2024AP1176

In the Wisconsin Court of Appeals

District II

DESSA BEARDEN, KYLE JENSEN, ANDREW JANNY, CORDARIO GOOCH, JESSE ANDERSON, AND KAREEM BEARDEN,
Plaintiffs-Appellants,
v.
WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE, & CONSUMER PROTECTION AND WISCONSIN DEPARTMENT OF JUSTICE,
Defendants-Respondents.

On Appeal from the Waukesha County Circuit Court,
the Honorable Michael J. Aprahamian, Presiding
Case No. 2023CV1102

OPENING BRIEF OF APPELLANTS DESSA BEARDEN, KYLE JENSEN, ANDREW JANNY, CORDARIO GOOCH, JESSE ANDERSON, AND KAREEM BEARDEN

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INTRODUCTION

Appellants Dessa Bearden, Kyle Jensen, Andrew Janny, Cordario Gooch, Jesse Anderson, and Kareem Bearden—mom-and-pop landlords owning a handful of properties in Waukesha- and Milwaukee-area communities—are intelligent, conscientious, diverse, law-abiding Wisconsinites. One manages a property to pay for his elderly mother's medical care. Two others have invested in real estate to support their children. Several have or had careers in education. One is a former Army veteran. Although none is wealthy or trained in the law, each is determined to comply with the rules and regulations of our State.

But the regulations governing landlords are hopelessly vague, especially Sections ATCP 134.06 and 134.09, which impose myriad requirements on landlords of all sizes. Of course, sometimes even lawyers have difficulty interpreting laws. And some difficulty is to be expected, and tolerated, in the civil context, where, for example, landlords and tenants are free to dispute in small-claims court whether carpet damage is "normal wear and tear" (for which the landlord is responsible) or "tenant damage, waste or neglect" (for which she is not), or whether a landlord's unwelcome entry into a unit to look over and replace an old window was truly an "inspect[ion]" and a "repair." Resolving these disputes might even require extensive discovery, expert reports, complex records, and lengthy trials—all of which our civil courts are capable of handling.

But violations of ATCP 134.06 and 134.09 are not mere civil infractions. They are crimes—punishable by up to a year in jail. And, just as shocking, they are strict-liability offenses, so the mental state of the alleged "wrongdoer" is irrelevant. No amount of good faith, diligence,

intellect, or training will save a landlord in the crosshairs of a district attorney or a bureaucrat who insists (in hindsight) that a tenant should not have been held responsible for an especially filthy carpet, that the replacement of a drafty window was not technically a "repair," or that some other of the rules' blurred lines had been crossed.

On top of this, landlords also must navigate a criminally enforceable regulation that does not even ban or require conduct—it has no *actus reus* at all—despite DATCP's having authority only to "forbid[ ]" or "prescrib[e]" acts. Wis. Stat. § 100.20(2)(a). The rule declares that certain landlord-tenant contracts are "void and unenforceable," but it does not ban parties from entering them. Hence it does not "forbid" or "prescribe" anything and so is not within DATCP's power to issue. This Court should declare it *ultra vires*.

ISSUES PRESENTED

1. Whether Wis. Admin. Code § ATCP 134.08 exceeds DATCP's authority granted by Wis. Stat. § 100.20.

The circuit court answered no.

2. Whether Wis. Admin. Code § ATCP 134.06(3) is void for vagueness under the Due Process Clause of the United States Constitution.

The circuit court answered no.

3. Whether Wis. Admin. Code § ATCP 134.06(3) is void for vagueness under the Due Process Clause of the Wisconsin Constitution.

The circuit court answered no.

4. Whether Wis. Admin. Code § ATCP 134.06(4)(a) is void for vagueness under the Due Process Clause of the United States Constitution.

The circuit court answered no.

5. Whether Wis. Admin. Code § ATCP 134.06(4)(a) is void for vagueness under the Due Process Clause of the Wisconsin Constitution.

The circuit court answered no.

6. Whether Wis. Admin. Code § ATCP 134.09(2) is void for vagueness under the Due Process Clause of the United States Constitution.

The circuit court answered no.

7. Whether Wis. Admin. Code § ATCP 134.09(2) is void for vagueness under the Due Process Clause of the Wisconsin Constitution.

The circuit court answered no.

ORAL ARGUMENT AND PUBLICATION

Given the dearth of case law in Wisconsin on void-for-vagueness challenges under the Due Process Clause of the Wisconsin and federal constitutions and the importance of whether DATCP has exceeded its authority in promulgating § ATCP 134.08, oral argument and publication may be warranted.

STATEMENT OF THE CASE

Appellant Landlords are five landlords and one prospective landlord who own, and to various extents manage, a handful of properties in the Waukesha- and Milwaukee-area communities. R.58, ¶¶ 30–32. Many of the Landlords manage their own properties, some on a full-time basis and others on a part-time basis. R.58, ¶ 42. Landlords are aware of Wisconsin landlord-tenant law and try their best to comply with this complex legal regime. R.58, ¶ 49.

Landlords filed their complaint on July 11, 2023, seeking a declaration that Wis. Admin. Code § ATCP 134.08 exceeds DATCP's

authority and that Wis. Admin. Code §§ ATCP 134.06(3), 134.06(4)(a), and 134.09(2) are void for vagueness under the Wisconsin Constitution. R.3. Landlords moved for a temporary injunction. R.14–15, 33.[1]

On September 25, 2023, the circuit court heard argument on Landlords' motion and denied the same. App.4–82. The court disagreed with Landlords regarding DATCP's authority to promulgate Section ATCP 134.08, holding that "Section 100.20 in authorizing the Department to forbid methods of competition that are unfair, includes the power to promulgate a regulation declaring certain contracts and terms to be void and unenforceable." App.77.

With respect to Landlords' vagueness challenges, the circuit court stated,

> Wisconsin precedent mandates application of the all applications test and binding precedent from the Court of Appeals in the context of a vagueness challenge to ATCP Chapter 134 holds that an administrative rule will withstand a vagueness challenge if it is sufficient definite so that potential offenders are able to discern when they are approaching the zone of proscribed conduct.

App.72. But the court expressed "disagreement" both "with the all applications test" when evaluating the claim under the Wisconsin Constitution and with the "statement … that a regulation is sufficiently definite so long as a potential offender is able to discern when he or she is approaching the zone of proscribed conduct." App.73.

The circuit court added that, absent Wisconsin-specific precedents, it "would tend to find that Plaintiffs have met their burden of establishing

[1] Landlords filed their motion and initial brief in support on July 11, 2023. R.4, 14–15. Landlords amended their brief in support on July 31. *See* R.32–33.

a reasonable probability of success of showing the unconstitutional vagueness of ATCP 134.06(3) … and ATCP 134.09(2).” R 50:70.

Landlords filed an amended complaint on October 6, 2023, adding claims that Sections ATCP 134.06(3), 134.06(4)(a), and 134.09(2) are void for vagueness under the federal Constitution. R.58. On the same day, Landlords filed a second motion for temporary injunction. On December 21, 2023, the circuit court denied this second motion, “conclud[ing] that the additional claims do not materially change the Court’s analysis in deciding the first motion.” App.84.

The parties filed a stipulation and joint motion for summary judgment on April 29, 2024. R.78. On April 30, 2024, the Court entered an order to this effect. App.85. This appeal followed. *See* R.82–83.

STANDARD OF REVIEW

This Court reviews “de novo” a summary-judgment decision, “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 constitutionality of a provision of the administrative code is a question of law which [courts] decide *de novo*.” *Skow v. Goodrich*, 162 Wis. 2d 448, 450, 469 N.W.2d 888 (Ct. App. 1991). And “[t]he issue of whether administrative rules exceed an agency’s statutory authority presents a question of law, which [courts] review de novo.” *Wis. Builders Ass’n v. Wis. Dep’t of Transp.*, 2005 WI 160, ¶ 8, 285 Wis. 2d 472, 702 N.W.2d 433.

