2024AP1175

In the Wisconsin Court of Appeals

District III

MINORITY BUSINESS ASSOCIATION OF WISCONSIN AND DIVINE LANDSCAPING LLC,
Plaintiffs-Appellants,
v.
WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE, & CONSUMER PROTECTION,
Defendant-Respondent.

On Appeal from the Waukesha County Circuit Court,
the Honorable Michael J. Aprahamian, Presiding
Case No. 2023CV1299

OPENING BRIEF OF APPELLANTS MINORITY BUSINESS ASSOCIATION OF WISCONSIN AND DIVINE LANDSCAPING LLC

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INTRODUCTION

This appeal tests the constitutionality of a law licensing the Department of Agriculture, Trade, and Consumer Protection ("DATCP"), the most powerful agency in Wisconsin, to demand immediate "access to . . . *any document* . . . of *any person* engaged in business" and to "require" from her sworn "reports" or "answers" to *any* question, to be submitted to DATCP at whatever time and in whatever manner that it dictates.[1] Anyone who "refuses" these commands, or even "fails" to grant instant "access," is a criminal.[2] Perhaps even a serial criminal, since each failure is a separate offense punishable by up to a year in jail. If instead she submits to the agency's show of authority and hands over her files or gives a compelled answer, and the agency spots a possible violation of a statute or rule (that it adopted), it can then refer the matter to a district attorney for prosecution. All of this, Justice Abrahamson noted decades ago, "impos[es] a heavy penalty and a serious stigma on [the] violator."[3]

Shocking on their face, these provisions are more astonishing for what they leave out. They say nothing about a warrant. They do not require probable cause. (Or any cause.) They do not mandate prior notice. And they do not afford the target even an opportunity to seek precompliance review of the agency's demands before a neutral decisionmaker—much less any review that would conclude *before* she incurs criminal liability.

The power conferred by this statute comes with only one limitation, if

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[1] Wis. Stat. § 93.15(1), (2) (emphases added).

[2] Wis. Stat. § 93.21(3), (4).

[3] *State v. Stepniewski*, 105 Wis. 2d 261, 295, 314 N.W.2d 98 (1982) (Abrahamson, J., dissenting); *see also, e.g.*, *State v. Lasecki*, 2020 WI App 36, ¶¶ 3–4, 392 Wis. 2d 807, 946 N.W.2d 137; State's Response Brief at 1, *State v. Roob*, No. 01-3261-CR (Wis. Ct. App. June 27, 2003) (admitting case was "referred . . . for prosecution" from DATCP to district attorney").

it can even be called that. The document to be seized, place to be searched, or question to be answered must be "relevant to any matter which [DATCP] *may* investigate"—which is practically everything.[4] As Justice Abrahamson noted, DATCP's regulations—and, thus, its power to investigate—reach nearly "every person engaged in almost any trade or business in this state."[5] Consider also that DATCP need not even first open an investigation; so long as it "may" investigate (meaning merely that it has the *power* to do so), the statute gives it unlimited, instant access to businesspersons' papers and premises. This is no limit at all.

The search scheme is unconstitutional on its face. In 2015, the United States Supreme Court put this beyond doubt. In *City of Los Angeles v. Patel*, a city ordinance required hotel operators to make their hotel registries "'available to any officer of the Los Angeles Police Department for inspection' on demand."[6] The Court held that the ordinance was facially unconstitutional under the Fourth Amendment because it failed to afford "the subject of the search . . . an opportunity to obtain precompliance review" from "a neutral decisionmaker" before criminal liability attached.[7] The search scheme here is no different—except that it is even more problematic, since it is not limited to one industry, such as hotels, or a single kind of document, such as registries. Additionally, but for the same reasons, the statute is invalid because it criminalizes the exercise of a search recipient's constitutional right to refuse warrantless, unreasonable searches. Confronted with these arguments,

[4] Wis. Stat. § 93.15(2) (emphasis added); *see also id.* § 93.15(1) (demands must relate "to any matter which the department may investigate").

[5] *Stepniewski*, 105 Wis. 2d at 295 (Abrahamson, J., dissenting).

[6] 576 U.S. 409, 412 (2015) (citation omitted).

[7] *Id.* at 420–21.

the circuit court concluded that the statute could be used "in a constitutional way" and therefore Plaintiffs Minority Business Association of Wisconsin and Divine Landscaping LLC's (hereinafter, collectively, "MBAW") facial challenge could not succeed. Specifically, the court seemed to adopt DATCP's argument that, because DATCP allegedly gives targets time to challenge search demands before having either to comply or face imprisonment, the statute does not violate *Patel* in all applications. But this completely misunderstands the all-applications test. Courts may "not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly."[8]

Separately, the statute is unconstitutional at least to the extent that DATCP can invoke it to conduct a suspicionless search for violations of penal laws, including especially Wis. Stat. § 100.20 and DATCP's regulations thereunder. The circuit court did not even address this fully briefed, independent ground for holding the statute unconstitutional.

Finally, DATCP's practice of demanding sworn statements under Wis. Stat. § 93.15(1) without prior notice or opportunity for a hearing violates the Wisconsin statutes. Wisconsin Statute § 93.18 plainly requires DATCP, before issuing any "special order relating to named persons," including demands under Section 93.15(1), to provide that person with notice and a hearing.[9]

[8] *United States v. Stevens*, 559 U.S. 460, 480 (2010)

[9] Wis. Stat. § 93.18(2).

ISSUES PRESENTED

1. Whether Wis. Stat. § 93.15(2), (3) is facially unconstitutional under the Fourth Amendment to the United States Constitution or Article I, Section 11 of the Wisconsin Constitution.

The circuit court answered no.

2. Whether DATCP's use of Wis. Stat. § 93.15(2) to investigate violations of Wis. Stat. § 100.20 or the regulations promulgated thereunder is facially unconstitutional under the Fourth Amendment to the United States Constitution or Article I, Section 11 of the Wisconsin Constitution.

The circuit court did not address this argument.

3. Whether DATCP must follow the procedures set forth in Wis. Stat. § 93.18(2) when issuing "special orders" under Wis. Stat. 93.15(1).

The circuit court answered no.

ORAL ARGUMENT AND PUBLICATION

Given the importance of the issues, this Court may wish to hold oral argument and publish its decision, which Minority Business Association of Wisconsin and Divine Landscaping LLC would welcome.

STATEMENT OF THE CASE

A. Legal Background

Wisconsin Statutes Section 93.15(2) empowers DATCP "or any of its authorized agents [to] have access to and . . . copy any document, or any part thereof, which is in the possession or under the control of any person engaged in business, if such document, or such part thereof, is relevant to any matter which the department may investigate." DATCP's power

to search under Section 93.15(2) is broad. DATCP's regulations touch almost every business in the State. *See Stepniewski*, 105 Wis. 2d at 295 (Abrahamson, J., dissenting); *see also* Wis. Admin. Code chs. ATCP 3–162. So the matters which DATCP may investigate likewise touch almost every business in the State. And DATCP is empowered to investigate any "unfair" business practices. Wis. Stat. § 100.20(3). The term "unfair" is not defined, making the universe of potential investigations by DATCP limitless. More, Section 93.15(2) places no limits on how DATCP conducts its searches, permitting its agents to conduct on-the-spot searches or send written demands for any number of documents and providing whatever deadline it chooses.

