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STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2022AP788

STATE OF WISCONSIN,

Plaintiff-Appellant-Cross-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 MANGER, 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-Petitioner

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

This is a consumer protection action brought by the State of Wisconsin under Wis. Stat. § 100.18, the Deceptive Trade Practices Act, against corporate entities and the individual who controlled those entities, all based in Wisconsin, who sold used car engines and other auto parts. From their Wisconsin location, they sell to customers around the country via the internet and are a major purveyor of used auto parts. The State alleges that the defendants, now Petitioners here, misrepresented facts about the used engines and other auto parts, including the actual mileage of the engines, whether they had been tested, and the locations of the businesses selling them.

Petitioners have argued that their misrepresentations don't count if they are made to consumers outside Wisconsin, and that the State must prove pecuniary loss to obtain relief under the statute. In a unanimous opinion, the court of appeals correctly disagreed on both fronts.

First, the court concluded that Wis. Stat. § 100.18(1) covers misrepresentations made in Wisconsin whether the consumer happens to be located in Wisconsin or Iowa. The court correctly held that the phrase "in this state" in section 100.18(1) refers to where the defendant "makes" the misrepresentation. Here, the defendants were Wisconsin entities or individuals and plainly made the misrepresentations at issue. That conclusion was consistent with plain text and the commonsense point that Wisconsin businesses cannot escape their home State's laws by advertising on the internet to reach out-of-state consumers.

Second, the court concluded, consistent with this Court's precedent, that the statutes applicable to an action by the State do not require the State to prove pecuniary loss. Those statutes are distinct from the private cause of action

and again are written sensibly because the State may seek injunctive relief and forfeitures before any damages accrue.

Neither issue meets the criteria for review.

On both issues, Petitioners essentially ask this Court to correct asserted errors, but this is not an error-correcting body. No law clarification is needed: the court of appeals decision plainly interprets the law and will be published. And Petitioners' extraterritoriality and dormant commerce clause objections make no sense in the context of a lawsuit brought by the State of Wisconsin, in Wisconsin courts, against Wisconsin businesses, challenging representations that the businesses broadcast from Wisconsin. Review by this Court would only delay a six-year-old case and relief for consumers.

This Court should deny the petition.

STATEMENT OF THE CASE

I. Petitioners operate numerous businesses based in Wisconsin.

Petitioners operate a Wisconsin business that sells used and remanufactured auto parts to consumers throughout the United States, primarily via the internet. (R. 80:6–7.) Petitioners' business operates exclusively out of Wisconsin. Midwest Auto Recycling, LLC ("Midwest"), is the primary corporate entity; it does business in Cudahy, Wisconsin. (R. 80:6–8.) Alfred Talyansky, a Wisconsin resident, owns the websites that Petitioners operate, while the corporate Petitioners own the content on those websites. (R. 80:10–11.) Talyansky is the principal of Midwest and its top manager. (R. 337:103, 113.) Midwest is the successor to a salvage yard in Milwaukee that sold used car parts; Midwest moved its location to Cudahy and focused on online sales of used engines, transmissions, and other parts. (R. 337:103–07.) Midwest sells auto parts in the United States to auto shops and individuals. (R. 337:114.)

All the other defendants are corporate entities related to Midwest and have their primary place of business in Cudahy, Wisconsin. (R. 80:6–8.) Some of the other corporate entities use mailing addresses outside Wisconsin, but those are not physical addresses and contain no business operations—they simply receive mail. (R. 80:7–8.) According to the defendants, Talyansky established various corporate entities, "using different company names and websites to increase internet traffic." (R. 80:7.)

Midwest has "a lot of different websites" that are "made strictly for - - to driv[e] traffic to our sites so customers find us, because there's so much competition out there." (R. 337:115.) It owns numerous auto parts sales websites, including Engine & Transmission World, Belden Manufacturing, Engine Shopper, Engine Shopper Manager, SW Transmissions, SW Transmissions Manager, SW Engines, SW Engines Manager, Quality Used Transmissions, Quality Used Transmissions Manager, Quality Used Engines, Remanns, Remanns Manager, APLS Acquisitions, Engine Recycler, Engine Recycler Manger, U Need Engines, and U Need Engines Manager. (R. 337:115–17; 338:26–29; 298, 300–01.)