ARGUMENT

I. SECTION ATCP 134.08 EXCEEDS DATCP'S AUTHORITY AND IS INVALID

"[A]dministrative agencies are creatures of the legislature" and accordingly have only the authority granted by statute. *Myers v. Wis. Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47. An agency rule that exceeds its statutory authority is invalid. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶¶ 43–59, 391 Wis. 2d 497, 942 N.W.2d 900; *see also* Wis. Stat. §§ 227.11(2)(a), 227.40(4)(a).

Administrative regulations, like statutes, are interpreted according to their plain terms. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 44–45, 271 Wis. 2d 633, 681 N.W.2d 110; *see also Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95.

Wisconsin Statute 100.20 empowers DATCP to "forbid[ ] methods of competition in business or trade practices in business which are determined by the department to be unfair" and "prescrib[e] methods of competition in business or trade practices in business which are determined by the department to be fair." Wis. Stat. § 100.20(2)(a). Consistent with this unambiguous grant of authority, DATCP has promulgated myriad regulations that "prescrib[e]" or "forbid[ ]" conduct, using the familiar "shall" and "shall not" construction. *See, e.g.*, Wis. Admin. Code § ATCP 134.06(2) ("[a] landlord shall …"); *id.* § ATCP 134.06(4) ("the landlord shall …"); *id.* § ATCP 134.07(3) ("[n]o landlord shall …"); *id.* § ATCP 134.09 ("[n]o landlord may …"); s*ee also, e.g.*, Wis. Admin. Code § ATCP 100.981 ("no dairy plant operator may …"); *id.* § ATCP 110.02 ("No seller shall …"); *id.* § ATCP 110.09(3) ("No seller …

shall engage …"); *id.* § ATCP 124.04(1) ("No price comparison may be made …"); *id.* § ATCP 156.02 ("No person may …"); *id.* § ATCP 137.04(1) ("No person may …"). The prior version of Section ATCP 134.08 likewise forbade conduct, stating that "no rental agreement may" do a number of enumerated actions. Wis. Admin. Code § ATCP 134.08 (2014).

In 2015, however, DATCP, amended Section ATCP 134.08 so that it no longer prohibits conduct. It now states that "a rental agreement is void and unenforceable if it does any of the following" enumerated acts. *See* Wis. Admin. Reg. No. 716B, CR 14-038 (Aug. 31, 2015). To declare a kind of contract "void and enforceable" is not to forbid parties from entering one. Nor is it to require them to enter into different agreements. It is simply to declare a consequence: if such an agreement is made, it is void. Because Section ATCP 134.08 now plainly no longer "forbid[s]" or "prescrib[es]" conduct, it exceeds DATCP's authority under Section 100.20. *See Wis. Builders Ass'n v. Wis. Dep't of Transp.*, 2005 WI App 160, ¶¶ 9–32, 285 Wis. 2d 472, 702 N.W.2d 433.

If the language of Section ATCP 134.08 were not plain enough, context confirms that the regulation neither mandates nor forbids conduct. *Kalal*, 2004 WI 58, ¶ 46. DATCP clearly knew how to require or prohibit conduct, since it did so in innumerable other regulations. *See supra* pp.15–16. That DATCP failed to do so here indicates that it had "a different intention." *Kimberly-Clark Corp. v. Pub. Serv. Comm'n of Wis.*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983). Similarly, the regulatory history of Section ATCP 134.08 demonstrates that it does not prohibit conduct. *See Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581. The earlier version of Section ATCP 134.08 contained language clearly forbidding conduct ("no rental agreement

may …"), while the current version contains no such language ("a rental agreement is void and unenforceable if …").

And if there were any ambiguity about the meaning of Section ATCP 134.08, the rule must be construed so as not to prohibit or prescribe conduct. Violations of Chapter ATCP 134 are punishable as crimes, *see* Wis. Stat. § 100.26(3), and thus Chapter ATCP 134 must be construed narrowly to avoid doubt upon its constitutionality and under the rule of lenity. *See United States v. Davis*, 588 U.S. 445, 464 (2019); *Liparota v. United States*, 471 U.S. 419, 426–28 (1985).

Because Section ATCP 134.08 neither "forbid[s]" nor "prescrib[es]" conduct, it exceeds DATCP's statutory authority and is invalid. *See Palm*, 2020 WI 42, ¶¶ 43–59; Wis. Stat. §§ 227.11(2)(a), 227.40(4)(a).

Siding with DATCP, the circuit court ignored the language of the statute, the text of the regulation, and basic interpretive canons. Nothing in Section 100.20 empowers DATCP to declare contracts void and unenforceable. To discover within the statute the authority to do so, the circuit court impermissibly read into the statute language "that does not exist." *See In re A.P.*, 2019 WI App 18, ¶ 10, 386 Wis. 2d 557, 927 N.W.2d 560. Indeed, other statutes in Chapter 100 explicitly provide when certain contracts are void. *See* Wis. Stat. § 100.202 ("All contracts and agreements made in violation of s. 100.201 are void."); *id.* § 100.22(2) (similar). Closely related statutes—including statutes "in the same chapter"—"are to be interpreted together" as part of "the same statutory scheme." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis. 2d 504, 904 N.W.2d 773. That Sections 100.201 and 100.22(2) expressly provide when certain contracts are "void," while Section 100.20 says nothing of the kind further supports that Section 100.20 does not empower DATCP

to declare contracts void.

Nor is there "implicit" authority in Section 100.20 to declare contracts void. First, rulemaking authority is always "expressly conferred"; it is not implied or implicit. *See* Wis. Stat. § 227.11; *Palm*, 2020 WI 42, ¶ 52. And any "imprecise delegation[ ]" of rulemaking authority must be construed narrowly. *Palm*, 2020 WI 42, ¶ 52. To the extent, then, that Section 100.20 is "imprecise" and requires implication, it should be construed narrowly, not to include undefined powers other than to prescribe or forbid business practices and methods.

Additionally, the circuit court's "rel[iance] on Wis. Stat. §§ 704.44 and 704.95" is misplaced. App.77. First, the circuit court noted that Wis. Stat. § 704.44 "mimics" Wis. Admin. Code § ATCP 134.08 "to the letter." App.77. But this says nothing about whether Section 100.20 grants DATCP the authority to declare contracts void and unenforceable. The Legislature, of course, has the authority to pass laws declaring that certain contracts, or provisions of the same, will be void and unenforceable, as it did in Wis. Stat. § 704.44. *See, e.g.*, Wis. Stat. § 134.49(5) ("A provision in a business contract that violates this subsection is void and unenforceable."); *id.* § 136.06(3) (similar); *id.* § 194.53(2)(b) (similar). But DATCP is not the Legislature. Its authority is limited to the power expressly granted by statute. And no statute grants DATCP the authority to declare contracts void and unenforceable.

Section 704.95 does not support the circuit court's conclusion either. While the statute notes that practices which violate Wis. Stat. § 704.44 "may also constitute unfair methods of competition or unfair trade practices under s. 100.20," Wis. Stat. § 704.95, DATCP did not so declare in Section ATCP 134.08. Instead, DATCP copied the language of Wis.

Stat. § 704.44, which declares contracts void and unenforceable—it does not prohibit conduct or otherwise declare a practice to be unfair. Indeed, if it did, there would have been no reason for the Legislature to include Section 704.95's permission to declare these practices unfair. And if DATCP wanted to declare practices unfair and prohibit them, it knows how to do so. *See supra* pp.16–17. But that is not what DATCP did.

Finally, DATCP's reliance on *Baierl v. McTaggert*, 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277, is misplaced. First and most importantly, *Baierl* involved the earlier and materially different version of Section ATCP 134.08, *see* 2001 WI 107, ¶ 4, and therefore does not control any analysis of the current version. *See Bank of New York Mellon v. Carson,* 2015 WI 15, ¶ 26, 361 Wis. 2d 23, 859 N.W.2d 422 (declining to adopt interpretation of "significantly different statute[ ]"). More, the relevant language from *Baierl* is not binding because the Court did not address whether the regulation exceeded DATCP's authority, but rather whether a lease that included a provision that violated the regulation was enforceable. *Baierl*, 2001 WI 107, ¶ 2; *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 57, 324 Wis. 2d 325 782 N.W.2d 682 (Wisconsin Supreme Court opinion addressing a different legal question was "inapplicable as precedent").

