution."[2] Similarly, the Wisconsin Supreme Court has declared that "[t]he general rule, unquestionably, is that law of a state have no extraterritorial effect." *State v. Mueller*, 44 Wis. 2d 387, 391, 171 N.W.2d (1969); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975)) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected. . . ."); *Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 2012 WI 89, ¶ 46, 342 Wis. 2d 576, 819 N.W.2d 240 ("[t]he general rule, unquestionably, is that laws of a state have no extraterritorial effect. . . we cannot ignore the State or Wisconsin's lack of authority to regulate a person's activities in another state."); *see also K-S Pharmacies, Inc. v. Am. Home Prods. Corp*., 962 F.2d 728, 730 (7th Cir. 1992) (discussing the "presumption of exclusive domestic application" based on states' lack of "any . . . power to reach outside their borders"). Absent clear language indicating that a statute is intended to have extraterritorial application, courts will not empower parties, much less the State itself, to bring suit under Wisconsin law for conduct occurring elsewhere. *Wis. Indus. Energy Grp.*, 2012 WI 89 ¶ 46; *K-S Pharmacies*, 962 F.2d at 730.

With these basic principles of federalism in mind, each of the fifty states has adopted their own unique statutory schemes relating to consumer protection and advertising.[3] Yet, the Court of Appeals determined that applying 100.18 to advertisements which were made to consumers in other states, received in other states, and acted upon in other states involved no

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[2] Article II of the Wisconsin Constitution describes the geographic boundaries of the State.

[3] Carolyn Carter, *Consumer Protection in the States, A 50-State Evaluation of Unfair & Deceptive Practices Law*, Nat'l Consumer L. Ctr. (2018), https://filearchive.nclc.org/udap/udap-report.pdf.

extraterritorial application of law because the State is regulating a Wisconsin business. *See Talyansky*, ¶ 36.

Midwest is not disputing the State's ability to enforce Wisconsin law where the conduct at issue occurred in Wisconsin. Rather, Midwest disputes the State's ability to regulate its advertising conduct in other states, which is received and acted upon in those states by out-of-state consumers. Applying Wisconsin law to conduct and practices occurring in other states is a clear case of extraterritorial application of state law. *See Mueller*, 44 Wis. 2d at 391; *State Farm*, 538 U.S. at 421-22. The mere fact that a business is incorporated in Wisconsin does not alter this conclusion and is insufficient to apply Wisconsin law to all of its conduct anywhere in the world. *State Farm*, 538 U.S. at 421-22.

Neither the Court of Appeals nor the State have pointed to any language in 100.18—nor does any such language exist—that directly contemplates or even suggests that regulating conduct in other states is permitted. Absent such language, 100.18 cannot be interpreted to regulate advertising carried on outside the State of Wisconsin.

B. The Court of Appeals Erred by Focusing on Advertiser Conduct While Ignoring Language Requiring the Recipient to be Located in Wisconsin.

The Court of Appeals concludes that 100.18 prohibits advertisers from making, publishing, disseminating, or causing such advertisements to be made, published, or disseminated in Wisconsin without direct reference to the conduct of the consumer or recipient. *Talyansky*, ¶¶ 30-32. However, the mere fact that a statute primarily references advertiser conduct is not dispositive of *where* advertisers can be regulated.

In its singular focus on advertiser conduct, the Court of Appeals ignores the remaining statutory language which requires that an advertisement be "placed before the public" followed by the language "in this state." This language expressly contemplates the location of the recipient of the advertising and requires that the recipient be located within Wisconsin before a cause of action exists. Ignoring this statutory language is illogical

and renders this element perfunctory in all online advertising cases. An interpretation which requires only dissemination or circulation of an advertisement in Wisconsin, regardless of where the consumer receives or acts upon said advertising, renders all online advertising subject to 100.18 as nearly every online webpage is accessible and theoretically circulated in Wisconsin.

Contrary to the Court of Appeals' Decision, 100.18 does contain an explicit geographic limitation on where the consumer must be located. The statute contains no language indicating that placement of advertising before the public in any other state is actionable, and as a result, the State is not permitted to enforce 100.18 with respect to consumers receiving advertising in other locations.