A third-party contractor creates Petitioners' website content, but Talyansky approves that content. (R. 81:3–4.) Those websites are the "primary source of information to potential customers," but information is also given to customers by phone or email. (R. 80:16.) All of Petitioners' telephone and email communications with customers are conducted from their Cudahy, Wisconsin location. (R. 80:16.) Likewise, all contacts with customers—whether via the defendants' websites or email and phone communications—drive sales transactions that are finalized at Petitioners' location in Cudahy. (R. 80:15–16.)

II. The State brings suit against Petitioners; the circuit court correctly interprets Wis. Stat. § 100.18(1), but then changes its mind on a reconsideration motion; and also holds that the State must prove pecuniary loss.

A. The State sues after receiving hundreds of complaints.

The State brought suit against the Petitioners after receiving hundreds of complaints about Petitioners' business practices. (R. 62:7–56.) The complaints ranged from misrepresentations about the mileage and quality of the parts being offered for sale, including whether they had been tested and guaranteed. (R. 62:17–56.) They also complained about the defendants' assertions about the size of their inventory and locations where they operated. (R. 62:17–56.)

The State filed its initial complaint in June 2017; the operative pleading is an amended complaint filed in early 2018. (R. 344; 32.) The State brought the action "pursuant to Wis. Stat. §§ 100.18(11)(d) . . . to enforce" Wis. Stat. § 100.18. (R. 32:7 ¶ 1.) The amended complaint alleges that Defendants engaged in deceptive practices by misleading consumers about their auto parts, services, and their physical location, by communications through internet advertising, websites, email, and telephone. (R. 32:23–24 ¶¶ 90–104).) The State alleged that the defendants committed violations under two subsections of the Act: (1) misrepresentations under Wis. Stat. § 100.18(1) in marketing and selling auto parts; and (2) misrepresentations under section 100.18(10r) regarding where the business was located. (R. 32:23–24 ¶¶ 90–104.)

The State sought judgment (1) finding that the defendants violated Wis. Stat. § 100.18; (2) finding that each violation was a separate offense; (3) enjoining the defendants and their agents from making further misrepresentations; (4) ordering the defendants to make restitution to consumers who suffered losses; (5) imposing civil forfeitures; (6)

temporarily enjoining the defendants from billing customers for auto parts that were not the parts represented during the sale; (7) for costs and attorney fees; and (8) for other equitable relief. (R. 32:24–26 ¶¶ A.–I.)

B. The circuit court initially holds that the statute covers violations of Wis. Stat. § 100.18(1) against consumers located outside Wisconsin, but it changes its mind on a reconsideration motion.

The State's case primarily featured misrepresentations made to customers who did not live in Wisconsin; the State's initial witness disclosure listed 427 consumer witnesses, with six in Wisconsin. (R. 62:7–14.) Closer to trial, the State indicated it would call 20 consumer witnesses, two of whom lived in Wisconsin. (R. 158:4–19.)

Petitioners moved for summary judgment, seeking a ruling that the State could not proceed with claims relating to representations received by anyone outside the State. (R. 72–76.) They argued that to be a violation of Wis. Stat. § 100.18(1), the statement must have also been "received" by someone in Wisconsin. (R. 73:11–13.)

The circuit court denied the defendants' motion, holding that "there is no language that indicates the conduct, statements, or consumers must be in Wisconsin, just that the false information must come before the public in Wisconsin." (R. 102:41–42.) "In short, the text of [Wis. Stat. § 100.18] contains no strict territorial boundary on its enforcement." (R. 102:45.)

Later, after the trial had been delayed due to the pandemic, the defendants filed a motion for reconsideration. (R. 230–32.) The motion was largely based on a September 2020 decision from the Eastern District of Wisconsin, *T&M Farms v. CNH Industrial America, LLC*, 488 F. Supp. 3d 756 (E.D. Wis. 2020), a case that included a private Wis. Stat.

§ 100.18 claim among many other claims. That court held, contrary to other federal district courts, that Wis. Stat. § 100.18 did not apply to representations made to consumers who are not Wisconsin residents. (R. 231:4–8.)