II. SECTIONS ATCP 134.06(3), (4)(A), AND 134.09(2) ARE UNCONSTITUTIONALLY VAGUE AND MUST BE SET ASIDE

Three of DATCP's regulations—Sections ATCP 134.06(3), 134.06(4)(a), and 134.09(2)—are void for vagueness under the due-process clauses of the Wisconsin and federal constitutions. These regulations, which create indefinite strict-liability crimes for acts that are not *malum in se*, are vague and confusing, failing to give ordinary

persons fair notice of what is prohibited and inviting arbitrary enforcement. These regulations therefore violate the federal and state due process clauses on their face. *See Johnson v. United States*, 576 U.S. 591, 601–02 (2015); *Sessions v. Dimaya*, 584 U.S. 148, 159 n.3 (2018). The regulations are therefore "invalid." *See* Wis. Stat. § 227.40(4)(a).

A. A Regulation Is Unconstitutionally Vague When It Fails to Give Fair Notice or Permits Arbitrary Enforcement

Both the Wisconsin and federal constitutions forbid unduly vague laws. This follows from both laws' prohibiting the State from depriving persons of life, liberty, or property without due process of law. U.S. Const. amend. V; Wis. Const. art. I, § 1; *State v. Neumann*, 2013 WI 58, ¶ 32 n.10, 348 Wis. 2d 455, 832 N.W.2d 560.[2] The government violates due process by having a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595.

These concepts are known as the "two due process essentials:" (1) "fair notice," which means the law is defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited," and (2) fair enforcement, meaning that the law's language "does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (citation omitted); *see also State v. Starks*, 51 Wis. 2d 256, 262, 186 N.W.2d 245 (1971) (striking down loitering statute as void for vagueness); *State v. Popanz*, 112 Wis. 2d 166, 172–73,

[2] Wisconsin courts generally interpret Wisconsin's due process requirements consistent with those of the federal constitution. *See Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999); *but see infra* p.24.

177, 332 N.W.2d 750 (1983) (holding that statutory phrase "private school" was void for vagueness); *State v. Janssen*, 213 Wis. 2d 471, 478, 570 N.W.2d 746 (Ct. App. 1997) (ruling that "casting contempt upon the flag" is void for vagueness). Administrative regulations are also subject to these requirements. *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976).

In all, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but … the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Thus, terms calling for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" will render laws unconstitutionally vague. *Id.* (describing terms such as "annoying" or "indecent"). The same is true of "terms of degree" with "no settled usage or tradition of interpretation in law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991) ("general"); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) ("annoy"). Finally, even if the constitution might tolerate an unclear term or phrase in isolation, vagaries can accumulate, such that a patchwork of hazy terms within one provision will render the entire provision invalid. *Johnson*, 576 U.S. at 602 (citation omitted).

Courts assessing vagueness challenges consider several factors to determine whether the law is too indeterminate to comport with due process. For instance, "repeated attempts and repeated failures [by courts] to craft a principled and objective standard out of" a law can "confirm its hopeless indeterminacy." *Id.* at 598. An inference of vagueness also arises when courts and juries come to differing

conclusions on the meaning of a term or phrase. *See id.* at 601; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 & n.2 (1921). Vagueness is also more likely when dictionary definitions and other writings "are numerous and varied" on the meaning of a term. *Lanzetta v. State of N.J.*, 306 U.S. 451, 454 (1939).

"The degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Laws carrying only civil penalties receive greater tolerance for vagueness, while laws imposing criminal penalties must possess "a high level of definiteness." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999); *see also Vill. of Hoffman Ests.*, 455 U.S. at 498–99; *Neumann*, 2013 WI 58, ¶ 36. Courts are even less tolerant of vagueness when the threat of the prohibited activity is lower. *See Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 602 (7th Cir. 2021); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972) (due-process problem when law "makes criminal activities which by modern standards are normally innocent"). And if the challenged law "threatens to inhibit the exercise of constitutionally protected rights," "a more stringent vagueness test should apply." *Vill. of Hoffman Ests.*, 455 U.S. at 499.

Finally, courts apply especially "heightened" scrutiny to a law that "contains no *mens rea* requirement," *United States v. Cook*, 970 F.3d 866, 873 (7th Cir. 2020), since a strict-liability prohibition can easily become "little more than 'a trap for those who act in good faith,'" *Colautti v. Franklin*, 439 U.S. 379, 395 (1979), *overruled in part on other grounds*

by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). Since "strict-liability [criminal] offenses" are "generally disfavored" in the law, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978), they receive "a relatively stringent review" for vagueness, *Peoples Rts. Org., Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998). Hence, as Justice Abrahamson explained, "Courts have struck down statutes creating strict liability crimes as violating due process," including because "these statutes are vague and lack notice." *State v. Stepniewski*, 105 Wis. 2d 261, 303, 314 N.W.2d 98 (1982) (dissenting op.).

The three regulations at issue here—strict-liability crimes, containing no *mens rea* requirement, for conduct that is not *malum in se*—must therefore undergo extremely demanding review for vagueness: a review which all three fail.

More, this court may conclude this regulatory scheme is invalid under Wisconsin's Constitution. After all, "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court." *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977). The Wisconsin Constitution has thus 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); *State v. Felix*, 2012 WI 36, ¶ 131 & n.10, 339 Wis. 2d 670, 811 N.W.2d 775 (A.W. Bradley, J., dissenting). Under a more-protective constitutional regime, these regulations even more clearly fail.

B. A Regulation That Is Unconstitutionally Vague Must Be Wholly Set Aside

A regulation that fails to give fair notice or permits arbitrary enforcement is invalid on its face. *See Johnson*, 576 U.S. at 601–02; *Sessions*, 584 U.S. at 159 n.3. This is true even if there are hypothetical scenarios (as there always will be) that would clearly fall within the provision's grasp. *See Johnson*, 576 U.S. at 602. Although courts used to insist that facial vagueness challenges could succeed only if the challenged provision was "impermissibly vague in all of its applications," *Vill. of Hoffman Ests.*, 455 U.S. at 497, that is no longer the law. In *Johnson*, the Supreme Court clarified that a "vague provision is [not] constitutional merely because there is *some conduct* that clearly falls within the provision's grasp." 576 U.S. at 602 (emphasis added). Rather, a law is across-the-board invalid so long as it is "permeate[d]" with vagueness, *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality op.), or "lacks 'any ascertainable standard for inclusion and exclusion,'" such that it simply "poses a trap for a person acting in good faith, who is given no guidepost by which he can divine what sort of conduct is prohibited." *Cook*, 970 F.3d at 873 (citation omitted); *see also Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.*, 89 F.4th 1337, 1350 (11th Cir. 2024) (declaring policy facially invalid even though "we can imagine a religious advertisement which clearly falls within the ban in [the] policy").

This rule makes sense. After all, under *Hoffman Estates*' "impermissibly vague in all of its applications" test, *no enactment* could be unconstitutionally vague on its face. Suppose a statute made "any unjust act" punishable by imprisonment. Genocide, rape, and murder are

undeniably "unjust," but that fact obviously would not save the statute. Applying the same logic, the Supreme Court has "deemed a law prohibiting grocers from charging an 'unjust or unreasonable rate' void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable." *Johnson*, 576 U.S. at 602–03 (citing *L. Cohen Grocery Co.,* 255 U.S. at 89). The Court has "similarly deemed void for vagueness a law prohibiting people on sidewalks from 'conduct[ing] themselves in a manner annoying to persons passing by'—even though spitting in someone's face would surely be annoying." *Id.* at 603 (quoting *Coates,* 402 U.S. 611) (alteration in original).