C. The Court of Appeals Erred in Determining that the Placement of a Comma Allowed for Regulation of Advertising Outside Wisconsin.

The Court of Appeals determined that the phrase "before the public" was not modified by the phrase "in this state." *Talyansky,* ¶¶ 30-32. Instead, in the Court's view, only the first portion of the statute prohibiting making, disseminating, publishing, circulating, or causing an advertisement to be made must occur within Wisconsin whereas the requirement that an advertisement be placed before the public has no geographic limitation.

In reaching this conclusion, the Court improperly emphasizes the comma that separates the phrase "before the public" and "in this state" arguing that if the phrase "in this state" modified the phrase "before the public," there would be no need for a comma. This analysis fails to consider the grammatical structure of the statute in context of *all* its language.

The relevant text of Wis. Stat. §100.18(1) provides:

> No person, firm, corporation . . . ***shall make, publish, disseminate, circulate, or place before the public***, or cause, directly or indirectly, to ***be made, published, disseminated, circulated, or placed before the public***, **in this state**, in a newspaper, magazine or other publication,. . . an advertisement, announcement, statement or representation of any kind to the public relating to such purchase . . . which advertisement, announcement, statement or representation contains any assertion,

> representation or statement of fact which is untrue, deceptive or misleading.

Wis. Stat. § 100.18(1) (emphasis added).

The Court's analysis ignores the fact that the clause, or "cause, directly or indirectly, to be *made, published, disseminated, circulated, or placed before the public*" modifies the clause ". . ., *shall make, publish, disseminate, circulate, or place before the public*." This second clause is the only reason why there is a comma before "*in this state*." If the second clause is removed, there would be no comma before "in this state." Further, it is illogical to conclude that "in this state" only modifies one of the two preceding clauses when those clauses are related enumerations of prohibited conduct. The only logical conclusion is that 100.18 was meant to protect the public in Wisconsin, and not everywhere else in the world.

To support its textual analysis, the Court of Appeals improperly relies upon *Ahlgrimm* concluding that the "use of a comma separating one phrase from another phrase means that the latter phrase does not modify the prior phase." *Talyansky*, 2023 WL 4743199 at ¶ 31 (citing *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978)). As an initial matter, the language used by the Court does not appear in *Ahlgrimm* nor does this case suggest that such grammatical construction is universally applicable. Courts have repeatedly acknowledged that 100.18 is one complicated run-on sentence that does not strictly adhere to any conventional rules of grammatical composition. *Hydraulics Int'l*, 2022 WL 4273475, at *6 (quoting *Uniek, Inc. v. Dollar Gen. Corp.*, 474 F. Supp.2d 1034, 1036 (W.D. Wis. 2007) ("Wisconsin Statute § 100.18(1) consists of one remarkably cumbersome sentence that 'would put even Dickens to shame.'")). Thus, the Court's assumption that strict grammatical interpretation should govern the interpretation of 100.18, which is itself complex and grammatically unconventional, is inherently suspect.

Further, the Court of Appeals' analysis misapplies the *Ahlgrimm* grammatical construction. The statute in *Ahlgrimm* provided:

> (a) For statewide offices, circuit judgeships, and for county judgeships when the district comprises more than one county, in the office of the board.

Ahlgrimm, 82 Wis. 2d at 589. The court determined that the phrase "more than one county" in section (a) only modified the phrase "county judgeships." The issue was whether language encapsulated by commas modified phrases outside the commas. The *Ahlgrimm* court concluded that it did not. Here, the language which the Court of Appeals determined did not modify preceding portions of 100.18 is not contained within the same set of commas but is instead part of a serial list with 68 commas. *See* Wis. Stat. § 100.18(1). In the illustration below, the bolded language offset with quotation marks represents the phrases which the respective courts indicate modify each other.

Grammatical Construction by Ahlgrimm Court

> (a) For statewide offices, circuit judgeships, and for "**county judgeships**" when the district comprises "**more than one county**", in the office of the board.