The circuit court granted the motion, holding it was allowed to consider *T&M Farms* as "the most recent authority" interpreting Wis. Stat. § 100.18(1) even though there was no manifest error of law or fact in the circuit court's prior decision. (R. 247:5.) Relying on *T&M Farms*, the court held that section 100.18(1) "does not apply unless a person makes a deceptive representation that is likely to reach an[d] induce an action by a purchaser in Wisconsin." (R. 247:10.) In sum, "the State cannot pursue claims based on customers that received and acted on the advertisements outside of Wisconsin." (R. 247:11.)

Prior to trial, the State submitted an offer of proof with the evidence it would have presented regarding the misrepresentations made to out-of-state consumers, including: (1) documents and testimony summarizing the defendants' practice of quoting mileages that systematically underreported the mileage on the engines actually sold; (2) testimony of out-of-state consumers about their experiences with the defendants; and (3) evidence of the defendants' internet advertising. (R. 264.) Of note, the State would have presented the testimony of three out-of-state consumers about how the engines they received did not match up with the representations that had been made about mileage and compression testing. (R. 264:9–16.)

The circuit court excluded all evidence relating to out-of-state consumers because, due to the ruling on the reconsideration motion, "matters involving incidents that occurred outside Wisconsin, meaning dealing with residents of other states, is not admissible." (R. 309:10.) In addition, the court ruled that under Wis. Stat. § 904.03, such evidence "would be unduly prejudicial in view of what I believe the law

is and what the statute says." (R. 309:10.) Thus, the State was precluded from putting on any evidence of this type.

Limited by the circuit court's ruling on the scope of Wis. Stat. § 100.18(1), the State presented the testimony of one Wisconsin witness and no out-of-state witnesses.

C. The circuit court orders that the jury instructions include a pecuniary loss element; it then denies the State's request for an injunction based on the State's lack of such evidence.

After both parties had presented their witnesses, the court addressed jury instructions with counsel outside the jurors' presence. (R. 339:74–77, App. 106–08.) Even though the parties had agreed not to include a pecuniary loss element in the instructions, the court said it would give "the standard jury instruction [Wis. JI–Civil] 2418 on unfair trade practices, which deals with the statute 100.18(1), provides that there are three elements." (R. 339:75, App. 106.) Rejecting the parties' joint submission, the court explained its view that it is "fundamental that the plaintiff would have to show that there has been some loss as a result of what they claim was false advertising," or "the statute itself would really stand for nothing." (R. 339:82–83, App. 113–14.) After the State objected, the court added a special verdict question on pecuniary loss. (R. 339:86–90, App. 117–19; 292:2.)

The jury found that the defendants' "advertisements to Wisconsin consumers" on their websites were not untrue, deceptive, or misleading by a vote of 10 to 2. (R. 292:1, App. 121.) The jury also found that four of the defendants' websites published a misrepresentation that the business behind the website was located in a certain community or region when it was not. (R. 292:2, App. 122.) It found that the representations in sales quotes to Wisconsin consumers were not untrue, deceptive or misleading. (R. 292:2, App. 122.) The

jury found that Alfred Talyansky had knowledge of, and the ability to control, the representations on which they were asked to rule. (R. 292:2, App. 122.) Lastly, they found that the State failed to prove a Wisconsin consumer had suffered a pecuniary loss due to a misrepresentation. (R. 292:2, App. 122.)

Given that the jury found that the State had proven a violation of Wis. Stat. § 100.18(10r) for misrepresentation of business location, the State asked for the circuit court to impose an injunction against such practices under section 100.18(11)(d) and a civil forfeiture for each violation and costs under section 100.26(4m). (R. 317.) The court denied the State's request because there was no showing of pecuniary loss, which it thought was an element of this claim. (R. 336:7–10.)

III. The court of appeals reverses the circuit court and remands for a new trial.

The State appealed the circuit court's rulings. In a published, unanimous decision, the court of appeals reversed and remanded on both issues. It "agree[d] with the State that the circuit court improperly found that Wis. Stat. § 100.18(1) only applies to misrepresentations made to in-state consumers, and that the State needed to prove that someone suffered a pecuniary loss." *State v. Talyansky*, 2023 WI App 42, ¶ 3 (publication ordered Aug. 30, 2023); App. 004.