Wisconsin precedents likewise teach that a law may be facially void for vagueness notwithstanding the existence of conduct to which the provision would indisputably apply. For example, in *State v. Starks*, the supreme court held facially void a law that criminalized being a "vagrant," defined as "[a] person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence," 51 Wis. 2d at 259, 262–63 (citation omitted), notwithstanding that some cases would obviously fit within the definition. Similarly, in *State v. Popanz*, the court held facially vague the phrase "private school" in a statute requiring persons "having control of a child who is between the ages of 6 and 18 years to cause the child to attend public or private school regularly," 112 Wis. 2d at 167–68, despite the many conceivable scenarios in which the law clearly would be transgressed. What doomed the statute was not an answer to some "applications" formula; it was that the determination of what is a private school was left "solely in the discretion of the school attendance

officer of the district" and required "[t]he persons who must obey the law … to guess at what the phrase 'private school' means." *Id.* at 175–76.

These cases distill to a simple rule: when a law reaches a certain level of vagueness, it must be struck down as void on its face.

The circuit court instead concluded that *Service Employees International Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, compels a different result, supposedly holding that the all-applications test governs all facial constitutional challenges (except, perhaps, those allegedly violating free speech). It cannot and does not.

First, even if the circuit court's reading of *SEIU* were correct, it would be irrelevant. That is because *Johnson*, which is a federal due process holding, controls—any state supreme court decision to the contrary notwithstanding. Wisconsin state courts "must follow the United States Supreme Court on matters of federal law." *State v. Halverson*, 2021 WI 7, ¶ 23, 395 Wis. 2d 385, 953 N.W.2d 847 (citation omitted).

Second, the circuit court misread *SEIU*. The decision makes an exception for vagueness challenges. *See* 2020 WI 67, ¶ 43 n.14. In the separation-of-powers context, to succeed on a facial challenge, the challenger must show that the statute is unconstitutional "in all applications" and "cannot be enforced 'under any circumstances.'" *Id.* ¶ 38 (citation omitted). But, it adds, in certain specific circumstances, a different standard applies. *See id.* ¶ 43 n.14. One of those situations is a void-for-vagueness challenge. *See id.* (citing *Sabri v. United States*, 541 U.S. 600, 609–610 (2004) citing *Morales*, 527 U.S. at 55–56 (plurality opinion) (applying a different facial standard to a void-for-vagueness challenge)). After all, the "all applications" test becomes a "tautology"

when applied to vagueness cases. *Johnson*, 576 U.S. at 603. If a statute if vague, "it is vague in all its applications." *Id.* So, a "prohibition of unjust or unreasonable rates" becomes "vague in all applications" even though one can imagine "the existence of some clearly unreasonable rates." *Id.*

Third, *SEIU* did not purport to overrule *Starks*, 51 Wis. 2d 256, and *Popanz*, 112 Wis. 2d 166. In both those cases, the law at issue was vague, despite possible hypothetical fact patterns in which the law would clearly be transgressed. *See supra* pp.26–27. Both cases would necessarily come out the other way under the all-applications test.

The State has relied upon *State v. Wood*, but that case likewise does not set the standard for vagueness challenges in Wisconsin. It sets forth—in a footnote—the same tautology that *Johnson* dispelled: if a statute is vague, it is vague in all its applications. *See State v. Wood*, 2010 WI 17, ¶ 44 n.15, 323 Wis. 2d 321, 780 N.W.2d 63 (quoting *Vill. of Hoffman Ests.*, 455 U.S. at 494–95 & n.7). If *Wood* is instructive on any point, it suggests that Wisconsin courts apply the federal vagueness standard to facial vagueness challenges under the Wisconsin Constitution. And drawing that inference requires acknowledging that *Hoffman Estates* was superseded by *Johnson*, as courts around the country have acknowledged. *See*, *Cook*, 970 F.3d at 876 (*Johnson* abrogated "pre-*Johnson* cases," including *Hoffman Estates*); *see also* Wright & Miller, 32 Fed. Prac. & Proc. § 8141 (2d ed.). It follows that *Johnson* governs vagueness challenges under Wisconsin law, as the state and federal constitutions have long been held to "provide identical due process protections." *Cnty. of Kenosha v. C & S Mgmt., Inc.,* 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999). This Court should therefore ask

whether the language is "so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability." *Starks*, 51 Wis. 2d at 259 (citation omitted). If the language is impermissibly obscure, it is *always* impermissibly obscure—and therefore facially void. *See Johnson*, 576 U.S. at 603.

Last but not least, even if *SEIU* did not make an exception for vagueness, *SEIU*'s purportedly "prudential" doctrine of remedies is displaced here by the remedies provisions of Wisconsin's Administrative Procedure Act, which requires full vacatur. Wis. Stat. § 227.40(4)(a). Section 227.40(4)(a) states that "the court shall declare the rule … invalid if it finds that it violates constitutional provisions." *Id*. This is the same remedy provided for challenges to federal regulations under the federal Administrative Procedure Act. *See, e.g., Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 36 & n.7 (2020) (vacating an agency decision). Because these three regulations violate the state and federal due process clauses, the court must declare the regulations invalid. *See* Wis. Stat. § 227.40(4)(a).[3]

C. Section ATCP 134.06(3) Is Unconstitutionally Vague and Must Be Set Aside

Section ATCP 134.06(3) states that, "[w]hen a landlord returns a security deposit to a tenant after the tenant vacates the premises, the landlord may withhold from the full amount of the security deposit only

[3] Contrary to DOJ and DATCP's arguments, there is no option to enjoin only criminal enforcement of these regulations. Section 227.40 provides no option to declare the criminal penalties—which are located *not* in the rules themselves but in Wis. Stat. § 100.26—unlawful. More, if a law if facially void for vagueness, then it is void in *both* its criminal *and civil* applications. *See Colautti*, 439 U.S. at 394–96 (1979); *see, e.g.*, *Brown v. Kemp*, 86 F.4th 745, 770–777 (7th Cir. 2023) (striking down as unconstitutionally vague laws with both criminal and civil penalties).

amounts reasonably necessary to pay for," as relevant, "tenant damage, waste, or neglect of the premises," but not "for normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law"; and "[u]npaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats."

Three phrases in Section ATCP 134.06(3) are impermissibly vague: (a) "normal wear and tear," (b) "tenant damage, waste, or neglect," as well as (c) "legally responsible" and "responsible under applicable law." Each of these phrases—whose vagueness is exacerbated by the layered requirement that only "reasonably necessary" amounts be withheld—independently invalidates the rule. *A fortiori*, viewing these cumulatively indefinite phrases in combination reveals a thoroughly "shapeless" law, susceptible of only "guesswork" by those subject to it and those enforcing it. *Johnson*, 576 U.S. at 602.

1. Start with the agency's criminal bar on withholding for "normal" wear and tear. Bent on complying with the rule, a person of ordinary intelligence—or, more likely, her lawyer—would "search[ ] the statutes, administrative rules and regulations and official [agency] writings for a definition" of "normal" wear and tear, or at least for "criteria" that wear and tear must meet to be considered "normal." *Popanz*, 112 Wis. 2d at 174 (holding statutory phrase "private school" void for vagueness). But she would find nothing—no "definition," no "prescribed criteria," and not even "a well-settled meaning [set forth] in decisions" of a Wisconsin court. *Id.* She would discover instead that Wisconsin courts have struggled themselves to come up with a legal definition for "normal wear and tear," and that discerning what is "normal wear and tear" in the fact-intensive context of a particular landlord-tenant dispute is complicated.

Howells v. Grosso Inv. Properties, LLC, 2009 WL 3127925, at *2 (Wis. Ct. App. Oct. 1) (unpublished) (28-paragraph opinion addressing these issues); *see also, e.g., Sunflower Condo. Ass'n, Inc. v. Everest Nat'l Ins. Co.*, 2020 WL 7061597, at *3 (S.D. Fla. Nov. 12) (relying upon testimony of public adjuster that "normal wear and tear is very … vague" to find genuine issue of material fact), *report and recommendation adopted*, 2020 WL 7059352 (S.D. Fla. Dec. 1, 2020); *Weeks Marine, Inc. v. Picone, Inc*, 1998 WL 717615, at *6 (S.D.N.Y. Oct. 14) (finding that "[t]he contract is ambiguous because the term 'ordinary wear and tear' is not defined"); *Zidell, Inc. v. Pac. N. Marine Corp.*, 744 F. Supp. 982, 986 (D. Or. 1990) (concluding that the phrase "good order and condition excepting ordinary wear and tear" was "capable of more than one reasonable interpretation" and was therefore "ambiguous"); *Marina Food Assocs., Inc. v. Marina Rest., Inc.*, 394 S.E.2d 824, 830 (NC Ct. App. 1990) (same).

