STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2024AP1176

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

RESPONDENTS' BRIEF

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INTRODUCTION

Appellants seek to invalidate two sets of regulations promulgated by the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) that have long structured the landlord-tenant relationship in Wisconsin. None of their claims succeed, as the circuit court properly recognized.

First, Appellants challenge DATCP's statutory authority to promulgate Wis. Admin. Code ATCP § 134.08, which bars provisions in lease agreements that, for instance, allow landlords to shift their legal costs to tenants. That argument is foreclosed by case law and statute, both of which make clear that this regulation fell well within DATCP's express authority.

Second, Appellants launch a series of due process vagueness challenges to other DATCP regulations, seeking to facially invalidate them all. But the challenged regulations are common nationwide and reflect basic principles that have long governed the landlord-tenant relationship. Practically all states apportion liability between landlords and tenants for property damage using familiar "wear-and-tear" language; practically all require landlords to describe why they withhold part of a tenant's security deposit; and practically all restrict when and why landlords can enter their tenants' units.

Yet despite these provisions' ubiquity, Appellants cannot identify even a single case invalidating one on vagueness grounds. That is unsurprising, since all these phrases have clear enough meanings that landlords and tenants have long applied.

Lacking case law support for their ambitious claims, they offer imaginative scenarios where the law might seem ambiguous. But "speculation about possible vagueness in hypothetical situations . . . will not support a facial attack on a statute when it is surely valid 'in the vast majority of its

intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation omitted). Moreover, as the U.S. Supreme Court has observed, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). So, a "fertile legal 'imagination can [always] conjure up hypothetical cases" that raise doubt on the margins of otherwise clear provisions. *Id.* at 110 n.15. But due process "does not demand that the line between lawful and unlawful conduct be drawn with absolute clarity and precision." *State v. Courtney*, 74 Wis. 2d 705, 710, 247 N.W.2d 714 (1976). Rather, "[a] fair degree of definiteness is all that is required." *Id.* (citation omitted).

And Appellants' "disfavored" facial challenge flops at the starting gate because they do not even try to satisfy Wisconsin's strict standard for such challenges: that the provisions "cannot be constitutionally enforced 'under any circumstances.'" *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 43, 393 Wis. 2d 38, 946 N.W.2d 35 ("*SEIU*"). Appellants try to wiggle out of that "not optional" test, *id.*, by citing federal cases, but those cases do not trump Wisconsin's approach to adjudicating facial vagueness challenges to state law.

And even if Appellants could show facial vagueness, they rely almost entirely on the strictest standard applied to laws enforced through strict liability criminal prosecutions. But the provisions here are virtually always enforced civilly, not criminally, and even Appellants acknowledge that civil enforcement can rest on less precise language. Appellants offer no good reason to throw out all civil enforcement, just because a hypothetical strict liability criminal prosecution might be problematic.

ISSUES PRESENTED

1. Did DATCP have express statutory authority to promulgate Wis. Admin. Code ATCP § 134.08?

The circuit court answered yes, and this Court should affirm.

2. Do Wis. Admin. Code ATCP §§ 134.06(3), (4)(a) and 134.09(2) survive facial vagueness challenges under the Wisconsin and U.S. Constitutions?

The circuit court answered yes, and this Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondents agree that publication and oral argument could be useful here.

STATEMENT OF THE CASE

DATCP has promulgated various landlord-tenant regulations in Wis. Admin. Code ATCP ch. 134, four of which are relevant.

First, Wis. Admin. Code ATCP § 134.08 provides that "a rental agreement is void and unenforceable if it" contains enumerated prohibited provisions related to, for instance, evictions and liability for property damage.

Second, Wis. Admin. Code ATCP § 134.06(3) allows a landlord to withhold from a tenant's security deposit "amounts reasonably necessary to pay for . . . tenant damage, waste, or neglect of the premises," which does not include "normal wear and tear, or . . . other damages or losses for which the tenant cannot reasonably be held responsible under applicable law." Wis. Admin. Code ATCP § 134.06(3)(a)(1), (c).

Third, Wis. Admin. Code ATCP § 134.06(4)(a) requires a landlord, when they withhold part of a tenant's security deposit, to describe in a "written statement" the specific "items" and "claims" for which each amount is withheld. Wis. Admin. Code ATCP § 134.06(4)(a).

Fourth, Wis. Admin. Code ATCP § 134.09(2) allows tenants to enter dwellings, among other reasons, "to inspect the premises, make repairs" or if "a health or safety emergency exists." ATCP § 134.09(2)(a)1., (2)(b)(2).