On the interpretation of Wis. Stat. § 100.18(1), the court properly analyzed the statutory language. It reasoned that the statute's "verbs, which include 'make,' 'publish,' and 'cause,' focus on the advertiser's conduct or actions, not the recipient or the consumer." *Talyansky,* 2023 WI App 42, ¶ 30, App. 012. Then, "[a]fter a comma, the statute provides that these actions may not take place 'in this state.'" *Id.* Because "[t]he statute does not proscribe where the recipient or consumer must be or reside," and "based on the plain

language of the statute," the court concluded, "that the State can enforce Wis. Stat. § 100.18(1) against Wisconsin businesses that reach consumers outside of the state." *Id.*

The court did not rely on *T&M Farms* because the federal district court had "skipped a plain language reading of the statute and focused instead on the purpose of the statute." *Id.* ¶ 35, App. 013. The court further rejected Petitioners' extraterritoriality argument because they did "not develop an argument explaining how the State securing a forfeiture or an injunction against an in-state business would involve an extraterritorial application." *Id.* ¶ 36, App. 014. And it rejected Petitioners' dormant commerce clause argument 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." *Id.* ¶ 37, App. 014–15.

On pecuniary loss, the court of appeals held that the pecuniary loss element applies only to private party actions under Wis. Stat. § 100.18(11)(b)2., which provides that a "[a]ny person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees[.]" The court distinguished that language from the provision applicable to the State. *Talyansky,* 2023 WI App 42, ¶ 41, App. 016. The court also pointed to this Court's decision in *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 430 N.W.2d 709 (1988), which held that there were two elements for a State enforcement action: "(1) there must be an advertisement or announcement; and (2) the advertisement or announcement must contain a statement which is 'untrue, deceptive, or misleading.'" *Id.* ¶ 42, App. 016.

REASONS THE PETITION FOR REVIEW SHOULD BE DENIED

Petitioners argue that this case presents a significant question of federal and state constitutional law, justifying review under Wis. Stat. (Rule) § 809.62(1r)(a), and that this Court must develop, clarify or harmonize the law, justifying review under Wis. Stat. (Rule) § 809.62(1r)(c). Review is not warranted under either criterion.

There is no need for this Court to develop or clarify the law because the court of appeals has already correctly interpreted the law on both issues, in a decision recommended for publication. Moreover, the court of appeals' interpretation presents no constitutional problems related to extraterritoriality or the dormant commerce clause. Simply put, there is nothing problematic about the State of Wisconsin enforcing its laws against businesses operating within its borders just because they advertise on the internet.

I. The court of appeals correctly interpreted the statute.

There is no need for this Court to clarify or harmonize the law because the court of appeals correctly interpreted the statute. First, the plain text applies to misrepresentations made in Wisconsin, which includes Wisconsin businesses making a representation that travels to other states. Second, the statute does not require the State to prove a pecuniary loss, as this Court has already recognized. That makes sense given that the State, unlike a private plaintiff, can seek injunctive relief to prevent future losses from occurring.

A. The Deceptive Trade Practices Act applies to representations made in Wisconsin.

The statutory interpretation question is straightforward: whether an in-state business that makes representations in Wisconsin has made those representations

"in this state" within the meaning of the statute. While the subsection is long, it prohibits (1) "mak[ing]" or "caus[ing] . . . to be made" (2) "in this state" an "advertisement" or other representation that contains an "untrue, deceptive or misleading" statement. Wis. Stat. § 100.18(1).

Petitioners' alleged conduct meets both elements. They "made" statements on their websites and via email and telephone communications that were false, deceptive or misleading, and they made those statements from their principal place of business in Wisconsin. Petitioners want to read an additional requirement into the statute: that the misrepresentation must be received by a Wisconsin resident. That addition violates core principles of statutory interpretation.