A person of ordinary intelligence would also learn that the term "normal" is notoriously "susceptible to many different interpretations, and so raises questions with no clear answers." *United States v. Hall*, 912 F.3d 1224, 1227 (9th Cir. 2019) (per curiam) (holding term of probation relating to "normal familial relations" unconstitutionally vague); *see also Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (observing that the term "normal" is "ambiguous" and vulnerable to "various interpretations").

Even before parsing cases, an ordinary landlord searching the internet would find numerous sources, many that admit that the meaning of "normal wear and tear" is extremely difficult to pin down and others that contradict each other. For example, while DATCP's informal

guidance suggests that "painting" or "carpet cleaning" are the landlord's responsibilities, DATCP, *Landlord Tenant Guide* at 4,[4] (R. 11, Ex. A), the University of Wisconsin–Milwaukee's Legal Clinic maintains that "the landlord is [not] always prohibited from withholding for carpet cleaning or painting." *Tenant Rights and Responsibilities* at 11, University Legal Clinic (Rev. 2010),[5] (R. 11, Ex. B). Reading the same regulation, some rental experts think that landlords may use security-deposit money to clean a carpet "that was dirtier than normal,"[6] (R. 11, Ex. D), while others insist that "Wisconsin tenant-landlord law prohibits [landlords from] using security deposits to cover the costs of cleaning, painting, or cleaning the carpet" at all,[7] (R. 11, Ex. E). After all, it is probably not worth risking a year in jail just to charge a tenant for a particularly disheveled carpet, given that the agency or a district attorney might conclude that the carpet showed only "normal" damage.

Real-estate attorneys agree that the meaning of "ordinary" or "normal" wear and tear is amorphous. O'Flaherty Law, operating throughout Wisconsin and specializing in real estate, points out that "[t]here is no definition for normal wear and tear" and that it is "up to the parties and a judge to decide whether something is normal wear and tear,"[8] (R. 11, Ex. F). Another firm agrees "that 'normal wear and tear' is a term that Wisconsin laws do not clearly define,"[9] (R. 11, Ex G).

Summing up these sentiments, the Tenant Resource Center puts it

[4] https://perma.cc/LAK6-7485.
[5] https://perma.cc/GL9M-K4KW.
[6] https://perma.cc/M7GP-SSSX.
[7] https://perma.cc/YS6D-7WE7.
[8] https://perma.cc/P7XW-VTY7.
[9] https://perma.cc/Z4UQ-X7B5.

best: "[N]ormal wear and tear" is "haaaaard" to explain to tenants. Laura Dixson-Kruijf, *Normal Wear and Tear*, Tenant Resource Center (Feb. 24, 2022),[10] (R. 11, Ex. D). "[I]t's up to a judge" to decide, the non-profit concludes, because "the law doesn't define it very well,"[11] (R. 11, Ex. D). Cold comfort for good-faith landlords wishing to avoid incarceration.

Compounding its unconstitutionality, the formlessness of "normal" is problematic in yet another respect: contrary to the teaching of *Johnson*, it requires a landlord, as well as a prosecutor, judge, or jury, to conceptualize an abstract, idealized "normal" scenario, against which she would then need to judge the circumstances that she confronts. It was precisely this difficulty—coming up with a theoretical "normal" or "ordinary" circumstance—that led the *Johnson* Court to strike down the Armed Career Criminal Act's residual clause. 576 U.S. at 597. The Court explained that the clause was problematic because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 597. The Court asked, "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* (citation omitted). A good-faith landlord would have the same questions.

Applying similar reasoning, the Seventh Circuit in *Whatley v. Zatecky*, 833 F.3d 762, 784 (7th Cir. 2016), held unconstitutional as applied an Indiana statute using the term "on a regular basis." The word "regular" is "amorphous," "susceptible to multiple meanings," "provides no objective standard," "and thereby fails to place persons of ordinary

[10] https://perma.cc/M7GP-SSSX.
[11] *Id.*

intelligence on notice of the conduct proscribed and allows for arbitrary enforcement." *Id*. at 772, 779, 784; *see also, e.g., Doe v. Snyder*

, 101 F. Supp. 3d 672, 687–90 (E.D. Mich. 2015) (holding law void for vagueness because of the words "regularly" and "routinely").

For the same reasons that the phrase "normal familial relations," "'ordinary case' of a crime," or "on a regular basis" fail to afford due process, the phrase "normal wear and tear" also falls short. The regulation, its context, case law, and secondary sources furnish no answers to the countless questions that the ordinary landlord must ponder. The term is therefore unconstitutionally vague. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 784.

DATCP will likely assert that the term "normal wear and tear" is well established for the purposes of *civil* litigation, but that assertion fails to appreciate that just because a term can be defined for one purpose does not mean that the term is sufficiently definite under the due process clauses—especially if that term is a font of strict criminal liability. The challenged term in *Starks* ("vagrant") was likewise defined: "A person found in or loitering near any structure, vehicle or private grounds who is there without the consent of the owner and is unable to account for his presence." 51 Wis. 2d at 259. But the definition itself was vague. *Id.* at 262–63.

If DATCP again attempts to define "normal wear and tear" as "the gradual deterioration of property over time caused by its proper and expected use by a tenant exercising ordinary care," that definition clarifies nothing. *See* R.35:21. "Normal wear and tear" might be wear and tear caused by normal or ordinary use, but "[t]his tautology fail[s] to answer the salient question of what the [rule] mean[s] by '[normal].'"

Whatley, 833 F.3d at 778.[12] How does one determine what is a "normal" or "ordinary" case of "use," or an "ordinary" level of care? This is the same problem in *Johnson*: the law requires a person to conceptualize an abstract, idealized "ordinary" tenancy without any baseline, 576 U.S. at 597—which perhaps is good enough for small-claims court but hardly sufficient in a criminal prosecution. Hence courts often bemoan words like "normal," "ordinary," and "regular" because of their ambiguity, *see, e.g.*, *Bassiri*, 463 F.3d at 931, and have struck down as impermissibly vague laws using them.[13]

2. Separately, but relatedly, the terms "tenant damage, waste, or neglect" are unduly vague. The person of ordinary intelligence would alas find that these words, too, are undefined and that other regulations provide no guidance. *See generally* Wis. Admin. Code ch. ATCP 134. Even so, the mom-and-pop landlord is forced make a complicated, *ex ante* legal determination concerning the culpability of another person, the tenant, whose circumstances the landlord likely will not even fully know. After all, to discern whether a person has been negligent, one must know all of the "facts and circumstances present in each individual case." *Hoida,*

[12] Nor does the use of terms like "proper" or "expected" help the State. These terms are likewise subject to myriad definitions with no standards for determining their meaning. *See McCormack v. Herzog*, 788 F.3d 1017, 1031–32 (9th Cir. 2015), *abrogated in part on other grounds by Dobbs*, 142 S. Ct. 2228. They "raise the same questions as the [original] terms themselves:" "proper" or "expected" "according to whom or what standard?" *Id.*

[13] *See, e.g.*, *Whatley*, 833 F.3d at 778, 784 ("on a regular basis"); *Doe v. Cooper*, 842 F.3d 833, 843 (4th Cir. 2016) ("regularly scheduled"); *Doe*, 101 F. Supp. 3d at 686–90 ("regularly operated" and "routinely used"); *see also Hall*, 912 F.3d at 1227 (term of probation) ("normal familial relations"); *United States v. Evans*, 883 F.3d 1154, 1163 (9th Cir. 2018) (condition of release) ("work regularly"); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 273–74 (4th Cir. 2019) ("habitual drunkard"); *Childs v. State*, 816 P.2d 1079, 1080–81 (Nev. 1991) ("'normal' pull of a slot machine handle").