Wisconsin Statutes Section 93.15(1) empowers DATCP to "require persons engaged in business to file with [DATCP], at such time and in such manner as [DATCP] may direct, sworn or unsworn reports or sworn or unsworn answers in writing to specific questions, as to any matter which [DATCP] may investigate." As with Section 93.15(2), the scope of this power is wide-ranging. Demands may be made of any "person[ ] engaged in business" and "as to any matter which [DATCP] may investigate." Wis. Stat. § 93.15(1). The statutes do, however, require DATCP to make these demands "by general or special order." *Id.* "General orders" must be issued "as prescribed in ch. 227." *Id.* § 93.18(1). And DATCP, "in any matter relating to issuing, revoking or amending a special order relating to named persons, . . . shall serve upon the person complained against a complaint in the name of the department and a notice of a public hearing thereon to be held not sooner than 10 days after such service." *Id.* § 93.18(2). "The person complained against shall be entitled to be heard in person, or by agent or attorney and shall be

entitled to process to compel the attendance of witnesses." *Id.*

No person may refuse or otherwise fail to acquiesce to DATCP's demands to search or for sworn statements under Section 93.15 without facing criminal sanctions for doing so. Section 93.15(3) provides that "[n]o person shall refuse or fail to render any report or answer required under this section at such time and in such manner as the department may prescribe," and "[n]o person shall refuse, neglect or fail to submit, for the purpose of inspection or copying, any document demanded under this section." "Any person who willfully violates s. [ ] 93.15(3) . . . shall, for each offense, be fined not more than $5,000 or imprisoned for not more than one year in the county jail or both." Wis. Stat. § 93.21(4). And "[a]ny person . . . who willfully violates or refuses, neglects, or fails to obey any order or regulation of [DATCP]" "shall be fined not to exceed $200 or imprisoned in the county jail not to exceed 6 months or both." Wis. Stat. § 93.21(1), (3) (collectively with Wis. Stat. §§ 93.15(2), (3), and 93.21(4), the "inspection statute").

B. Factual Background

DATCP frequently issues "Civil Investigative Demands" ("CIDs"), ordering under Section 93.15(1) that the named recipient respond with sworn reports or answers to questions and under Section 93.15(2) that the recipient produce documents or face criminal sanctions. For example, in 2021 and 2022, in only the landlord-tenant context, DATCP issued at least eight CIDs demanding sworn answers and/or documents under Section 93.15. *See* R. 3:44–100. These demands state that any failure to comply may be punishable by criminal sanctions, including up to a year in jail. *Id*. And DATCP varies widely in the time it provides the search

subject to respond—ranging at least from 14 days to 31 days. *See id.* at 5–17. As DATCP's own internal training confirms, it is entirely within the discretion of DATCP employees whether to issue a CID, what to ask for, and how long to provide for the recipient to respond. *See id.* at 18–40. And recipients of CIDs who failed to respond have been criminally prosecuted for such failure. *See id.* at 41–43, 101–04.

DATCP does not provide notice or a hearing before issuing CIDs, including those that demand sworn reports or answers to questions under Section 93.15(1). Indeed, DATCP has promulgated a regulation allowing employees to issue "special order[s]," including "formal investigative demand[s]," without any notice. Wis. Admin. Code §§ ATCP 1.01(26), (28), 1.03. DATCP's internal training provides that employees may simply issue demands under Section 93.15(1), with no mention of prior notice or hearing. *See* R. 3:18–40. And DATCP's CIDs give no indication that the recipient was provided prior notice—and do not provide for any hearing. *See, e.g.*, *id.* at 5–17, 44–100.

The Minority Business Association of Wisconsin was created to advocate for the interests of minority-owned or -operated businesses throughout the state. R. 5, ¶ 11. The Association provides a voice for its members, who face particular challenges given this state and country's history of discrimination and disparate treatment. *Id.* ¶ 12. The Association works to clear legal and regulatory barriers that pose significant risks to its members, including unconstitutional laws like the ones at issue here. *Id.* ¶¶ 13–14.

To date, the Association has numerous members, all of whom are persons engaged in business and who are therefore subject to searches under the inspection statute. *See* Wis. Stat. § 93.15(2); *see also* R. 5:2,

¶ 9. Its members have privacy interests in their places of business and in their papers. *See id.* ¶ 10. And at least one of the Association's members has received communications from DATCP about its business practices, including consumer complaints, which have often required a response. *Id.* at 1–2, ¶¶ 4, 8.

Divine Landscaping LLC is a small business that Erick Rosas co-founded with his cousin in 2018. *See* R. 4:1, ¶ 2. The business's premises and papers are private. *Id.* at 1–2, ¶ 4. It had a "very troubling" encounter with a state agency in 2022. *Id.* at 2, ¶ 5. A person claiming to represent the State of Wisconsin knocked on the front door of Mr. Rosas' personal residence. *Id.* ¶ 6. His wife answered the door. *Id.* The State gave no advanced notice or warning of the visit and did not present any papers or a warrant. *Id.* The officials were wearing plain clothes and driving a vehicle that did not have any apparent governmental markings on it. *Id.* At first, Mr. Rosas thought it might be a scam. *Id.* The officials claimed they were auditing Divine Landscaping, but they never stated clearly—let alone in writing—what they were after or of what they suspected. *Id.* ¶ 7. Many hours were spent compiling the records that the officials sought. *Id.* Because Divine Landscaping is an honest and scrupulous business, the State never identified that it had done anything wrong. *Id.* ¶ 8. But the State never confirmed this—they instead just let Rosas worry whether he or his colleagues would end up in trouble. *Id.* Because of this episode, which made Rosas feel "unsafe," he constantly worries about the government showing up again, unannounced, to perform an on-the-spot search or to attempt to procure his private documents in some other way. *Id.* at 2–3, ¶ 8, 10. He states that, "as a minority immigrant, you are often taught by society that you are always

doing something wrong. Therefore, even if you have done nothing wrong, as a minority immigrant, it is frightening when the government shows up at your door." *Id.* at 3, ¶ 11. Divine Landscaping has altered aspects of its operations and incurs additional expenses out of fear that it will be asked for documents from the government without notice and without being properly informed about what the government is seeking. *Id.* at 4, ¶ 14.

C. Procedural History

On August 14, 2023, MBAW filed this declaratory and injunctive action asserting that Wis. Stat. §§ 93.15(2) and (3) are unconstitutional and invalid under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution, and that DATCP must use the procedures of Wis. Stat. § 93.18(2) when issuing demands to named persons under Wis. Stat. § 93.15(1). R. 2. The same day, MBAW filed a motion for a temporary injunction barring enforcement of Sections 93.15(2) and (3) and requiring DATCP to follow Section 93.18(2) when issuing demands under Section 93.15(1). R. 6, 8.