Appellants contend that the first provision exceeds DATCP's authority under Wis. Stat. § 100.20. (App. Br. 16–20.) And they facially challenge the latter three as unconstitutionally vague under the due process clauses of the state and federal constitutions. (App. Br. 20–43.)

The circuit court granted summary judgment to DATCP on each claim. (A-App. 85.) It held that Appellants' vagueness claims "cannot survive the all applications test" for facial challenges. (A-App. 72.) And it held that Wis. Stat. § 100.20 empowered DATCP "to promulgate a regulation declaring certain contracts and terms to be void and unenforceable." (A-App. 77.)

This appeal followed.

STANDARD OF REVIEW

Appellants accurately state the applicable standard of review. (App. Br. 15.)

ARGUMENT

I. DATCP had express statutory authority to promulgate Wis. Admin. Code ATCP § 134.08.

The Legislature has long granted DATCP broad authority to promulgate administrative rules under Wis. Stat. § 100.20. That statute expressly authorizes DATCP to "issue

general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair." Wis. Stat. § 100.20(2)(a).

One such rule is Wis. Admin. Code ATCP § 134.08 ("section 134.08"). It provides that "a rental agreement is void and unenforceable if it does any of the following," and then lists various prohibited terms. Barred terms include, for example, requiring tenants to pay the landlord's attorney fees arising from a rental dispute (subsection (4)) or authorizing the landlord to exclude a tenant from the premises without following ordinary eviction procedures (subsection (3)).

Appellants contend that section 134.08 exceeds DATCP's authority under Wis. Stat. § 100.20 because the rule does not "prohibit conduct": in their view, the rule simply "declare[s] a consequence"—that rental agreements are void under certain circumstances—rather than "forbid[ding] parties from entering one." (App. Br. 16–20.)

This semantic argument fails for two independent reasons, one resting on case law and the other on statute.

A. *Baierl* forecloses Appellants' argument.

Appellants' position that section 134.08 does not prohibit conduct is foreclosed by *Baierl v. McTaggart*, 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277. That case involved a residential lease purporting to obligate the tenant to reimburse the landlord's attorney fees, a provision barred by section 134.08. *Id.* ¶¶ 1, 4. Although the primary issue concerned whether the lease was enforceable despite the invalid provision, the court also addressed the precise issue raised here and resolved it in DATCP's favor.

In analyzing section 134.08's language to determine the "nature of the regulatory prohibition," *Baierl* observed that "the prohibited act is the inclusion of a clause claiming to obligate the tenant to reimburse the landlord's costs and

attorneys fees." *Id.* ¶ 22. In other words, the rule covered conduct: the "prohibited act" of including in a lease a term barred by section 134.08.

And *Baierl* bolstered this conclusion by also considering "[t]he language of the enabling statute, Wis. Stat. § 100.20," which "also provides insight into the nature of the prohibition in [section 134.08]." *Id.* ¶ 23. The statute "generally prohibits '[u]nfair methods of competition and unfair trade practices in business,'" and the court observed that DATCP "promulgat[es] rules, such as § ATCP 134.08, to proscribe specific unfair trade practices." *Id.* So, "not only is the inclusion of the provision at issue a prohibited act under [section 134.08], but it is also properly denominated an unfair trade practice." *Id.*

In short, *Baierl* left no doubt that section 134.08 is a valid regulation that bars a type of prohibited conduct under Wis. Stat. § 100.20.

Appellants respond that *Baierl* is irrelevant because it addressed an "earlier and materially different version of Section ACTP 134.08." (App. Br. 20.) But Section 134.08 was not meaningfully different when *Baierl* was decided, at least as to this "conduct" issue. Then, its introductory clause read "no rental agreement may," before listing prohibited provisions. *Baierl*, 245 Wis. 2d 632, ¶ 4. Now it instead says "a rental agreement is void and unenforceable if it does any of the following," before listing the exact same prohibited provisions. Wis. Admin. Code ATCP § 134.08.

Neither version is phrased in terms of what landlords "shall" or "shall not" do, which is apparently what Appellants think is required to yield a valid rule under Wis. Stat. § 100.20 (App. Br. 16–17.) *Baierl* had no difficulty in finding that the prior version of section 134.08 barred conduct under Wis. Stat. § 100.20. The same must be true for the current version, which is not meaningfully different.