The analysis "begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning." *Id.* Moreover, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

Section 100.18(1) provides that no one "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" various forms, "an advertisement, announcement, statement or representation of any kind to the public" that "contains any assertion, representation or statement of fact

which is untrue, deceptive or misleading." The relevant language here is "make . . . in this state . . . an advertisement." Wis. Stat. § 100.18(1). Section 100.18(1) is an old law, comprised of a long sentence, but it is not ambiguous.

The natural reading of the word "make" refers to the creation of the misrepresentation, not to its receipt by a potential customer. Black's Law Dictionary defines "make" as "1. To cause (something) to exist." *Make*, Black's Law Dictionary (11th ed. 2019). Under this definition, the advertisement is made in Wisconsin when the business creates it and then sends it out into the public. The statute uses verbs, like "make," that focus on the actions of the person making the representation, not on the recipient of that communication.

This is reinforced by the many synonyms for "make" used in the provision. *See State v. Pinder*, 2018 WI 106, ¶ 38, 384 Wis. 2d 416, 919 N.W.2d 568 (noting that words should be interpreted in the same sense as surrounding terms). Wisconsin Stat. § 100.18(1) uses the terms "publish, disseminate, circulate, or place before the public," which all focus on the advertiser's conduct. An advertisement is "published" when it goes into the world, not when someone hears it. Black's Law Dictionary defines "publish" as "1. To distribute copies (of a work) to the public." *Publish*, Black's Law Dictionary (emphasis added). Similarly, the word "disseminate" focuses on the actions of the advertiser and even contemplates that the advertiser's statement will spread from the advertiser out to others in the world: "disseminate" is defined as "to spread abroad as though sowing seed." *Disseminate*, Merriam-Webster, https://www.merriam-webster.com/dictionary/disseminate (last visited Sept. 1, 2023).

A Wisconsin business takes all these actions in Wisconsin, where it is located. The defendants here issued their internet advertisements from their corporate home in Cudahy, and thus made and disseminated those advertisements in Wisconsin.

Petitioners' reading goes against the statutory text. They argue the phrase "placed before the public, in this state" means that the recipient must be in Wisconsin. But the phrase "in this state" modifies all the preceding actions: make, publish, disseminate, etc. The comma in between "public" and "in this state" shows that "in this state" does not modify only the last word before it. *Talyansky,* 2023 WI App 42, ¶ 31, App. 012.

As the court of appeals also pointed out, the Legislature could easily have added language that limited Wis. Stat. § 100.18 depending on the residence of the consumer or where the representation was "received." A different section of Wis. Stat. ch. 100, regulating mail-order sales, limits claims in both ways: it defines a "buyer" as someone who both (1) "[i]s a resident of this state" and (2) "[w]hile located in this state, receives a solicitation . . . ." Wis. Stat. § 100.174(1)(a)1.–2. In contrast, in Wis. Stat. § 100.18(1), the Legislature required neither of those things. It did not limit the statute based on whether the consumer is a resident of Wisconsin or where they happen to be located when they hear or see the misrepresentation.

Petitioners' reading does not comport with the statute's text in another way. Wisconsin Stat. § 100.18(1) is a prohibition on "untrue, deceptive or misleading" advertising. Thus, the misrepresentation in the advertisement is illegal, even if a consumer has not yet acted on that misrepresentation by purchasing a product. This is why the State is allowed to seek injunctive relief: to stop the misrepresentations and prevent those losses from occurring in the first instance. *See* Wis. Stat. § 100.18(11)(d) (allowing

the State to seek injunctive relief but also allowing the court discretion to restore any person any pecuniary loss suffered).

Petitioners suggest federal decisions in diversity cases all go the other way, but that is not the case. *See Le v. Kohls Dep't Stores, Inc.*, 160 F. Supp. 3d 1096, 1114–15 (E.D. Wis. 2016) (holding that Wis. Stat. § 100.18(1) applies to a Wisconsin business, even in cases where the advertising is seen by consumers in other States); *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1415 (N.D. Ill. 1996) (Wis. Stat. § 100.18 "may be violated so long as the allegedly deceptive or misleading representation was 'ma[de], publish[ed], disseminate[d], circulate[d], or placed before the public, in [Wisconsin]' and the citizenship of the individual receiving the deceptive or misleading statement is of no consequence." (alteration in original)).