On November 27, 2023, the circuit court held a hearing on the motion and explained that it would be denying the motion, which it later did by written order on November 29 "[f]or the reasons stated on the record." App. 59. It concluded, first, that there was no "imminent irreparable harm given the circumstances that have been outlined here." App. 53. Second, and relevant here, it concluded that MBAW's claims failed as a matter of law, although it found the statute "concerning." App. 55. Specifically, the court held that neither claim could possibly succeed under what it regarded as the governing standard for facial challenges:

the "all applications" test, as described in *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35. App. 54–55. The Court asserted that there are "applications" of the inspection statute that would survive constitutional muster. App. 54–55. Still, the court emphasized "there could be more safeguards in the language of the statute or in regulations that the department itself may promulgate as to how this would work in order to maintain constitutional integrity," which could include "a tolling period or . . . language within the CID itself which says if you have any objections to this or challenge, you have the right to pursue a challenge which will toll the time [for compliance]." App. 55. As for Section 93.15(1), the court agreed with DATCP that "based upon a reading 93.16 dealing with preliminary investigation that there is no need to have any sort of a hearing prior to doing the preliminary investigation." App. 54–55.

In light of the court's conclusion that MBAW's claims lack merit and therefore fail as a matter of law, the parties jointly moved and stipulated to summary judgment. R. 57. The court therefore granted summary judgment in favor of DATCP on April 30, 2024. App. 60. This appeal followed.

STANDARD OF REVIEW

This Court reviews "a summary judgment decision de novo, applying the same methodology as the circuit court." *Quick Charge Kiosk LLC v. Kaul*, 2020 WI 54, ¶ 9, 392 Wis. 2d 35, 944 N.W.2d 598. "Summary judgment is appropriate when there is no genuine issue of material fact and 'the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Wis. Stat. § 802.08(2)). The interpretation and constitutionality

of statutes are "questions of law" "review[ed] de novo." *SEIU*, 2020 WI 67, ¶ 28.

ARGUMENT

I. THE INSPECTION STATUTE IS UNCONSTITUTIONAL

In Wisconsin, a business's right to be free of unreasonable searches and seizures, including demands for documents, is protected by the federal and state constitutions. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause … ." U.S. Const. amend IV. Similarly, the Wisconsin Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." Wis. Const. art. 1, § 11 (collectively, the "Fourth Amendment").[10] This right belongs not only to natural persons but also to corporations, *see G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), and applies in both civil and criminal contexts. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978). Demands for documents effect "search[es]." *See McLane Co. v. E.E.O.C.*, 581 U.S. 72, 84 (2017).

The inspection statute—granting DATCP access, for any reason, to any document belonging to any businessperson—violates the Fourth Amendment for several independent reasons. ***First***, even if one assumes for the sake of argument that it authorizes mere "administrative

[10] Wisconsin courts interpret the Wisconsin Constitution's ban on unreasonable searches and seizures consistent with, and sometimes as even more protective than, the Fourth Amendment. *State v. Dearborn*, 2010 WI 84, ¶ 14 & n.7, 327 Wis. 2d 252, 786 N.W.2d 97.

searches," the inspection statute unconstitutionally "penalizes [targets] for declining to turn over their records without affording them any opportunity for precompliance review." *Patel*, 576 U.S. at 412 (2015). ***Second***, the statute unconstitutionally criminalizes one's exercise of her constitutional right to be free from unreasonable, warrantless searches and seizures. ***Third***, to the extent it is used to investigate possible violations of *penal* statutes specifically, including Wis. Stat. § 100.20 and DATCP's regulations thereunder, the inspection statute unlawfully circumvents the warrant and probable-cause requirements.

A. The Inspection Statute Is Facially Unconstitutional Because It Does Not Afford an Opportunity for Precompliance Review by a Neutral Decisionmaker

1. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citation omitted). One exception covers "administrative searches," understood as serving "a 'special need' other than conducting criminal investigations." *Patel,* 576 U.S. at 420; *see also Camara v. Mun. Ct. of City & Cnty. of San Francisco,* 387 U.S. 523, 537 (1967) (an administrative search is one "no[t] aimed at the discovery of evidence of a crime"); *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619–20 (1989) (a "special need" is one "beyond the normal need for law enforcement").

Yet, "in order for an administrative search to be constitutional, the target of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420. This review, if elected, must conclude "*before* [the subject] faces

penalties for failing to comply." *Id.* at 421 (emphasis added). And "[t]he review scheme at a minimum must give the property owner a meaningful chance to contest an administrative-search request in front of a neutral party before the search occurs." *Benjamin as Tr. of Rebekah C. Benjamin Tr. v. Stemple*, 915 F.3d 1066, 1069 (6th Cir. 2019) (Sutton, C.J.). Without this check, there is an "intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass" citizens. *Patel*, 576 U.S. at 421.

Patel shows how this rule applies in a facial challenge, which, *Patel* makes clear, are *not* "disfavored" in this context. *Patel*, 576 U.S. at 419. A statute is facially unconstitutional when it "is unconstitutional in all of its applications." *Id.* at 418 (citation omitted); *see also SEIU,* 2020 WI 67, ¶ 38. But, in the search-and-seizure space, "the proper focus of the constitutional inquiry" in a facial challenge "is searches that the [challenged] law actually authorizes, not those for which it is irrelevant." *Patel*, 576 U.S. at 418. In other words, situations in which an "exigency or a warrant" or some other exception "justifies [a] search" are irrelevant to the facial analysis—they are not "applications" of the statute. *Id.* at 418–19. Instead, "applications" are searches that would be justified only by reference to the statute and not on any other legal basis. *See id.*; *see also Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 168 (3d Cir. 2016) (explaining and applying this principle).

Under this search-and-seizure-specific standard for facial validity, the *Patel* Court scrutinized a law stating that hotels' registries "shall be made available to any officer of the Los Angeles Police Department for inspection" upon request, and any failure to so provide was "a misdemeanor punishable by up to six months in jail and a $1,000 fine."

576 U.S. at 413 (citing Los Angeles Municipal Code § 41.49(3)(a)). The fatal defect in this provision, the Court explained, was that it failed to "afford[ ] hotel operators any opportunity whatsoever" for meaningful precompliance review. *Id.* at 421. And, while the *Patel* Court did not "attempt[ ] to prescribe the exact form an opportunity for precompliance review must take,"[11] it stressed that "business owners cannot reasonably be put to th[e] choice" of complying with an administrative search or "be[ing] arrested." *Id.* Because the provision offered just such a "choice," it was "facially invalid." *Id.* Hence, since *Patel*, courts consistently have held that imposition of criminal penalties upon refusal to comply with an administrative search renders a law facially unconstitutional.[12]

Importantly, *Patel*'s precompliance-review requirement applies regardless of whether the search is conducted on the spot or through a subpoena-like process. Precompliance review, in the form of obtaining an administrative warrant from a neutral decisionmaker, is necessary for on-the-spot searches to protect targets from being "subject to the discretion of the official in the field." *Camara*, 387 U.S. at 532. A "disinterested party" must therefore review the proposed search and approve before it can be conducted. *Id.* The same is true of so-called administrative subpoenas. Under the Fourth Amendment, an

[11] *Patel* implicitly holds that Section 1983 (under which the suit arose) or any other similar mechanism for challenging government conduct did not provide sufficient "precompliance review." *See Landon v. City of Flint*, No. CV 16-11061, 2017 WL 2806817, at *3 (E.D. Mich. Apr. 21), *report and recommendation adopted*, No. CV 16-11061, 2017 WL 2798414 (E.D. Mich. June 27, 2017).