Appellants' only theory that section 134.08's prior version was materially different concerns an entirely different issue: whether prohibited provisions are severable or instead void the entire lease. To be sure, the prior version was "ambiguous" on this point, as *Baierl* observed, and the new version eliminated this ambiguity. 245 Wis. 2d 632, ¶ 24. But that is a distinction without a difference here. Both versions include the same "conduct" phrasing. Section 134.08 has never referred to what landlords "shall" or "shall not" do, and so *Baierl*'s observation that the rule falls within Wis. Stat. § 100.20 still controls today.

B. Wisconsin Stat. §§ 704.44 and 704.95 also expressly authorized DATCP to promulgate Section 134.08.

Even if *Baierl* did not foreclose Appellants' theory, two statutes would: Wis. Stat. §§ 704.44 and 704.95.

Wisconsin Stat. § 704.95 provides that "[p]ractices in violation of s. . . . 704.44 may also constitute unfair methods of competition or unfair trade practices under s. 100.20."

In turn, Wis. Stat. § 704.44 exactly mimics the language of section 134.08. Both are titled "Residential rental agreement that contains certain provisions is void," both begin with the same introductory clause—"a residential rental agreement is void and unenforceable if it does any of the following"—and both bar the same lease terms. *Compare* Wis. Stat. § 704.44, *with* Wis. Admin. Code ATCP § 134.08. Not a single word differs between the two provisions.

The import of these two statutes could not be clearer. Under Wis. Stat. § 704.95, violations of Wis. Stat. § 704.44 "constitute unfair methods of competition or unfair trade practices under [Wis. Stat.§] 100.20." Section 134.08 matches Wis. Stat. § 704.44, and so violations of Section 134.08 also "constitute unfair methods of competition or unfair trade practices under [Wis. Stat.§] 100.20." Therefore, Wis. Stat.

§ 100.20 expressly authorized DATCP to promulgate Section 134.08.

None of Appellants' responses persuasively deal with these two statutes.

Appellants concede that Wis. Stat. § 704.44 and Section 134.08 are identical, but they contend that "this says nothing about whether Section 100.20 grants DATCP the authority to declare contracts void and unenforceable." (App. Br. 19.) That might be true in a vacuum, but it ignores Wis. Stat. § 704.95. Again, that statute expressly recognizes that "[p]ractices in violation of . . . [Wis. Stat. §] 704.44" are "unfair methods of competition or unfair trade practices under [Wis. Stat. §] 100.20." This means that Section 134.08—which mimics Wis. Stat. § 704.44—also bars "unfair methods of competition or unfair trade practices under [Wis. Stat. §] 100.20."

Appellants' attempt to wave away Wis. Stat. § 704.95 is difficult to decipher. (App. Br. 19–20.) They seem to say that even though "practices in violation" of Wis. Stat. § 704.44 fall within Wis. Stat. § 100.20, section 134.08 somehow does not cover such "practices." That makes no sense, given how Wis. Stat. § 704.44 and section 134.08 cover the exact same "practices": adding prohibited terms to leases.

Appellants' other arguments rely on irrelevant statutes and concepts. They point to Wis. Stat. §§ 100.202 and 100.22(2) as examples of statutes that expressly void contracts in contrast to Wis. Stat. § 100.20 (App. Br. 18), but that is irrelevant: Wis. Stat. § 704.95 does the work of defining provisions like Section 134.08 as barring unfair trade practices under Wis. Stat. § 100.20. And Appellants' musings about "implicit" rulemaking authority are equally irrelevant (App. Br. 19), as DATCP has explicit authority here under all the statutes discussed above. Nor is there any ambiguity that requires interpreting Wis. Stat. § 100.20 narrowly (App. Br. 18–19), given both *Baierl* and these chapter 704 statutes.

II. The challenged provisions in Wis. Admin. Code ATCP §§ 134.06 and 134.09 are not unconstitutionally vague on their face.

Appellants do not even try to show that the challenged provisions in ATCP ch. 134 "operate[ ] unconstitutionally in all applications," and so their facial vagueness claims fail for that reason alone. *SEIU*, 2020 WI 67, ¶ 38. *SEIU* binds this Court, despite Appellants' efforts to import inapplicable federal standards.

And even if a more lenient facial challenge standard applied, Appellants have not met it. These provisions are all sufficiently definite. At worst, Appellants have identified a problem only with enforcing them through strict liability criminal prosecutions; any remedy should be limited to such applications.

A. Appellants cannot show that the challenged provisions are vague in every application.

1. Facial challenges generally must show invalidity in every application.

Challenges to the constitutionality of a statute or administrative regulation generally come in two flavors: facial and as applied. *SEIU*, 2020 WI 67, ¶ 37.