Inc. v. M & I Midstate Bank, 291 Wis. 2d 283, 306, 717 N.W.2d 17 (2006). Perhaps even the tenant himself does not know all the circumstances. And all these same fatal defects afflict the term "waste," which is, itself, unconstitutionally vague on its face. *See Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 243 (1932).

A Google search here would again prove unhelpful. DATCP's informal guidance merely parrots the rule,[14] (R.11, Ex.A). Given the phrase's indefiniteness, one treatise advises landlords "to prescribe precisely what acts or omissions are to be considered waste."[15] This guidance is of little assistance, however, because damage from failure to take reasonable precautions is arguably just "normal wear and tear." Industry guidance acknowledged this problem: "Damage is the destruction caused by abusive or negligent use of a rental unit," a leading property management website advises, "like ripped carpets and heavily stained walls." *See* R. 11:102. Yet ripped carpet or stained walls could conceivably be, under the circumstances, the kind of "normal wear and tear" that DATCP does not think merits a deduction.

In sum, this language fails to give "person[s] of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304. The kinds of determinations that it requires "are questions of law mixed with questions of fact which perplex [even] judges little less than they baffle 'men of common intelligence.'" *Williams v. State of N.C.*, 325 U.S. 226, 276–77 (1945) (Black, J., dissenting). The government cannot imprison landlords for their "failure to prophesy what a judge or jury will do" when presented with then-unknown-and-unknowable facts that ultimately

[14] https://perma.cc/LAK6-7485.
[15] 1 Wis. Prac., Methods of Practice § 13:32 (5th ed 2022).

would drive any later determination of whether a tenant committed "waste" or "neglect." *Id.* at 278 (Black, J., dissenting); *see also Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 877 (N.D. Tex. 2008) (ordinance "fail[ed] to put" "landlords with no training or expertise in federal immigration law … on sufficient notice of what acts may be punished by the city").

3. For similar reasons, the regulation's use of terms like "legally responsible" and "responsible under applicable law" are equally problematic. Merely to avoid jailtime, a landlord must answer the unanswerable: whether all the facts that might come out later would render the tenant ultimately "responsible" for payments that he seemingly owes. *See Villas at Parkside Partners*, 577 F. Supp. 2d at 877; *see also Williams*, 325 U.S. at 276–77 (Black, J., dissenting). Making matters more difficult, the landlord of ordinary intelligence also must figure out what law or laws would "appl[y]" to yet unknown and potentially unknowable facts—something that even attorneys and courts have trouble agreeing upon. *See Smart v. Thompson*, 2014 WL 642059, at *7–*8 (Wis. Ct. App. Feb. 20) (unpublished) (the parties, circuit court, and court of appeals disagreed on the meaning of "applicable law" in 134.06(3)). This violates due process. *See Villas at Parkside Partners*, 577 F. Supp. 2d at 877.

Similarly, Section ATCP 134.06(3) allows a landlord to withhold only unpaid rent for which a tenant is "legally responsible" after applying the provisions of Wis. Stat. § 704.29. *See* Wis. Admin. Code § ATCP 134.06(3)(a)1. That statute, in turn, allows landlords to recover unpaid rent when a tenant "unjustifiably removes from the premises," but only to the extent that the landlord cannot "mitigate" with "reasonable

efforts" the lack of payment. Wis. Stat. § 704.29. Determining whether a tenant has "unjustifiably remove[d]" from the premises can prove a Herculean task at best and so it, too, fails to give "person[s] of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304; *see also Williams*, 325 U.S. at 276–77 (Black, J., dissenting). Courts themselves are forced to undertake complex legal analyses to assess whether a tenant is legally responsible for unpaid rent. *See, e.g.*, *Long v. Weber*, 2021 WL 2577058, at *1–*4 (Wis. Ct. App. June 23) (unpublished); *Wyndham Properties, LLC v. Kingstad L. Offices, S.C.*, 2010 WL 1753300, at *2–*3 (Wis. Ct. App. May 4) (unpublished); *Butler Plaza, LLC v. Curtis*, 2019 WL 1796113, at *2–*5 (Wis. Ct. App. Apr. 25) (unpublished). Yet a landlord is asked to figure all this out on her own, without all the facts—and go to jail if she makes an innocent mistake.

Having to decide whether a landlord's mitigation efforts were "reasonable" under Section 704.29 adds even more uncertainty. Parties constantly clash over whether attempts at mitigation were "reasonable." *See, e.g.*, *Butler Plaza*, 2019 WL 1796113, at *5–*6; *Lagunas v. Wis. O'Connor Corp.*, 2016 WL 4083580, at *4 (Wis. Ct. App. Aug. 2) (unpublished); *Sun-P Enterprises, LLC v. Jbeck Pizza LLC*, 2011 WL 6224512, at *4–*6 (Wis. Ct. App. Dec. 15) (unpublished). There are also questions regarding whose burden it is to prove that mitigation efforts were reasonable. *See Butler Plaza*, 2019 WL 1796113, at *5–*6. Does a landlord have to predict whether the tenant will succeed in overcoming a prima facie case to determine whether she can withhold unpaid rent from a security deposit? A person's liberty cannot be made to turn on what would constitute sheer speculation even in a law office. *See Coates*, 402 U.S. at 614.

At the very least, the combination of and relationship between these amorphous terms and provisions renders the regulation hopelessly indefinite. *See Johnson*, 576 U.S. at 602. Forced to navigate the term "reasonably necessary," an ordinary landlord is then confronted with the prohibition on withholding for "normal wear and tear" and rent for which the tenant is not "legally responsible" and costs for which the tenant "cannot reasonably be held responsible under applicable law," as well as the requirement to apply Section 704.29, and all its vague and confusing requirements. When these problems are aggregated, "their sum makes a task … which at best could be only guesswork." *Id.* (citation omitted). Section ATCP 134.06(3) therefore violates due process. *Id.*

In support of these phrases, DATCP touted the maxim that "every person is expected to know the law"—cold comfort when the *law itself* is unclear. *See* R.35:26 (citing *Neumann*, 2013 WI 58, ¶ 50 n.29). For vagueness purposes, courts have made clear that ordinary citizens cannot be expected to be legal experts, *Villas at Parkside Partners*, 577 F. Supp. 2d at 876–77, much less to know unknowable facts, *Peoples Rights*, 152 F.3d at 535–37; *Lawson v. Kolender*, 658 F.2d 1362, 1370 (9th Cir. 1981). Yet Section ATCP 134.06(3) requires both.

4. The circuit court agreed that, under the proper standard, Section ATCP 134.06(3) would be void for vagueness. App.73. The court articulated three reasons why it believed *Johnson* is the better test. First, it noted that vague regulations, like Section ATCP 134.06(3), require Landlords to "forgo[ ] rights and often compensation to which they are otherwise entitled under the law." App.74. Second, the court identified the "risk" of "selective enforcement." App.74–75. Third, the court explained that the Legislature—not the courts—should "define

what conduct is sanctionable and what is not." App.75–76. The circuit court's reasoning on this score is correct and, applying the proper standard, *see supra* pp.27–29, the regulation is unconstitutionally vague.

D. Section ATCP 134.06(4)(a) Is Unconstitutionally Vague and Must Be Set Aside

Section ATCP 134.06(4)(a) provides that, "[i]f any portion of a security deposit is withheld by a landlord, the landlord shall," in the relevant timeframe, "deliver or mail to the tenant a written statement accounting for all amounts withheld." Wis. Admin. Code § ATCP 134.06(4)(a). That statement must "describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim." *Id.*

Section ATCP 134.06(4)(a) is subject to exacting vagueness analysis. It imposes criminal penalties with no *mens rea* requirement, necessitating a high degree of definiteness. *See Vill. of Hoffman Ests.*, 455 U.S. at 499. Finally, stricter scrutiny is required because the threat to the public of the conduct prohibited—not sufficiently itemizing a security-deposit return letter—is exceedingly low. *See Planned Parenthood*, 7 F.4th at 602.