[12] *See Liberty Coins, LLC v. Goodman*, 880 F.3d 274, 281–82 (6th Cir. 2018); *Free Speech Coal.*, 825 F.3d at 155–56, 168–72; *Halpern 2012, LLC v. City of Ctr. Line*, 404 F. Supp. 3d 1109, 1121 (E.D. Mich. 2019), *aff'd sub nom. Halpern 2012, LLC v. City of Ctr. Line, Michigan*, 806 F. App'x 390 (6th Cir. 2020); *Pund v. City of Bedford, Ohio*, 339 F. Supp. 3d 701, 712–13 (N.D. Ohio 2018).

administrative subpoena "may not be made and enforced by the inspector in the field, and the subpoenaed party [must be able to] obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See v. City of Seattle*, 387 U.S. 541, 545 (1967). It follows that a statutory scheme that permits both on-the-spot and subpoena-like searches without affording the party to be searched an opportunity for review by a neutral is unconstitutional. *See, e.g.*, *Mid-Fla Coin Exch., Inc. v. Griffin*, 529 F. Supp. 1006, 1019–24 (M.D. Fla. 1981) ("The primary protection afforded by the subpoena process [ ] is the fact that it cannot be enforced by the agent in the field, but only upon order of court following judicial review.").

2. The inspection statute here is far more sweeping than the provision in *Patel*. It, too, licenses DATCP to undertake administrative searches, imposing criminal penalties for refusals. Yet, while the *Patel* provision governed searches of only one kind of document (registries) maintained in a single industry (hotels), the inspection statute authorizes on-the-spot or subpoena-style searches of *anyone* "in business" as to "any matter" that the agency "may" investigate. Wis. Stat. § 93.15(2). And the investigable "matters" are limitless, reaching "potentially all business people in the state." *Stepniewski*, 105 Wis. 2d at 295 (Abrahamson, J., dissenting) (expressing concern, 40 years ago, that "[t]here appear to be 16 chapters and 79 pages of regulations in the administration code, violations of which constitute crimes under Section 100.26(3)"); *see* Wis. Stat. § 100.20 (permitting DATCP to investigate any business for "unfair" practices). More, while the *Patel* ordinance mandated that, "[w]henever possible, the inspection [ ] be conducted at a time and in a manner that minimizes any interference with the operation of the

business," 576 U.S. at 413, the inspection statute offers no such accommodation. Quite the contrary, it enables the agency to demand "access" to private documents whenever it wishes—at noon, midnight, or any time between—without prior notice. *See* Wis. Stat. § 93.15(2); *see also id.* § 93.21(3) (making it a crime for anyone to "refuse[ ], neglect[ ] or fail[ ] to obey *any* order . . ." (emphasis added)); *id.* § 93.21(4).

Like the ordinance in *Patel*, but unlike its neighboring provisions, the inspection statute plainly provides no opportunity for precompliance review by a neutral. *Compare* Wis. Stat. § 93.15(3) ("No person shall refuse, neglect or fail to submit . . . any document demanded under this section."), *with* Wis. Stat. § 93.14(3) ("Any person who shall unlawfully fail to attend as a witness or refuse to testify may be coerced [by court order] as provided in s. 885.12."). Failure to comply with a Section 93.15(2) document demand is a crime. "Any person who willfully violates [Section] 93.15(3) . . . shall, for each offense, be fined not more than $5,000 or imprisoned for not more than one year in the county jail or both." *Id.* § 93.21(4); *see also id.* § 93.21(3). Because this scheme puts business owners to the "choice" of compliance or criminal sanctions, it is "facially invalid." *Patel*, 576 U.S. at 420–21.

At the very least, this scheme is invalid under Wisconsin's Constitution, which has been interpreted to "afford greater protection than the United States Constitution." *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625 (citation omitted); *see also State v. Brown*, 2020 WI 63, ¶ 78 n.11, 392 Wis. 2d 454, 945 N.W.2d 584 (Dallet, J., dissenting) ("The Fourth Amendment sets 'the minimal constitutional standards' . . . .") (citation omitted); *State v. Felix*, 2012 WI 36, ¶ 131, 339 Wis. 2d 670, 811 N.W.2d 775 (A.W. Bradley, J., dissenting). Wisconsin

law requires that the government obtain a warrant before conducting a search, unless an exception to the warrant requirement applies. *State v. Forrett*, 2022 WI 37, ¶ 6, 401 Wis. 2d 678, 974 N.W.2d 422. Here, Wisconsin law should not recognize an exception to the warrant requirement for purportedly administrative searches where the subject has no opportunity to contest the search before being criminally punished for refusing. *See id.* ¶ 8 ("the state cannot criminalize the exercise of a constitutional right").

3. The circuit court erred in adopting DATCP's argument that a court must analyze the constitutionality of the inspection statute not on its face but in view of how DATCP actually uses the statute, and that the agency's practice is allegedly always to give enough time for precompliance challenges.[13] *See* App. 55–56 ("Clearly [this statute] can be [used in a constitutional way] and I think clearly it generally is based upon what the State has submitted and the way they operate under this statute."). But "[t]hat is not how [the all-applications test] works." *Nat'l Shooting Sports Found. v. Bonta*, No. 23-cv-0945, 2024 WL 710892, at *7 (S.D. Cal. Feb. 21). "It is not enough to cherry-pick a scenario that avoids the evils justifying a constitutional protection. So long as the statutory language *applied* to analyze that scenario—on its face—offends the Constitution, the law must fall." *Id.* (citing *Patel*). The State's historical "actual applications by the agency" principle is unsupported and

[13] While DATCP claims it always gives sufficient time for search recipients to obtain review, DATCP's own internal training confirms that it is entirely within the discretion of DATCP employees how long to provide for the recipient to respond to a CID. *See* R. 3:34 ("A subpoena or investigative demand should normally specify a response deadline of at least 2 weeks after the date on which DATCP issues the subpoena," but "[t]he appropriate response deadline may vary, depending on the surrounding circumstances and the amount of information required.").

unsupportable. How DATCP has tended to "apply" the statute over time is irrelevant here.

Regardless, DATCP's voluntary choice to provide search recipients with time to comply with a search demand still does not stop the recipient from incurring criminal liability and thus does not guarantee the search recipient "an opportunity to have a neutral decisionmaker review an officer's demand to search the registry *before* he or she faces penalties for failing to comply." *Patel*, 576 U.S. at 421 (emphasis moved); *see Garner Properties & Mgmt. v. Charter Twp. of Redford*, No. 15-cv-14100, 2017 WL 3412080, at *12 (E.D. Mich. Aug. 8) ("The constitutional problem is not solved on the theory that the property owner can simply refuse the inspection; that carries serious consequences, including fines," leaving the owner only to "hope that a challenge to the scope and conditions of the proposed inspection is later upheld and all fines are returned or invalidated."). Put simply, an unconstitutional law cannot be saved by the government's voluntary enforcement decisions. *Stevens*, 559 U.S. at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *see also State v. Crute*, 2015 WI App 15, ¶ 48, 360 Wis. 2d 429, 860 N.W.2d 284 ("[A] court cannot 'presume[ ] the [government] will act in good faith and adhere to standards absent from the [statute's] face.'") (first two alterations in original; citation omitted). Thus, in *Patel*, the fact that police could have voluntarily given hotel operators warning before coming to search their books, giving the operators time to run to court seeking emergency relief, did not save the statute. *See Patel*, 576 U.S. at 412–13 (describing search regime); *id.* at 419–21; *see also Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 486–95 (S.D.N.Y. 2019)

(ordinance likely unconstitutional despite search recipients knowing in advance that a search would occur once a month).