"As-applied challenges address a specific application of the statute against the challenging party." *Id.* In such cases, "the reviewing court considers the facts of the particular case in front of it to determine whether the challenging party has shown that the constitution was actually violated by the way the law was applied in that situation." *Id.* By contrast, in a facial challenge "the challenging party claims that the law is unconstitutional on its face—that is, it operates unconstitutionally in all applications." *Id.* ¶ 38. The supreme court has "repeatedly reaffirmed that to successfully challenge a law on its face, the challenging party must show

that the statute cannot be enforced 'under any circumstances.'" *Id.* (citation omitted).

A claim of facial invalidity therefore imposes an extremely heavy burden on challengers. "Proving a legislative enactment cannot ever be enforced constitutionally 'is the most difficult of constitutional challenges' and an 'uphill endeavor.'" *Id.* ¶ 39. Such claims are "disfavored" because they raise a significant "risk of judicial overreach," in that they "often rest on speculation about what might occur in the future" and "call[ ] on courts to interpret statutes prematurely and decide legal questions before they must be decided." *Id.* ¶ 40. That can lead courts to "overstep" their judicial role by "strik[ing] down a legislative enactment with constitutional applications." *Id.* ¶ 42. Therefore, the rule that a facial challenge must show invalidity in every application "has not been a principle selectively applied; it is not optional." *Id.* ¶ 43.

Appellants do not even try to satisfy this strict standard—nor could they. Countless constitutional applications of the challenged regulations are plain as day. To take just one hypothetical, lawful example for each:

- ATCP § 134.06(3): A landlord withheld money from a tenant's security deposit to repair tenant "damage" in the form of burn marks on the wall caused by a grease fire the tenant started on his stove in the kitchen. Despite prompt repairs, the tenant moved out a month early without paying the remaining rent, and so the landlord also withheld this "unpaid rent for which the tenant [was] legally responsible." The landlord did not, however, withhold any money to repair "wear and tear" to 15-year-old carpet that had worn down around the front door, a high-traffic area.
- ATCP § 134.06(4): The landlord sent the tenant a "written statement" about the security deposit

withholding; it contained "items" stating that a specific amount was withheld for "kitchen wall repair" and another specific amount was withheld for "unpaid last month's rent."

- ATCP § 134.09(2): The landlord perceived a "safety emergency" and believed that entry was "necessary to protect the premises from damage" when she saw smoke coming out of the tenant's window and entered the unit without advance notice to put out the grease fire. Later, the landlord gave advance notice to the tenant and entered the unit to "inspect" the damage and "repair" the kitchen wall.

One could craft countless more clear scenarios like these. Because the burden rests on Appellants to show invalidity in *every* conceivable application, their facial challenge fails.

2. A more lenient standard does not apply here.

Realizing they cannot show invalidity in every application, Appellants instead assert that this "not optional" test, *SEIU*, 2020 WI 67, ¶ 43, is nevertheless optional in the vagueness context. But it is not, as our supreme court confirmed in *State v. Wood*, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63. *Wood* observed that "when a court reviews a facial vagueness challenge, provided it does not implicate protected conduct, a court upholds 'the challenge only if the enactment is impermissibly vague in all of its applications.'" *Id.* ¶ 44 n.15.

To be sure, *SEIU* did acknowledge a "very limited" exception to this general rule, but not for vagueness challenges, as Appellants assert. (App. Br. 27–28.) Rather, *SEIU* observed an exception for "facial challenges premised on general *claims of statutory overbreadth*." *SEIU*, 2020 WI 67, ¶ 43 n.14 (emphasis added). Appellants raise

vagueness claims here, not overbreadth ones. These "two concepts are distinct." *State v. Starks,* 51 Wis. 2d 256, 263, 186 N.W.2d 245 (1971). And the only Wisconsin case *SEIU* cited, *State v. Konrath*, 218 Wis. 2d 290, 305, 577 N.W.2d 601 (1998), noted only an "overbreadth" exception for First Amendment claims, which are not presented here.[1]

The only other Wisconsin cases on which Appellants rely predate *Wood* and *SEIU*: *State v. Popanz*, 112 Wis. 2d 166, 177, 332 N.W.2d 750 (1983), and *Starks*, 51 Wis. 2d 256. (App. Br. 26–27.) Neither case expressly addressed how to resolve facial challenges on vagueness grounds, and, in any case, *Wood* and *SEIU* supersede them. As the circuit court observed, "more recent authority makes clear that it"—that is, the "all applications test for facial challenges"—"is still the law and [the court is] bound to apply it." (A-App. 72.)