Grammatical Construction by Court of Appeals

> No person, firm, corporation . . ., shall "**make, publish, disseminate, circulate**", or place before the public, or "**cause, directly or indirectly, to be made, published, disseminated, circulated**," or placed before the public, "**in this state**", in a newspaper, magazine or other publication, or in the form of a book, notice . . .

These constructions are not remotely similar. Illogically, the Court of Appeals concluded that all of the listed items except "placed before the public" are modified by the phrase "in this state" and thus, the advertisements do not have to be placed before or received by the public in Wisconsin. In essence, the Court of Appeals skipped over "placed before the public" and concluded that phrases appearing both before and after this language were somehow modified by "in this state" while only "placed before the public" is not. This construction is not supported by *Ahlgrimm* and should be rejected.

D. The Court of Appeals Erred in Construing 100.18 in a Manner that Produces Absurd and Unreasonable Results.

Under the Court of Appeals' interpretation, the State is permitted to recover under 100.18 when an out-of-state resident views an online advertisement outside of Wisconsin and acts on that advertisement in another state simply because the same advertisement is also *available* in Wisconsin. This construction produces absurd and unreasonable results. As federal courts within the Eastern District aptly concluded:

> One might contend that, because [defendant] marketed [] on its website and in agricultural magazines, its marketing statement should be deemed to have been 'made' in Wisconsin, since anyone in Wisconsin could have viewed [defendant's] website . . . But this reading of 'made' would produce absurd results, in that it would subject every person who advertises on the Internet or in publications to the Wisconsin DPTA . . . For example, this reading would allow an Arizona resident to sue an Arizona used car dealership that makes claims about its inventory on its own website under the Wisconsin DTPA simply because a Wisconsin resident could have visited the dealership's website from a computer in Wisconsin. Nothing in the text or purpose of the DTPA suggests this extraterritorial effect was intended. *See Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n*, 342 Wis. 2d 576, 602, 819 N.W.2d 240 (2012) (noting that Wisconsin presumes that its laws have no extraterritorial effect).

T&M Farms, 488 F. Supp. 3d at 763. Taken to its logical conclusion, there is no reasonable stopping point for enforcement of 100.18 in an online world.

Under the Decision, businesses would be forced to curtail their activities in compliance with Wisconsin law regardless of whether those same actions would be legal elsewhere. Alternatively, assuming that the conduct is prohibited in another state and under Wisconsin law, the State indicated that it would seek forfeitures and restitution for the conduct and other states would also be entitled to seek their own forfeitures and damages for the same conduct. It is not difficult to imagine the disastrous financial impact which would result from double enforcement of state law, especially in State enforcement actions involving forfeitures. Should other States adopt the Court of Appeals' reasoning, all state consumer protection laws would suddenly have application to out-of-state activity and companies would be forced to comply with the laws of all fifty states regardless of where the advertising in question is actually directed, received, or acted upon.

These concerns were echoed by federal courts tasked with determining whether 100.18 applies to out-of-state advertising. These courts unanimously rejected the interpretation advanced by the Court of Appeals stating:

> Reading the statute as [plaintiff] proposes would protect consumers located anywhere from a deception by a Wisconsinite or a Wisconsin business. While that may be a noble goal, it would be an unusual goal for a state legislature, which is generally concerned with protecting its own residents and not with subjecting its citizens and businesses to liability for the sake of protecting residents of other states. Residents of other states must generally turn to their own state legislatures for protection. . . . reading the statute this way is unreasonable and would create a statute of extraordinary scope.

Hydraulics Int'l, 2022 WL 4273475, at *8; *T&M Farms*, 488 F. Supp. 3d at 763 (" But this reading . . . would produce absurd results, in that it would subject every person who advertises on the Internet or in publications to the Wisconsin DPTA."); *Jou v. Kimberly-Clark Corp.*, No. C-13-03075 JSC, 2013 WL 6491158, at *12 (N.D. Cal. Dec. 10, 2013); *Force v. ITT Hartford Life & Annuity Ins. Co.*, 4 F. Supp. 2d 843, 857-58 (D. Minn. 1998).