The *T&M Farms* decision relied on by the circuit court conducted no plain language interpretation and looked only at one purpose of the statute, "to protect Wisconsin residents from deceptive advertising." 488 F. Supp. 3d at 761. The court believed that the only way to protect Wisconsin residents from out-of-state violators of Wis. Stat. § 100.18(1) was to have the statute apply depending on where the misrepresentation was received. *Id.* at 762. That court made three mistakes.

First, it failed to focus on the statutory text. *Kalal*, 271 Wis. 2d 633, ¶ 49. Second, it ignored another purpose of the statute, "'to deter sellers from making false and misleading representations in order to protect the public.'" *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 49, 389 Wis. 2d 669, 937 N.W.2d 37 (quoting *Novell v. Migliaccio*, 2008 WI 44, ¶ 30, 309 Wis. 2d 132, 749 N.W.2d 544): not simply protecting Wisconsin consumers, but also preventing Wisconsin sellers from breaking the law and committing fraud.

Third, the *T&M* court erred in assuming it had to choose between protecting Wisconsin consumers from a violator wherever that violator is located and protecting consumers only from violators located in Wisconsin. The statute covers both types of violations with different clauses. It prohibits a company both from "mak[ing]" *and* "caus[ing] to make" a false representation.[1] A Wisconsin company like the defendants here makes its representations in Wisconsin; an Illinois company that places an ad in the Milwaukee State Journal "causes to make" a representation in Wisconsin to consumers located here.[2]

B. The State need not prove pecuniary loss.

The court of appeals also correctly held that the State does not need to prove a pecuniary loss to prove a violation of Wis. Stat. § 100.18. Petitioners rely on the statute applicable to private party lawsuits, which contains a pecuniary loss requirement. The State proceeds under different subsections that do not require a pecuniary loss.

The private right of action under Wis. Stat. § 100.18 provides that "[a]ny person *suffering pecuniary loss* because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable

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[1] The court also relied on an Attorney General opinion from 1928. *T&M Farms v. CNH Indus. America, LLC*, 488 F. Supp. 3d 756, 762 (E.D. Wis. 2020) (citing 17 Op. Att'y Gen. 194 (1928)). This one-page opinion, however, did not even interpret the relevant statutory language (at that time, Wis. Stat. § 343.413), but instead advised that a plaintiff would have to be able to obtain service on an agent in Wisconsin to bring such a suit.

[2] Petitioners' standing argument is frivolous. The State clearly has an interest in deterring in-state businesses from making misrepresentations in advertisements, and the statute specifically gives the State the right to bring these types of suits.

attorney fees." Wis. Stat. § 100.18(11)(b)2. Unsurprisingly, this Court has held that a pecuniary loss is an element of a private cause of action. *See Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶¶ 38–39, 270 Wis. 2d 146, 677 N.W.2d 233. The model jury instruction relied upon by the circuit court tracks this line of cases.

The State, in contrast, has different enforcement powers. It proceeds under subsections (11)(a) or (d). Subsection (11)(a) provides that "[t]he department of agriculture, trade and consumer protection shall enforce this section. Actions to enjoin violation of this section or any regulations thereunder may be commenced and prosecuted by the department in the name of the state in any court having equity jurisdiction." Wis. Stat. § 100.18(11)(a). Subsection (11)(d) provides that the State "may commence an action in circuit court . . . to restrain by temporary or permanent injunction any violation of this section." Wis. Stat. § 100.18(11)(d). These subsections do not require the State to show a pecuniary or monetary loss.

This Court has already recognized that there is no pecuniary loss element for State enforcement actions. This Court said that "[t]here are two elements to this offense: There must be an advertisement or announcement, and that advertisement must contain a statement which is 'untrue, deceptive or misleading.'" *American TV*, 146 Wis. 2d at 300. Under *American TV*, the State was required to prove only two elements, and not pecuniary loss.

C. The errors were not harmless.

The circuit court's errors were not harmless because, on remand, the State will be able to present significant additional evidence. When a jury reviews that new evidence, its verdict will be based on instructions that properly state the law. And the circuit court will be able to order relief including

an injunction and forfeitures regardless of pecuniary loss.[3] In addition, as the court of appeals held, "the circuit court denied the State any relief" on the claims it proved at trial "based on the circuit court's incorrect view that the State needed to prove a pecuniary loss." *Talyansky,* 2023 WI App 42, ¶ 43, App. 017.