Section ATCP 134.06(4)(a) cannot withstand heightened constitutional scrutiny. The regulation's requirement to "describe each item of physical damages or other claim" and to account for the amount withheld for "each item or claim" is undefined and is open to numerous interpretations. Lay and legal dictionaries provide multiple open-ended definitions for "claim," including "a demand for something due or believed to be due," "a right to something," "an assertion open to

challenge," or "something that is claimed." *Claim*, Merriam-Webster;[16] *see also Claim*, Black's Law Dictionary (11th ed. 2019) ("[a] statement that something yet to be proved is true," [t]he assertion of an existing right," "[a] demand for money, property, or a legal remedy to which one asserts a right," "[a]n interest or remedy recognized at law"). The term "item" likewise has many definitions, including "a distinct part in an enumeration, account, or series," "an object of attention, concern, or interest," or "a separate piece of news or information." *Item*, Merriam-Webster.[17] None of these definitions clarify whether a security-deposit return is sufficiently detailed to satisfy the requirement to describe each "item of physical damage" and each "claim."

For instance, if a landlord withholds money from a tenant's security deposit to cover the damage of several holes in a wall, is each hole an "item of physical damage" or is the wall the "item of physical damage"? And if a tenant owes utilities for multiple months, is each month owed a separate "claim," or are the unpaid utilities as a whole the "claim"? Indeed, much like the terms "neighborhood" and "locality" at issue in *Connally*, the terms "item" and "claim" "offer a choice of uncertainties," since they "are elastic and … may be equally as satisfied by areas measured by rods or miles. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 395 (1926). Such "elastic" terms fail to provide fair notice or standards for fair enforcement. *Id.*

Courts also differ over whether certain charges are sufficiently itemized. In *Heiman v. Roe*, this court disagreed with a circuit court on this point. 2022 WL 14177251, at *3–5 (Wis. Ct. App. Oct. 25)

[16] https://perma.cc/C77E-E9LZ.
[17] https://perma.cc/Q6KX-CDN4.

(unpublished). Cases from other jurisdictions have likewise clashed over such technicalities. *Compare Nolan v. Sutton*, 647 N.E.2d 218, 220 (Oh. App. Ct. 1994) (finding "$40–cleaning" charge to be insufficiently itemized), *with Castillo-Cullather v. Pollack*, 685 N.E.2d 478, 485 (Ind. Ct. App. 1997), *abrogated on other grounds by Mitchell v. Mitchell*, 695 N.E.2d 920 (Ind. 1998) (finding $26 "general cleaning" charge to be sufficiently itemized). This confirms that this phrase contains no discernible standard. *See L. Cohen Grocery Co.*, 255 U.S. at 89–91.

Courts also struggle to define the term "claim." In the insurance context, parties frequently disagree and courts labor to discern whether something is a "claim." *See, e.g.*, *Lamberton v. Travelers Indem. Co.*, 325 A.2d 104, 106 (Del. Super. Ct. 1974), *aff'd*, 346 A.2d 167 (Del. 1975) ("claim" was an "[a]ssertion by a person injured"); *ProBuilders Specialty Ins. Co., RRG v. Yarbrough Plastering, Inc.*, 739 F. App'x 395, 396–97 (9th Cir. 2018) ("claim" was legal action filed against subcontractor, not original claims of injury by homeowners); *Atlas Underwriters, Ltd. v. Meredith-Burda, Inc.*, 343 S.E.2d 65, 68 (Va. 1986) (disagreeing with trial court on the meaning of the term "claim").

In all, the requirement to "describe each … claim" or "each item of physical damages" leaves landlords, courts, juries, and all others to simply "guess" as to whether any given description meets this standard, in violation of due process. *Coates*, 402 U.S. at 614; *Larson v. Burmaster*, 2006 WI App 142, ¶ 29, 295 Wis. 2d 333, 720 N.W.2d 134.

This court's decision in *State v. Lasecki*, 2020 WI App 36, 392 Wis. 2d 807, 946 N.W.2d 137, has no impact on this analysis. There, the court addressed a challenge to a different portion of the regulation—namely, the requirement to send a statement at all. *Id.* ¶¶ 17, 40. The

requirement to send a statement was, of course, clear in the law. *Id.* But the requirement to "describe each item of physical damages" and "claim" against the security deposit is not nearly as straightforward, and the *Lasecki* court offered no opinion as to that portion of the regulation. *See generally id.* ¶¶ 15–17, 40.

Nor is this court's unreasoned decision in *State v. LaPlant*, 204 Wis. 2d 412, 555 N.W.2d 389 (Ct. App. 1996), relevant here. There, the court considered a vagueness challenge to an entirely different regulation, Section ATCP 134.04. *Id.* at 422–23. The defendant challenged the phrases "good operating condition," "safe operating condition," "substantial hazard to health and safety," and "disclose." *Id.* The court asserted, without analysis, that "the ordinary meaning of these phrases" was sufficiently definite for fair notice and fair enforcement because, unlike the phrases challenged here, they permit a landlord to "determine[ ] when he or she is reaching [a general] zone of conduct proscribed." *Id.* at 423.

E. Section ATCP 134.09(2) Is Unconstitutionally Vague and Must Be Set Aside

Section ATCP 134.09(2) prohibits a landlord from "[e]nter[ing] a dwelling unit during tenancy except to inspect the premises, make repairs, or show the premises to prospective tenants or purchasers" and requires the landlord entering for such purposes to stay only for "the amount of time reasonably required" to carry out the specific task. Wis. Admin. Code § ATCP 134.09(2)(a)(1). Further, under this provision, no landlord may "[e]nter a dwelling unit during tenancy except upon advance notice and at reasonable times" (with advance notice defined as at least 12 hours). *Id.* § 134.09(2)(a)(2). The law provides exceptions

where a tenant has consented to or requested the landlord's entry, a "health or safety emergency exists," or if "[t]he tenant is absent and the landlord reasonably believes that entry is necessary to protect the premises from damage." *Id.* § 134.09(2)(b).

Section ATCP 134.09(2) would fail even under a more forgiving vagueness test. But, again, a landlord is subject to criminal penalties for violating Section ATCP 134.09(2), which contains no *mens rea* requirement and regulates conduct merely *malum in prohibitum*, and is thus subject to a "stringent" vagueness test. *Peoples Rights Org.*, 152 F.3d at 534; *Vill. of Hoffman Ests.*, 455 U.S. at 498–99. Several of the terms used in the regulation are unconstitutionally vague on their own and certainly unconstitutional in combination. *Johnson*, 576 U.S. at 602.

1. The word "repair" is unconstitutionally vague. While the regulation permits entry for a "repair[ ]," Wis. Admin. Code § ATCP 134.09(2)(a)1., the term is undefined in the regulations, *see* Wis. Admin. Code ch. ATCP 134, and is susceptible of different meanings. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 772–73. The dictionary defines "repair" as "to restore by replacing a party or putting together what is torn or broken," or "to restore to a sound or healthy state." *Repair*, Merriam-Webster.[18] Under the law, however, it is not clear whether replacing an item is the same as repairing it. In a closely related statute, the Legislature imposes upon landlords a duty to keep the premises "in a reasonable state of repair," to "[m]ake all necessary structural repairs," and to "repair or replace any plumbing, electrical wiring, machinery, or equipment furnished with the premises and no longer in reasonable

[18] https://perma.cc/GMS4-G3SM.

working condition." Wis. Stat. § 704.07(2); *see Reyes Fuerte*, 2017 WI 104, ¶¶ 26–27. That the statute separates the terms "repair" and "replace" sows confusion as to whether a replacement is a repair.

As evidence of this vagueness, courts and attorneys have struggled to determine when something is a "repair" and when something is a "replace[ment]." For example, during a summary-judgment hearing in a case alleging that a landlord impermissibly charged tenants for certain "repairs," the court and counsel engaged in an extended discussion of "the [statutory] meaning of repair and replacement," with the court describing this conversation as "going around in circles." Summ. J. Mot. Hr'g Tr. 37–42, *State of Wisconsin v. Wis. O'Connor Corp.*, No. 15-CX-0001 (Milwaukee Cnty. Cir. Ct. Feb. 7, 2017) (R.11, Ex. N). Confirming the ambiguity of the term "repair," DATCP required an Attorney General Opinion to determine whether cleaning can constitute a "repair." *See* OAG-04-13 (July 30, 2013).[19] This opinion, in turn, "disagree[d] with" an earlier opinion of an Assistant Attorney General on the subject. *Id.* ¶¶ 12, 18. That courts and the Wisconsin Department of Justice struggle to define the term "repair" and disagree over its application indicates that the term is insufficiently definite. *See L. Cohen Grocery Co.*, 255 U.S. at 89–91.