The Court of Appeals summarily rejected these cases stating that the courts did not undertake a textual analysis of 100.18, but instead relied upon the purpose of the statute to arrive at their conclusions. *See Talynasky*, 2023 WL 4743199 at ¶ 35 ("*T&M Farms* skipped a plain language reading of the statute and focused instead on the purpose of the statute.") Although Midwest disagrees with the Court of Appeals characterization, the fact remains that multiple courts have determined that the Court of Appeals' interpretation leads to absurd and unreasonable results.

Under Wisconsin law, any textual interpretation must be reasonable and avoid absurd results. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110; *State v. Delaney*, 2003 WI 9, ¶ 15, 259 Wis. 2d 77, 658 N.W.2d 416; *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 ("we interpret statutory language reasonably, 'to avoid absurd or unreasonable results.'") (quoting *Osterhues v. Bd. Adjustment for Washburn County*, 2005 WI 92, ¶ 24, 282 Wis. 2d 228, 698 N.W.2d 701). Further, "[a]n interpretation that contravenes the manifest purpose of the statute is unreasonable." *Dinkins*, 2012 WI 24, ¶ 29. Thus, the

Court of Appeals was required to consider whether the textual interpretation it arrived at was reasonable and also should have considered the manifest purpose of the statute as part of its analysis.

The Court of Appeals does not articulate any disagreement with Midwest or the federal courts' assertions that its interpretation creates an extraordinarily expanded scope of state law and would permit 100.18 to apply on a nationwide basis. The Court also does not articulate any disagreement with Midwest's position that the manifest purpose of 100.18 is the protection of *Wisconsin* consumers, not consumers in other states. *See, e.g.*, *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2006 WI App 148, ¶ 19, 295 Wis. 2d 298, 720 N.W.2d 507 ("the legislature intended that *Wisconsin residents* be protected from 'any untrue, deceptive, or misleading representations made to promote the sale of a product.'") (quoting *State v. Automatic Merchandisers of Am., Inc.*, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974)), *aff'd*, 301 Wis. 2d 109, 732 N.W.2d 792 (2007). There is simply no response to these issues and no attempt made by the Court of Appeals to demonstrate that its interpretation somehow does not produce the absurd results articulated by Midwest and all recent federal authority discussing the issue.

E. The Court of Appeals' Interpretation Produces Unconstitutional Results.

In addition to the above textual issues, the Court of Appeals' interpretation violates the Dormant Commerce Clause and should be rejected. *See In re A. P.*, 2019 WI App 18, ¶ 26, 386 Wis. 2d 557, 927 N.W.2d 560 ("courts must interpret statutes to avoid unconstitutional results"). The Court of Appeals claims that there are no constitutional problems created by its interpretation because "all Wisconsin businesses must do to comply with the law is refrain from making misrepresentations in their advertising. If Midwest has to follow the law for in-state residents, there should be no issue following the law for out-of-state residents given that both view the same websites." *Talyansky*, at ¶ 37.

This reasoning is based on an inherently flawed assumption that refraining from making a misrepresentation universally means the same thing in all states. Contrary to the Court of Appeal's assertions, under the Decision,

to avoid violating consumer protection law, Midwest would have to comply with 100.18 whenever it made any advertisement or representation to consumers anywhere in the world. Midwest would then also have to comply with the regulations of the state in which the advertising was received as that state would also have an interest in protecting its consumers under its own laws.

Ultimately, every business would have to comply with the laws of all fifty states whenever it acted, and perhaps more importantly, would also be subject to duplicate fines, penalties, and damages in all fifty states for the same advertisement. This is precisely the outcome sought to be avoided through application of the Dormant Commerce Clause.

Although the issue decided by the Court of Appeals is one of first impression in Wisconsin, and consequently there is no case law discussing the constitutional impacts of this interpretation, courts interpreting the Wisconsin Fair Dealership Law ("WFDL") have determined that applying state law to out-of-state conduct is unconstitutional, concluding:

> We think, in light of both the presumption against extraterritoriality and the troublesome nature of the constitutional questions that would be raised if the WFDL reached beyond Wisconsin's borders, that the Wisconsin Supreme Court would construe the WFDL as not applying to Morley-Murphy's sales of Zenith products in Minnesota and Iowa.

Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373, 380 (7th Cir. 1998). The *Morley* court elaborated that applying the WFDL outside of Wisconsin "may adversely affect interstate commerce by subjecting activities to inconsistent regulations[.]" *Id*. at 379. Further, the court expressed concern with extraterritorial regulation generally stating, "[i]t is much more difficult to see why Wisconsin is entitled to insist that other states adhere to the same economic policy it has chosen . . . the state that has chosen more regulation could always trump its deregulated neighbor." *Id*. Thus, even though the plaintiff was a Wisconsin company, the court refused to apply Wisconsin law to the company's conduct in other states.

In determining whether conduct violates the Dormant Commerce Clause, Wisconsin courts apply the *Pike* test:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . .
>
> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

State v. Amoco Oil Co., 97 Wis. 2d 226, 251, 293 N.W.2d 487 (1980) (quoting *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970)). Under this test, the Court of Appeals should have weighed Wisconsin's interest in punishing conduct occurring outside its borders against the burden such regulation imposes on interstate commerce. Instead, the Court simply concluded that there was no interstate activity because a Wisconsin business is involved. This analysis is plainly in error as the State is seeking to regulate a Wisconsin business's advertising occurring in other locales. As a result of this fundamental misunderstanding, the Court of Appeals improperly truncated its analysis and declined to address any Constitutional considerations.

Under the Appellate Court's interpretation of the statute, the location where an advertisement is received is irrelevant, and an advertisement, once placed online, is published, disseminated, or circulated in Wisconsin and therefore subject to 100.18. Applying this holding, any business that advertises online is subject to the WDTPA and may be fined up to $10,000 per violation regardless of where the advertisement is viewed. Further, by the State's own admission, the business would also be subject to duplicate penalties from any other state or individual wishing to pursue a cause of action relating to the advertisement. Given the large number of Wisconsin and out-of-state corporations advertising online, and thus technically placing an advertisement in circulation in Wisconsin, this burden is undeniably enormous.

Neither the State nor the Appellate Court asserted any countervailing legitimate local interest in the regulation of conduct outside Wisconsin. This is because there is no legitimate state interest in regulating conduct outside its borders or protecting non-resident consumers. Case law demonstrates that not only does the state in which the injury actually occurred have a superior

interest in regulating this conduct and protecting its consumers, but the State of Wisconsin is also not free to impose its legislative policy choices on its neighbors. *See In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.*, No. 14-cv-5696, 2017 U.S. Dist. LEXIS 48792, at *116 (N.D. Ill. Mar. 31, 2017); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 559 (1996). Absent a sufficiently strong interest in regulating out-of-state conduct, the State's enforcement of 100.18 is plainly improper.

F. The Court of Appeals Erred in Determining that the State Has Standing to Assert Claims Under 100.18 for Conduct Occurring Outside the State of Wisconsin.

The Court of Appeals summarily dismissed Midwest's standing argument, maintaining that 100.18(11)(a) provides the State with the authority, and that 100.18(11)(d) permits the State to enforce "any violation of this section." *Talyansky*, at ¶ 38. However, this response misconstrues the substance of Midwest's argument. Midwest does not dispute that the State has authority to pursue violations of 100.18 by instituting lawsuits "in the name of the state." *See* Wis. Stat. § 100.18(11)(a) & (d). Instead, Midwest has alleged that the requirement that suit be brought "in the name of the state" constrains the State's ability to initiate enforcement actions which do not serve any legitimate state interest.

The Wisconsin Supreme Court expressly held that standing in a state enforcement action has two elements; (1) the State must demonstrate that it has an interest in the matter by establishing an injury or threatened injury, and (2) the interest asserted must be recognized by law meaning that the Attorney General can point to a statute allowing suit in the name of the state. *State v. City of Oak* Creek, 2000 WI 9, ¶¶ 18-19, 232 Wis. 2d 612, 605 N.W.2d 526. Before it is entitled to bring a lawsuit "in the name of the state," a sufficient injury or interest in regulating the conduct at issue must exist.