Indeed, if it were the case that voluntary enforcement decisions could save an otherwise unconstitutional statute, then no statute would ever violate the Fourth Amendment—it would always be the case that law enforcement could voluntarily provide the search recipient with time to seek precompliance review or otherwise keep their search within constitutional bounds. But this always-present possibility has never saved a law from facial invalidation under the Fourth Amendment. *See Patel*, 576 U.S. at 419–21 (police hypothetically could have provided advance notice of searches); *Marshall*, 436 U.S. at 323–25 (government hypothetically could have searched only when there was a substantial government interest and the search was necessary to further that interest); *See*, 387 U.S. at 545–46; *Camara*, 387 U.S. at 533–34. Rather, the rule is that if the law empowers the government to conduct a search without affording the recipient an opportunity for precompliance review before imposing criminal liability, it is unconstitutional. *Patel*, 576 U.S. at 421.

DATCP has also argued that the statute *does* afford an opportunity for precompliance review before criminal liability attaches for a failure to comply with the demanded inspection. DATCP hangs this argument on a narrow exception in the last sentence of subsection (3): "No person shall, *except through judicial process*, resist or obstruct any official or subordinate of the department in the exercise of the official's or subordinate's lawful authority." Wis. Stat. § 93.15(3) (emphasis added). DATCP insists that this sentence means that "a non-response [to a CID] is immune from penalty when judicial process is invoked." R. 34:18.

DATCP's argument fails for two independent reasons. First, it ignores that "fail[ures] to submit" to inspections are also crimes (under the second sentence of subsection (3)), and one could "fail" to submit to an inspection demand without "resist[ing] or obstruct[ing]" DATCP. Wis. Stat. § 93.15(3). Perhaps the target is away when DATCP shows up for an on-the-spot search. Or maybe she answers the door when the agents show up demanding immediate access, but she asks them to come back in an hour after she's had a chance to talk to her lawyer. Or perhaps, if the demand is made in writing and DATCP in its discretion gives her 14 days to comply, the CID gets lost in the mail. Or maybe she misplaces it. It is not difficult to think up a dozen more commonplace scenarios where the target's "fail[ure]" to respond is plainly a crime under the second sentence and does not fall within DATCP's capacious understanding of the exception in the last sentence.

Second, even if failing or refusing to comply with an inspection demand pending requested judicial review is always "resist[ance]," it is not resistance "through judicial process." "Judicial process" means "acts of *a court*." *Process*, Black's Law Dictionary (4th rev. ed. 1968) (emphasis added); 72 C.J.S. Process § 1 ("'Process' and 'writ' or 'writs' are synonymous, in the sense that every writ is a process, and in a narrow sense of the term 'process' is limited to judicial writs in an action, or at least to writs or writings issued from or out of a court, under seal and returnable to the court."); *see also Massachusetts Mut. Life Ins. Co. v. Cent. Penn Nat. Bank*, 372 F. Supp. 1027, 1044 (E.D. Pa. 1974) (enforcement of lien "through the judicial process" meant "by 'writ of execution, attachment, levy or the like'") (citation omitted). So resisting a demand "through judicial process" means telling the agent, "I won't be

complying with your demand, because the court has ordered that I don't have to." It does not mean, "I won't be complying because I just filed something in a court." In the latter scenario, she has violated Section 93.15(3) and "shall be punished." Wis. Stat. § 93.21(3), (4). This is unconstitutional. *Patel*, 576 U.S. at 420–21.

DATCP has also argued that certain searches under the statutes, including by CIDs, are mere "administrative subpoenas" and therefore constitutional because they are not "self-executing," meaning that DATCP could enforce them only through a court order and that *only then* could targets be penalized for noncompliance.[14] But that is false and, even if true, irrelevant. It is false because its CIDs are routinely issued pursuant to Section 93.15, *see, e.g.*, R. 3:5–17, 44–100, and under that statute all that matters is that the document has been "demanded" by the agency, which is a unilateral act. The fact of the demand *alone* makes noncompliance criminal. Wis. Stat. § 93.21(3), (4). Nothing in the inspection statute contemplates an intervening court order. By comparison, Section 93.14 explicitly provides that DATCP may enforce its hearing subpoenas only *through a court order* "as provided in s. 885.12." Wis. Stat. § 93.14(3). That Section 93.15 does not contain a similar enforcement provision indicates "that a different intention existed." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 22, 316 Wis. 2d 47, 762 N.W.2d 652 (citation omitted). And, in fact, the text puts this beyond doubt, stating that "[n]o person shall refuse, neglect or fail to submit, for the purpose of inspection or copying, any document

[14] A legal instrument is "self-executing" if it is "effective immediately without the need of any type of implementing action," such as a court order approving of it. Self-Executing, *Black's Law Dictionary* (2019).

demanded under this section." Wis. Stat. § 93.15(3). Anyway, DATCP's assertion has no bearing on the facial validity (or not) of the inspection statute, which, like the hotel-registry law in *Patel*, authorizes on-the-spot "access" to records as well as subpoena-like demands of instant compliance. A proper administrative subpoena, in stark contrast, becomes "enforceable" only if a neutral decisionmaker says so—*after* having reviewed the "subpoenaed party's objections." *Patel*, 576 U.S. at 422.

That Section 93.21(4) imposes criminal penalties only for "willful[ ]" violations of Section 93.15(3) does not establish that demands under the inspection statute are not self-executing. To begin, this argument ignores Section 93.21(3), which criminalizes failure to obey a DATCP "order" and contains no willfulness element. Regardless, even if Section 93.21(3) did not exist, "willful[ ]" violations of Section 93.15's prohibition on refusing access occur when the recipient knows merely that DATCP has *demanded access* but the recipient refuses it. *See* Model Penal Code § 2.02 ("A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."). Indeed, there is no way for DATCP to enforce its right of access *except* through criminal penalties for refusal, since Section 93.15—unlike, for example, Section 93.14—provides no mechanism by which DATCP can seek a court order enforcing its demand. *Compare* Wis. Stat. § 93.15, *with* Wis. Stat. § 93.14(3). Because criminal penalties are the method by which the State "require[s] compliance" with DATCP's directions, the term "willfully" simply means knowingly and intentionally. *State v. Hanson*, 2012 WI 4, ¶ 22, 338 Wis. 2d 243, 808 N.W.2d 390. A business

owner's decision to refuse a demand for documents—and instead to assert her Fourth Amendment rights—would thus be "willful." Accordingly, the State has criminally charged CID recipients merely for failing to respond. *See* R. 3:41–43, 101–04. And even if there were any doubt on this score, the owner would not be able to obtain review of her decision to refuse access until *after* being criminally charged. But that would obviously not count as sufficient precompliance review. *See Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1243 (11th Cir. 2003) (criminal proceedings would ask only whether the agency's order was violated, not whether the order was proper in the first place).