Additional problems are raised by the landlord's duty to "repair" and "replace" certain items. Wis. Stat. § 704.07(2). A landlord cannot avoid entering a dwelling unit—she is required by law to do so. *See id.* But when she enters, she opens herself up to potential criminal liability. *See* Wis. Stat. § 100.26(3). And because the law imposes strict liability,

[19] https://perma.cc/25R4-3PF3.

landlords who unintentionally violate Section 134.09(2) in their efforts to meet other legal obligations will not be able to defend themselves on the grounds that they reasonably believed they were discharging a legal duty. *See Stepniewski*, 105 Wis. 2d 261. This renders the vagueness of Section ATCP 134.09(2) even more offensive to notions of due process and fair play. *See Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut*, 2023 WL 171392, at *14 (D.N.H. Jan. 12, 2023) (ban's vagueness "problems [were] compounded" by the fact that teachers had "an affirmative duty to teach topics that potentially implicate several of the banned concepts").

DATCP may assert that the term "replace" as used in Wis. Stat. § 704.07 is surplusage and that no one could "reasonabl[y]" read Section ATCP 134.09(2) to prohibit "entering units to replace broken fixtures, appliances, and the like." *See* R.35:36. But statutes in Wisconsin are read to *avoid* surplusage. *Kalal*, 2004 WI 58, ¶ 46. More to it, the State's argument here contradicts its position in *State v. Wis. O'Connor Corp.*, where it insisted that "[y]ou do not 'repair' the fixture by replacing it. That's replacement." State's Reply in Support of Summary Judgment, *State of Wisconsin v. Wis. O'Connor Corp.*, No. 15-CX-0001, at 3 (Milwaukee Cnty. Cir. Ct. Jan. 23, 2017). And that was not the first time that DOJ has taken inconsistent positions on the meaning of "repair." *See* OAG-04-13, ¶¶ 12–18 (July 30, 2013).[20] The rule's enforcers cannot even agree on its meaning.

2. The term "inspect" is equally vague. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 127 F. Supp. 2d 243, 247 (D.D.C. 2001) (the term "inspection" is "*absolutely* ambiguous"), *aff'd sub nom.*, 284 F.3d 125

[20] https://perma.cc/25R4-3PF3.

(D.C. Cir. 2002). A landlord may enter to "inspect the premises," Wis. Admin. Code § ATCP 134.09(2)(a)1., but "inspect" is not defined. *See generally* Wis. Admin. Code ch. ATCP 134. And it is a term susceptible of different meanings. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 772–73. Indeed, dictionaries provide "numerous" and "varied" meanings. *Lanzetta*, 306 U.S. at 453–55; *see, e.g.*, *Inspect*, Merriam-Webster ("to view closely in critical appraisal," "look over," "to examine officially");[21] *Inspect*, Cambridge Dictionary ("to look at something carefully in order to check its quality or condition," "to officially visit a building or organization in order to check that everything is correct and legal");[22] *see People v. Bailey*, 903 N.E.2d 409, 413 (Ill. 2009) (dictionaries and "various intrinsic aids to construction … do not resolve" the meaning of "inspect" but "instead, only add ambiguity"). Hence "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Larson*, 2006 WI App 142, ¶ 29 (citation omitted). For example, must a landlord have an express or "apparent purpose" when looking at the dwelling to be considered an "inspect[ion]"? *See Morales*, 527 U.S. at 57. Does the "inspect[ion]" need to be "official" in some way? If so, what does that even mean? Or is *any* entry an inspection, so long as the landlord is not blindfolded and therefore cannot help but "look over" some part of the unit?

Industry guidance is again unhelpful. Legal Action of Wisconsin maintains that an inspection is something more official, calling them "health/building inspections." *Tenant Sourcebook* at 20, Legal Action of

[21] https://perma.cc/K927-RLS5.
[22] https://perma.cc/UP4D-VK7S.

Wisconsin,[23] (R. 11, Ex. L). And "guidance" from DATCP adds nothing, simply repeating its rule that a landlord may enter to "[i]nspect the premises." *Landlord Tenant Guide*, *supra*.

3. The term "health or safety emergency" is impermissibly vague. While the regulation allows entry if "a health or safety emergency exists," Wis. Admin. Code § ATCP 134.09(2), this term is, again, not defined. *See generally* Wis. Admin. Code ch. ATCP 134. Dictionary definitions are likewise unhelpful, as they leave the term up to subjective interpretation. *See Emergency*, Merriam-Webster ("an unforeseen combination of circumstances or the resulting state that calls for immediate action");[24] *Williams*, 553 U.S. at 306 (words requiring "wholly subjective judgments" are unlawfully vague). What constitutes an "emergency" to one person may not constitute an "emergency" to others. *See Coates*, 402 U.S. at 614. Or, the landlord might lack perfect information. She might enter after being told of smoke under a front door only to discover that the tenant is smoking a cigar.

Courts have long strained to define an "emergency." For example, in *Mueller v. McMillian Warner Insurance Co.*, this court and the circuit court disagreed as to what constituted "emergency care" under the Good Samaritan Law. 2005 WI App. 210, ¶¶ 23–35, 287 Wis. 2d 154, 704 N.W.2d 613. The Wisconsin Supreme Court similarly struggled to create a clear definition, instead "attempt[ing] to provide a flexible, broad working definition." *Mueller v. McMillian Warner Ins. Co.*, 2006 WI 54, ¶¶ 36–46, 290 Wis. 2d 571, 714 N.W.2d 183. The exigency doctrine of the Fourth Amendment is another area in which courts struggle to define

[23] https://perma.cc/LEA8-LKNA.
[24] https://perma.cc/R86L-7JR5.

what is an "emergency" or "exigency." *See State v. Kraimer*, 99 Wis. 2d 306, 316, 298 N.W.2d 568 (1980).

LaPlant does not favor DATCP here. *LaPlant* upheld the term "substantial hazard to health and safety," 204 Wis. 2d 412, but that term is not akin to the "health or safety emergency" used in Section ATCP 134.09(2). More, the terms are used in different regulations: the rule challenged in *LaPlant* involved a landlord's duty to disclose information *known to her*, Wis. Admin. Code § ATCP 134.04(2), while Section ATCP 134.09(2) requires a landlord to make decisions based on imperfect information.

4. At the very least, Section ATCP 134.09(2) is unconstitutionally vague when all these indefinite terms and phrases are read in combination. Again, the law imposes a duty on a landlord to "repair or replace" certain items. Wis. Stat. § 704.07(2). But a landlord cannot know whether replacing anything is allowed as a "repair" under the regulation. And if there is a problem reported, the landlord does not know whether she can enter to "inspect" the premises. Even if she knew whether she could enter, she has no measure by which to determine what length of time is "reasonably required" to remain in the premises. And while she may be able to enter and stay regardless, this is true only if "a health or safety emergency exists," which she has no way of knowing, as this is a subjective determination. Or she may believe that entry is "necessary" to prevent damage to the premises, but someone else might believe differently. How can she judge if her belief is "reasonable"? In combination, these myriad vague and ambiguous terms call for "guesswork" about whether entry, even when required by law, is forbidden by Section ATCP 134.09(2). *Johnson*, 576 U.S. at 602.

5. The circuit court again agreed that, under the proper standard—*Johnson*—this regulation is void for vagueness. App.73. The circuit court identified the same three reasons for why *Johnson* should apply to this scenario. *See* App.73–76.

CONCLUSION

This Court should reverse the decision of the circuit court and remand with instructions to grant judgment in favor of Landlords.

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 10,992 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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