II. The court of appeals' decision presents no constitutional problems.

Perhaps due to the weakness of Petitioners' statutory text argument, they mainly contend that the court of appeals erred due to concerns about extraterritoriality and the dormant commerce clause.

This case involves no extraterritorial application of Wisconsin law. Defendants fail to explain how the State's securing of an injunction against an in-state business from disseminating advertisements from Wisconsin involves any sort of extraterritorial application. The State is regulating a business within its borders and specific conduct—the advertisements—that is done in Wisconsin. There is "clear statutory language" that the State can enforce in Wis. Stat. § 100.18(1) against in-state businesses for making misrepresentations, regardless of whether the misrepresentations are received by consumers in another State. And the appropriate relief, such as forfeitures or restitution, should take into account everyone the business has affected.

Along the same lines, there is no dormant commerce clause problem. The U.S. Supreme Court recently made clear that an "antidiscrimination principle lies at the 'very core' of

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[3] Petitioners raise an argument about whether an injunction is appropriate relief. This is not an issue given that the case will be remanded, and the circuit court will make a determination on injunctive relief based on the new evidence.

our dormant Commerce Clause jurisprudence.'" *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (citation omitted). It also clarified that its prior cases involving extraterritoriality were addressing "the familiar concern with preventing purposeful discrimination against out-of-state economic interests." *Id.* at 371. The Court also made plain that the *Pike* balancing relied on by Petitioners is about discrimination against out-of-state businesses: "the presence or absence of discrimination in practice proved decisive" in each of the Court's cases on the subject. *Id.* at 378.[4]

There is no dormant commerce clause problem because Wisconsin is not discriminating against out-of-state businesses in favor of in-state businesses. The same law applies to all businesses who operate here: don't make false or misleading representations in your advertising. This is even more apparent here, where Wisconsin is taking action against an *in-state business*.

And there is no problem under the pre-*National Pork Producers* case law. That precedent would "invalidate[] state statutes that 'may adversely affect interstate commerce by subjecting activities to inconsistent regulations.'" *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (citation omitted). Petitioners have not shown that there is any inconsistent regulation, *i.e.*, that there is a State where it is legal to make the kinds of misrepresentations the State alleged them to have made. There is no complicated, overlapping web of regulations; most, if not all, States have laws prohibiting false advertising. All Wisconsin businesses must do to comply with the law is refrain from making

[4] Further, Petitioners have forfeited any argument under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), because they did not raise this argument in the circuit court or court of appeals. In any event, there is no burden on interstate commerce in prohibiting misrepresentations given that misrepresentations are not lawful in any State.

misrepresentations in their advertising, which is what they have to do in other states as well. Defendants admit they must follow the law for in-state residents, so it should be no issue with treating out-of-state residents the same. Petitioners have not shown that it is legal for a business to misrepresent the miles on an engine in any State.

This is also why Petitioners' reliance on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is misplaced, too. That case was based on the due process clause of the Fourteenth Amendment, not the dormant commerce clause. *Id.* at 562 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." (citation omitted)) The due process clause "dictate[s] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. This is not a problem here, where the State of Wisconsin seeks to enforce Wisconsin law against a Wisconsin business (and is not seeking millions of dollars in punitive damages for a $601.37 paint job). *See id.* at 574. There is no due process problem with applying Wisconsin law to a Wisconsin business, particularly a law that merely prohibits conduct that is generally illegal everywhere.

At bottom, Petitioners' arguments do not hold up to scrutiny. Under their logic, an advertisement is initially subject to no State's law but potentially subject to every State's law. Only after a consumer sees an ad and buys a product can one determine what State's law governs the advertisement. Petitioners provide no support for their argument that this arrangement is constitutionally required.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Dated this 5th day of September 2023.

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Electronically signed by:

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 5569 words.

Dated this 5th day of September 2023.

Electronically signed by:

Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of September 2023.

Electronically signed by:

Brian P. Keenan
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