The State has also offered a dizzying array of seemingly alternative paths to precompliance review—although, curiously, only one that involves "judicial process," which in DATCP's view is all that the inspection statute allows. None suffices. First, the State recommends that targets of DATCP seek precompliance review from DATCP itself, under Chapter ATCP 1, whether formal or informal. But pursuing this review would not stay enforcement of criminal penalties, *see* Wis. Admin. Code §§ ATCP 1.03(3)(f) (formal and informal review), 1.06(1) (formal review), which independently renders it inadequate. More, informal review is nothing more than a request for a second opinion by another DATCP staff member (the investigator's co-worker), which plainly is insufficient. *See* Wis. Admin. Code § ATCP 1.03(3). Formal review, meanwhile, is not even as of right but subject to the DATCP Secretary's unfettered discretion. *See* Wis. Admin. Code § ATCP 1.06(3). Even if the Secretary were inclined to permit review, she may do so only if the requirements of Section 227.42 or some other law are met (none is applicable), *see id.*, and Section 227.42 is not triggered by a pure question

of law, such as whether the agency has complied with a statute or the constitution, Wis. Stat. § 227.42(1). *See Haase-Hardie v. Wis. Dep't of Nat. Res.*, 2014 WI App 103, ¶¶ 13, 15, 357 Wis. 2d 442, 855 N.W.2d 443 (review available under Section 227.42(1) only when there is a "dispute of material fact"); *State v. Eskridge*, 2002 WI App 158, ¶ 9, 256 Wis. 2d 314, 647 N.W.2d 434 ("[W]hether a search is reasonable under the Fourth Amendment is a question of law.").

The State has also gestured toward the possibility of pre-issuance review under Section 93.18, which requires notice and hearing before DATCP can issue a "special order." But this review does not even apply to the inspection statute, since that law does not require DATCP to act by "special order" and so does not trigger the special-order hearing rules. *See* Wis. Stat. §§ 93.15(2), 93.18(2). Anyway, Section 93.18 provides "how a [special order] may issue, not a procedure for precompliance review." *ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 727 (E.D. Tex. 2020) (explaining that ordinance providing how the city was to issue a subpoena was not adequate precompliance review). Finally, review by the agency issuing the demand and conducting the search is not neutral. *See See*, 387 U.S. at 544–45.

The State also has suggested that the target of a DATCP demand could always seek an emergency writ from a court—except, of course, in the case of on-the-spot demands for access. Yet *Patel* implicitly rejects the argument that petitions for extraordinary writs offer a meaningful path to relief, since the hotels under the *Patel* ordinance *also* could have sought it. *See San Diego Police Officers Assn. v. San Diego Police Dept.*, 76 Cal.App.4th 19 (Cal. Ct. App. 1999) (petition for a writ of mandamus against city police department). Anyway, petitions for extraordinary

writs are just that: extraordinary. They rarely succeed. *See Roberts v. United States Dist. Ct. for N. Dist. of California*, 339 U.S. 844, 845 (1950) ("Mandamus is an extraordinary remedy, available only in rare cases."). That is largely because they require an extremely high showing of "a clear legal right, a positive and plain duty, substantial damages, and no other adequate remedy at law." *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 6, 287 Wis. 2d 795, 706 N.W.2d 161 (mandamus); *State ex rel. Lynch v. Cnty. Ct., Branch III*, 82 Wis. 2d 454, 459–60, 262 N.W.2d 773 (1978) (prohibition). Indeed, *Patel* itself was a suit seeking declaratory and injunctive relief. *See* 576 U.S. at 413. In all, the suggestion that a Hail Mary action for a declaration and injunction is good enough for the Fourth Amendment is "absurd is on its face." *Landon*, 2017 WL 2806817, at *3. What is more, judicial review of an agency action does *not* stay its enforcement. *See* Wis. Stat. §§ 227.52, 227.54, 806.04. So, even if there were time for a party to seek relief, the court's review would be very unlikely to occur "*before* [the subject] faces penalties for failing to comply." *Patel*, 576 U.S. at 421 (emphasis added).

B. The Inspection Statute Is Facially Unconstitutional Because It Criminalizes the Exercise of Fourth Amendment Rights.

As the Wisconsin Supreme Court reminded the State recently, it cannot punish persons for exercising their "right to refuse a warrantless, unreasonable search." *Forrett*, 2022 WI 37, ¶ 6; *see also State v. Dalton*, 2018 WI 85, ¶ 66, 383 Wis. 2d 147, 914 N.W.2d 120 ("no criminal penalties may be imposed for refusal" to submit to an unwarranted search). A warrantless search is "'per se unreasonable,' unless some exception to the Fourth Amendment's warrant requirement applies."

Forrett, 2022 WI 37, ¶ 6. And no exception to the warrant requirement applies here because searches under Section 93.15(2) do not constitute constitutionally permissible administrative searches. *See supra* Part I.A.

Relying on the long-established principle "that a [s]tate may not impose a penalty upon those who exercise a right guaranteed by the Constitution," the *Forrett* court invalidated a criminal sentence that was tied to the State's graduated penalty scheme for repeat OWI offenders. 2022 WI 37, ¶ 6 (alteration in original; citation omitted); *id.* ¶ 14. There, the defendant had been charged with a Class F felony—a charge that carries with it a mandatory period of confinement—because he had seven prior OWI offenses. *Id.* ¶ 3. One of those prior offenses, however, was the temporary revocation of his driving privileges after he refused to submit to a warrantless blood draw during a police stop. *Id.* ¶ 2. But as the court recognized, absent a warrant or an exception to the warrant requirement, individuals are well within their constitutional rights to refuse a blood draw after an OWI arrest. *Id.* ¶ 8. Thus, the refusal to submit to a blood draw could not be factored into the sentencing because "the state cannot criminalize the exercise of a constitutional right." *Id.* ¶ 11. This conclusion was grounded in the U.S. Supreme Court's holding in *Birchfield v. North Dakota*, 579 U.S. 438, 477 (2016), where the Court affirmed that a defendant "cannot be deemed to have consented to submit to [an unlawful search] on pain of committing a criminal offense."

The inspection statute imposes criminal penalties for noncompliance with a warrantless search. Thus, a search recipient who refuses, on Fourth Amendment grounds, to comply with a demand under Section 93.15(2) can be criminally punished. This is precisely the kind of "unconstitutional result" forbidden by *Forrett* and *Birchfield*. *Forrett*,

2022 WI 37, ¶ 17. Thus, the inspection statute is facially unconstitutional for this reason, too.[15]

C. In Addition, the Inspection Statute Is an Unconstitutional Means of Investigating Possible Violations of Penal Laws, Including Section 100.20, Because It Purports to Authorize Warrantless Searches Without Probable Cause.

The special-needs exception to the warrant requirement applies only to search schemes that are "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79–80 (2001). "It is well established that searches conducted as part of a general regulatory scheme, done in furtherance of administrative goals rather than to secure evidence of a crime, may be permissible under the Fourth Amendment without a particularized showing of probable cause." *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998), *as amended* (Nov. 16, 1998). But searches "for law enforcement purposes," which are conducted "to gather evidence of violations of penal laws," do not fall under the "special needs" exception. *Ferguson*, 532 U.S. at 82–84 & n.21. These searches require a warrant and probable cause. *See id.* at 86.