Specifically, the State must "articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party, [and] [t]he State must express a quasi-sovereign interest." *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). Although a state has a sovereign interest in the health and well-being

of its residents, the state has no sovereign interest in the health and well-being of those outside its borders. *Id.*

The Court of Appeals did not address these issues but instead repeatedly referenced the notion that the State is attempting to regulate the conduct of in-state businesses. However, any possible interest that Wisconsin might have in protecting out-of-state consumers is superseded by the consumer's home state's interest in enforcing its own consumer protection laws. *In re Fluidmaster, Inc.*, 2017 U.S. Dist. LEXIS 48792, at *116 (citing *Darisse v. Nest Labs, Inc.*, No. 5:14-CV-01363-BLF, 2016 U.S. Dist. LEXIS 107938, at *15 (N.D. Cal. Aug. 15, 2016)) ("Each consumer's home state 'has a compelling interest in protecting their consumers from in-state injuries caused by an out-of-state company doing business within their borders, and in setting the scope of recovery for consumers under their own laws."). Thus, the State of Wisconsin cannot bring suit "in the name of the state" concerning out-of-state advertising.

To hold otherwise would empower the State to use its jurisdiction over Wisconsin companies operating in any other state to shape policy and enforcement on a national level. It is well-settled that such powers and policy decisions are necessarily left to the federal government and the respective states in which the conduct occurred. *BMW of N. Am.*, 517 U.S. at 559 ("Principles of state sovereignty and comity forbid a State to enact policies for the entire Nation, or to impose its own policy choice on neighboring States."). Further, allowing the State to recover penalties on behalf of non-residents for conduct occurring out-of-state effectively prevents injured states from protecting their own consumers, determining the laws that regulate individuals within state borders, and collecting funds that should go to their state's initiatives aimed at protecting victims of the alleged conduct. The State of Wisconsin is not the proper party to redress alleged harm to consumers in other jurisdictions and is not permitted to recover for conduct occurring in other states.

II. The Court of Appeals Erred in Determining that the State Was Not Required to Prove Pecuniary Loss

The Court of Appeals determined that the State did not have to prove pecuniary loss relying on *State v. Am. TV & Appliance of Madison, Inc.*, 146

Wis. 2d 292, 430 N.W.2d 709 (1988). *See Talyansky*, ¶ 42. Specifically, the Court found that in an action brought by the State under 100.18 there are only two elements: 1) there must be an advertisement or announcement; and 2) the advertisement or announcement must contain a statement which is "untrue, deceptive, or misleading." *See Talyansky*, ¶ 42; *Am. TV,* 146 Wis. 2d at 295, 300. Contrary to the Court's Decision, pecuniary loss is an element of all claims under 100.18, and, in any case, damages or forfeitures cannot be recovered for conduct occurring outside of Wisconsin.

As the Circuit Court aptly noted, reliance on *Am. TV* is misplaced as that case involved an appeal relating to the trial court's decision to dismiss the State's complaint for failure to state a claim. (R. 339:84-85.) The court was not required to evaluate pecuniary loss since the existence of such loss was not at issue. Further, the Circuit Court correctly found that subsequent Wisconsin authority has consistently required pecuniary harm for any claim under 100.18. (R. 336:8); *Novell v. Migliaccio*, 2008 WI 44, 309 Wis. 2d 132, 749 N.W.2d 544; *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792. This precedent is clear and requires pecuniary loss to be demonstrated. *Fox v. Iowa Health Sys.*, 399 F. Supp. 3d 780, 798 (W.D. Wis. 2019) (holding that claimants "under the Wisconsin Deceptive Trade Practices Act, Wis. Stat. §100.18, . . . must prove the representation materially induced (caused) a pecuniary loss to the plaintiffs.") None of these cases condition the elements of a claim on whether the State or a private individual is the plaintiff. [4]

A. Even if Pecuniary Loss is Not an Element of State's §100.18 Claims, the Error is Harmless.

The Court of Appeals found that instructing the jury that pecuniary loss was an element of 100.18 was not a harmless error. *Talyansky*, ¶ 43. However, the jury verdict separately asked whether a misrepresentation had occurred and whether pecuniary loss resulted from that misrepresentation.