The difference between an administrative law and a penal law lies in their purpose and function. "An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated [by] setting forth rules to guide an operator's conduct." *New York v. Burger*, 482 U.S. 691, 712 (1987). A penal law, by contrast, "punish[es] individuals for specific acts of behavior." *Id.* "If [a] statute imposes a

[15] The circuit court did not address this argument explicitly, presumably concluding that because in its view the underlying facial Fourth Amendment theory lacks merit, this argument necessarily lacks merit, too. *See generally* App. 4–59.

disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (plurality op.); *accord Wooden v. United States*, 595 U.S. 360, 396 n.5 (2022) (Gorsuch, J., concurring) ("Historically, lenity applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines."). To illustrate, penal laws punish the act of stealing automobiles or possessing stolen property, while administrative laws regulate the business of vehicle dismantlers, requiring them to obtain licenses and to comply with certain recordkeeping requirements. *See Burger*, 482 U.S. at 693–64, 713–14. Similarly, building codes are administrative because they are "aimed at securing city-wide compliance with minimum physical standards for private property." *Camara*, 387 U.S. at 535–36.

There are innumerable penal statutes governing Wisconsin businesses that DATCP is free to police under the inspection statute, including Wis. Stat. § 100.20 and DATCP's regulations thereunder. Section 100.20 enumerates prohibited conduct and empowers DATCP to delineate additional prohibited conduct. Wis. Stat. § 100.20(1m), (1n), (1r), (1t), (1v), (2). The statute does *not* purport to regulate how certain businesses should be operated or to grant DATCP such authority. *Compare* Wis. Stat. ch. 704 (regulating the residential-rental industry), *with* Wis. Stat. § 100.20. Thus, Section 100.20 is not aimed at ensuring compliance with a particular administrative regime like vehicle-dismantler licensure and recordkeeping or building codes. Instead, it simply prohibits specific acts of behavior. And Section 100.26 then "punish[es] individuals for [those] specific acts of behavior." *Burger*, 482

U.S. at 712; *see* Wis. Stat. § 100.26 (providing "penalties" for engaging in behavior prohibited under 100.20, including forfeitures, fines, and jail time). Indeed, the court of appeals has recognized that the purpose of these penalties is to "deter conduct which violates agency orders." *State v. Weller*, 109 Wis. 2d 665, 673, 327 N.W.2d 172 (Ct. App. 1982). And there is no question that these penalties—forfeitures, fines, and jail time—are designed "to punish wrongdoers." *Stepniewski*, 105 Wis. 2d at 294 (Abrahamson, J., dissenting).

An investigation seeking evidence of a violation of Section 100.20 or any rule promulgated thereunder thus serves no "special need[ ] beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619–20. Such investigations are aimed at "gather[ing] evidence of violations of penal laws." *Ferguson*, 532 U.S. at 82–84 & n.21. Indeed, the State has criminally charged individuals resulting from DATCP's investigations of violations of Section 100.20 and regulations promulgated thereunder. *See, e.g.*, *Lasecki*, 2020 WI App 36, ¶¶ 3–4 ("After Lasecki failed to cooperate with the DATCP's investigation, the local district attorney's office became involved. The State eventually charged Lasecki with two criminal counts" for violations of Chapter ATCP 134 and Section 100.20). Such investigations clearly do not fall under the administrative-search exception to the warrant requirement.

Because searches for violations of Section 100.20 and DATCP's regulations thereunder are not administrative searches, DATCP must adhere to the Fourth Amendment's warrant and probable-cause requirements when conducting such a search. *See Ferguson*, 532 U.S. at 84–86. Thus, it is unlawful for DATCP to rely on Section 93.15 for such searches, as the statute does not require any warrant or showing of

probable cause. *See id.*

The circuit court did not address this argument, and DATCP's counters are unavailing. According to DATCP, "[b]ecause [Section] 93.15(2) can be used . . . to investigate violations of [Section] 100.20 for non-penal purposes, Plaintiffs cannot show that *all* uses of CIDs to investigate violations of [Section] 100.20 are invalid." R. 34:23. But DATCP cites no authority to support this proposition. And MBAW's as-applied challenge here takes aim only at the penal applications of statutes. More, "'[w]here the primary purpose of a statute is expressly enforceable by fine, imprisonment, or similar punishment the statute is always construed as penal.'" *New Jersey v. Solarski*, 863 A.2d 1095, 1098 (N.J. Ct. App. 2005) (quoting Norman J. Singer, 3 S*utherland Statutory Construction* § 59.1 (2001)). Section 100.20's primary purpose—at least insofar as the government is concerned—is clearly penal. *See* Wis. Stat. § 100.26(3), (6).

DATCP also has argued that administrative subpoenas can be used to investigate penal laws without a warrant or probable cause. They have cited *United States v. Powell*, 379 U.S. 48 (1964), for this proposition, but their reliance is misplaced. *Powell* does not even address whether the statute for which the IRS was investigating was a penal law or whether the search was conducted for law enforcement purposes. *See generally* 379 U.S. 48. Indeed, *Powell* does not address the Fourth Amendment at all. *See id.* at 56–57. Instead, *Powell* cites *Oklahoma Press* and *Morton Salt* to analogize "the general rejection of probable cause requirements in like circumstances involving other agencies." *Powell*, 379 U.S. at 57 (citing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 216 (1946) and *United States v. Morton Salt*, 338 U.S. 632, 642–43 (1950)). But both

have a key distinguishing factor: any subpoena issued by the agency was enforced by the district court—not by the agency. *See Oklahoma Press*, 327 U.S. at 200 n.24, 214; *Morton Salt*, 338 U.S. at 635 n.1 (statute "gives District Courts jurisdiction to compel compliance with the [administrative] subpoena"); *see also United States v. Security State Bank & Trust*, 473 F.2d 638, 641–42 (5th Cir. 1973) (explaining when the court can enforce an administrative subpoena). By contrast, the penalties for refusing a DATCP search are imposed without court intervention. *See* Wis. Stat. §§ 93.15(3), 93.21(3), (4). These searches can thus be "enforced by the [agent] in the field." *See*, 387 U.S. at 544–45 (describing such searches as unconstitutional).

More, *Powell* analogizes federal investigative subpoenas to federal grand jury subpoenas, yet DATCP's searches under Section 93.15(2) bear no resemblance whatsoever to the function and procedures of a federal grand jury.[16] Grand jury subpoenas—to the accused and others—issue "in the same manner as other legal process" affording the subpoenaed party numerous procedural protections. *In re Grand Jury Proc. Harrisburg Grand Jury 79-1*, 658 F.2d 211, 214 (3d Cir. 1981) (citation omitted). For example, "[a] court may quash a subpoena where compliance would be unreasonable or oppressive." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. s 1461 et seq.*, 706 F. Supp. 2d 11, 14 (D.D.C. 2009). "[T]he time for appearance" "can generally be altered." *In re Grand Jury Proc.*, 658 F.2d at 214 (citation omitted). A subpoenaed party may appear before the grand jury and "then decline[ ]

[16] Additionally, state agencies are not the same as federal agencies, and require direct authority from the Legislature to take any action. *See Myers v. Wis. Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47.

to comply with requests for documents, testimony, handwriting or voice samples." *Id.* at 215 (collecting cases). At bottom, "the assumption of grand jury neutrality" serves as a "protective bulwark . . . between the ordinary citizen and the overzealous prosecutor." *Id.* at 214 (citation omitted).

In addition, federal grand jury proceedings contain significant procedural safeguards designed for the protection of an accused. *See Ealy v. Redfield*, No. 22-cv-0356, 2022 WL 16963730, at *3 (D. Or. Nov. 11) ("[A] central function of the grand jury" is "to protect the accused."). The grand jury itself is "a safeguard against unjustified or harassing prosecutions," *Id.* at *3, and "acts as a check on prosecutorial power," *United States v. Cotton*, 535 U.S. 625, 634 (2002). To protect the target of a federal investigation, "when Congress authorized 'special grand juries' under 18 U.S.C. [§] 3331, it took pains to include in the statutory scheme . . . a number of procedural safeguards." *United States v. Christian*, 660 F.2d 892, 909 n.5 (3d Cir. 1981) (Garth, J., concurring). For example, "once a[ ] [grand jury] investigation closes without charges, the subject of the criminal investigation retains significant privacy interests tied to the public disclosure of investigation materials, such as avoiding the unfairness of being stigmatized from sensationalized and potentially out-of-context insinuations of wrongdoing, particularly where individuals lack the opportunity to clear their names at trial." *In re Los Angeles Times Commc'ns LLC*, 628 F. Supp. 3d 55, 68 (D.D.C. 2022) (internal quotation marks and citation omitted).

DATCP's searches under the inspection statute, in stark contrast, serve an entirely different function—the gathering of evidence against an individual or entity—and contain no procedural safeguards. For

starters, "there is no authority for grand juries to conduct an 'investigation for its own sake.'" *In re Mayer*, No. 05-33, 2006 WL 20526, at *4 (D.N.J. Jan. 4). The inspection statute, on the other hand, empowers DATCP to perform investigations for any reason or no reason at all. *See* Wis. Stat. § 93.15(2). The inspection statute also allows for "the disclosure of allegations of criminality which [the subpoena recipient] has had no opportunity to rebut, and which may be based on nothing more than rumor or speculation"—something forbidden of grand juries. *United States v. Corbitt*, 879 F.2d 224, 231–32 (7th Cir. 1989). Indeed, grand jury proceedings are not only dissimilar to investigations authorized under the inspection statute; they serve to thwart altogether the types of arbitrary investigations and prosecutorial power authorized under the inspection statute. Thus, DATCP's federal cases invoking grand jury subpoenas do not support the notion that DATCP can simply fire off investigative demands for evidence of violations of penal laws (many of which carry criminal penalties). *See, e.g.*, Wis. Stat. §§ 93.21(3), 100.26(3).

Separately, even if federal law allowed for administrative subpoenas for penal investigations (something of an oxymoron), "[t]he Fourth Amendment sets 'the minimal constitutional standards,'" and courts "can and ha[ve] interpreted Article I, Section 11 of the Wisconsin Constitution to afford greater protections." *Brown*, 2020 WI 63, ¶ 78 n.11 (Dallet, J., dissenting); *Felix*, 2012 WI 36, ¶ 131 (A.W. Bradley, J., dissenting) (same). In Wisconsin, a warrantless search is "'per se unreasonable,' unless some exception to the Fourth Amendment's

warrant requirement applies." *Forrett*, 2022 WI 37, ¶ 6.[17] Likewise, no Wisconsin law authorizes the State to perform a search merely to assure itself that no penal violation has occurred. "In a [penal] search context, the proper probable cause inquiry is whether evidence of a crime *will* be found," not the inverse. *State v. Rodriguez*, 2001 WI App 206, ¶ 14, 247 Wis. 2d 734, 634 N.W.2d 844 (emphasis added). Finally, Wisconsin's criminal procedure requires probable cause before a subpoena may be issued. *See* Wis. Stat. § 968.135. There is thus no similar grand jury mechanism in Wisconsin that allows for the issuance of criminal subpoenas without probable cause.

II. TO ISSUE A "SPECIAL ORDER" UNDER SECTION 93.15(1) DEMANDING SWORN OR UNSWORN REPORTS OR ANSWERS TO QUESTIONS, DATCP MUST PROVIDE PRIOR NOTICE AND A HEARING, AND ITS PRACTICE OF FAILING TO DO SO IS UNLAWFUL

"Administrative agencies are creatures of the legislature" and therefore have only the authority that the statutes give them. *See Myers v. Wis. Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47; Wis. Stat. § 227.57(8). Acts beyond their legislatively conferred powers are *ultra vires* and unlawful.

The statutes require that DATCP, before issuing a demand for statements or reports, provide the recipient with notice and a hearing. Section 93.15(1) states that DATCP "may, by general or special order, require persons engaged in business to file with the department . . . sworn or unsworn reports or sworn or unsworn answers in writing to

[17] *Cf. State v. Weide*, 155 Wis. 2d 537, 544 n.4, 455 N.W.2d 899 (1990) ("The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures" (citation omitted)).

specific questions, as to any matter which the department may investigate." Wis. Stat. § 93.15(1). To issue "general orders," DATCP must engage in Chapter 227 rulemaking. *See* Wis. Stat. § 93.18(1) ("General orders . . . shall be adopted . . . as prescribed in ch. 227."). To issue a "special order," DATCP must first provide notice and hold a hearing. "[I]n any matter relating to issuing . . . a special order relating to named persons," DATCP "shall serve upon the person complained against a complaint in the name of the department and a notice of public hearing thereon to be held not sooner than 10 days after such service." Wis. Stat. § 93.18(2). "The person complained against shall be entitled to be heard in person, or by agent or attorney and shall be entitled to process to compel the attendance of witnesses." *Id.* The statute contains no requirement that the person regarding whom DATCP seeks to issue a special order separately have been named as a respondent in a different complaint. *See id.* Instead, when DATCP "issu[es] . . . a special order relating to named persons," it must first provide notice and a hearing. *Id.*

DATCP therefore must provide notice and a hearing before issuing a "special order"—*i.e.*, an order directed at a named person—demanding "sworn or unsworn reports or sworn or unsworn answers in writing to specific questions" under Section 93.15(1). And DATCP's practice of issuing such demands without notice or hearing, *see supra* pp. 14–15, is unlawful.

DATCP has attempted to resist this plain reading of the statute by pointing to Section 93.16, and the circuit court followed its lead. *See* App. 54–55 ("I think the State has the better argument based upon a reading [of Section] 93.16 dealing with preliminary investigation that there is no

need to have any sort of a hearing prior to doing the preliminary investigation."). But Section 93.16 does not excuse DATCP from following the procedures mandated by Section 93.18(2) before issuing a "special order." Section 93.16 permits DATCP to "conduct [a] preliminary investigation . . . to determine whether a hearing or proceeding ought to be begun" and authorizes DATCP to use "[t]he authority contained in [Sections] 93.14 and 93.15 . . . in the conduct of such preliminary investigation." Wis. Stat. § 93.16. Nowhere does the statute say that DATCP is relieved from all procedural requirements when using "[t]he authority contained in [Sections] 93.14 and 93.15." *Id.* § 93.16(2).

CONCLUSION

This Court should reverse and remand with instructions to enter judgment in favor of MBAW.

Dated: September 3, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,232 words.

Dated: September 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2024, I caused the foregoing to be filed with the Court's e-filing system, which will send notice to all registered users.

Dated: September 3, 2024

Electronically signed by Ryan J. Walsh
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