[4] No binding case law expressly addressing the elements required to prove a violation of 100.18(10r) exists, however, 100.18(10r) is undeniably part of the WDTPA and should be treated similarly to other forms of misrepresentation contained in the WDTPA requiring pecuniary loss.

Special Verdict Question No. 1 asked, "Were the representations in the Defendants' advertisements to Wisconsin consumers untrue, deceptive, or misleading?" (R. 292:1.) The jury answered "No." (*Id*.) Thus, regardless of whether damages were required or not, the State could not possibly prevail on its claims under Wis Stat. § 100.18(1). Where separate jury verdict questions are issued, any error is harmless. *Rashke v. Koberstein, et al*., 220 Wis. 75, 264 N.W. 643 (1936).

Even if the State established a technical violation of 100.18(1) or (10r),[5] the State is not entitled to obtain relief for violations occurring outside of Wisconsin. The State's primary claim in this case is recovery of damages for out-of-state consumers. In fact, at trial, the State introduced testimony of only one Wisconsin resident, and is now seeking to recover based on out-of-state conduct. (*See* R. 338:161-211.)

However, the United States Supreme Court has already made clear that claimants seeking recovery under state law cannot obtain damages based on out-of-state conduct, stating:

> No one doubts that a State may protect its citizens by prohibiting deceptive trade practices . . . [b]ut the States need not, and in fact do not, provide such protection in a uniform manner. . . the result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States. . . while we do not doubt that Congress has ample authority to enact such a policy for the entire Nation, it is clear that no single State could do so, or even impose its policy choice on neighboring States. . . By attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other states. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers. . . Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions. . . neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful.

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[5] The State established no violation of any other section of the 100.18 because the jury found no other conduct to be a misrepresentation.

BMW of N. Am., 517 U.S. at 568-73.

The Court of Appeals failed to articulate any injury to Wisconsin or Wisconsin consumers based on Midwest's out-of-state conduct. Instead, the Court of Appeals incorrectly concluded that because a Wisconsin business was involved, that the State was empowered to pursue any violations of Wisconsin law regardless of where the advertising was received or acted upon.

Where the State is not permitted to recover based on out-of-state conduct, any alleged error regarding proof of damages is harmless and does not entitle the State to a new trial.

B. A Permanent Injunction is Not Warranted.

The State also sought a permanent injunction, pursuant to Wis. Stat. § 100.18(11)(d). The State argued a permanent injunction was necessary to bar Midwest from misrepresenting the location of their business. While Midwest challenges the State proved a violation of 100.18(10r), even assuming *arguendo* the State had established a violation, a permanent injunction is unwarranted.

The State sought an injunction against all 21 Defendants, even though the jury only found 4 websites contained location-based misrepresentations because Midwest used virtual addresses. (R. 292:2.) When Midwest realized their conduct might be in violation of Wisconsin law, in the summer of 2018, it voluntarily removed all virtual addresses from the websites. (R. 337:121-22; 338:63; 339:50.) Yet, the State sought an injunction over three years later against all Defendants. While the State argues it was entitled to an injunction, injunctive relief is discretionary even when a statutory violation is established. *Forest Cnty. v. Goode*, 219 Wis.2d 654, 684, 579 N.W.2d 715 (1998) (holding that "[o]nce a violation is established," the court has discretion to issue a permanent injunction). Finally, despite the Circuit Court restricting the State's enforcement of 100.18 to Wisconsin, the State still sought to impose a blanket regulation on how Midwest conducts business across the country. This remedy is clearly unwarranted, and the Circuit Court properly exercised its discretion in denying the injunction. The Court of

Appeals stated that the denial of the injunction was "based on an incorrect belief that the State to prove a pecuniary loss." *Talyansky*, at ¶ 45.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court accept this petition for Review.

Dated this 21st day of August 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm) and 809.62(4) for a Petition produced with a proportional serif font. The length of this Petition is 7,576 words.

CERTIFICATION AS TO APPENDIX AS REQUIRED BY WIS. STAT. § 809.19(8g)(b)

I hereby certify that I submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublish opinion cited under s. 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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