Appellants respond that *SEIU* did not expressly overrule *Starks* and *Popanz* (App. Br. 28), which is true but irrelevant. To the extent a conflict exists between the more recent supreme court decision and its earlier ones, Appellants offer no authority for the proposition that the earlier ones can somehow still control.

In short, the binding Wisconsin precedent in *SEIU* and *Wood* is clear: vagueness challenges must satisfy the strict "invalid in every application" standard.

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[1] The only basis Appellants offer for extending this "very limited" exception for "overbreadth" challenges to vagueness challenges is a citation within a citation. *SEIU* cited *Sabri v. United States*, 541 U.S. 600, 609 (2004), which itself cited *City of Chicago v. Morales*, 527 U.S. 41 (1999), a vagueness case. But *Sabri* only cited *Morales* for the proposition that facial challenges "invite judgments on fact-poor records" and "relax[ ] familiar requirements of standing." *Sabri*, 541 U.S. at 609.

Lacking support in Wisconsin case law, Appellants turn to federal cases that do not bind this Court, primarily *Johnson v. United States*, 576 U.S. 591, 602 (2015). There, the U.S. Supreme Court relaxed the standard for a facial vagueness challenge to a "sui generis" so-called "residual clause" in a federal criminal statute. *United States v. Cook*, 970 F.3d 866, 876 (7th Cir. 2020) (describing holding in *Johnson*). As the Seventh Circuit has recognized, given *Johnson*'s unique context, it is "not clear how much *Johnson* . . . actually expand[ed] the universe of litigants who may mount a facial challenge to a statute they believe is vague." *Id.* In a "routine vagueness challenge that highlights some imprecision in the statutory language and posits uncertainty as to whether the statute might apply to certain hypothetical facts"—which precisely describes Appellants' claims here—*Johnson* did not change the "invalid in every application" rule. *Id.*[2]

And even if *Johnson* did change the federal rule, that would not matter to this state case. Most obviously, this Court must still follow state precedent—*SEIU* and *Wood*—in resolving Appellants' state due process claims under Wis. Const. art. I § 1. *See State v. Gary M.B.*, 2003 WI App 72, ¶ 11, 261 Wis. 2d 811, 661 N.W.2d 435 ("Holdings of the United States Supreme Court are binding on this court only when they address questions of federal law which govern the dispute before us."). Indeed, even after *Johnson*, Wisconsin courts continue to apply the traditional rule in vagueness cases.[3]

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[2] *See also United States v. Hasson*, 26 F.4th 610, 620 (4th Cir. 2022) (holding that *Johnson* did not change the rule for "routine vagueness challenge[s]); *United States v. Requena*, 980 F.3d 30, 41–43 (2d Cir. 2020) (distinguishing *Johnson* on similar grounds).

[3] *See, e.g.*, *State v. Hibbard*, 2022 WI App 53, ¶ 27, 404 Wis. 2d 668, 982 N.W.2d 105 ("[V]agueness challenges which

Nor could *Johnson* save Appellants' federal due process claims. Appellants tersely assert that "*Johnson*, which is a federal due process holding, controls" (App. Br. 27), but that oversimplifies the matter. Appellants are right only if the federal standard for a facial vagueness claim governs challenges to state law in state courts resting on federal law.

And it does not, as shown by one of the federal cases on which Appellants repeatedly rely: *City of Chicago v. Morales*, 527 U.S. 41 (1999). There, criminal defendants in state court facially challenged a municipal loitering ordinance on federal due process grounds. *Id.* at 45. In affirming the Illinois Supreme Court's decision striking down the ordinance as unconstitutionally vague, one major point of dispute among the Justices involved what standard to use for the facial challenge. The *Morales* plurality (like the Illinois Supreme Court) applied a relatively lenient test that simply examined whether "vagueness permeat[ed] the text" of the ordinance, much like the test Appellants offer. *Morales*, 527 U.S. at 55. In dissent, Justice Scalia advocated instead for the strict facial challenge standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987), which (like *SEIU*) requires a showing "that no set of circumstances exists under which the [challenged law] would be valid." *Morales*, 527 U.S. at 77–83 (Scalia, J., dissenting).

Critically, the plurality reasoned that it—and, by extension, the Illinois Supreme Court—could dodge *Salerno*'s stricter standard because that case would not bind state

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do not involve [F]irst [A]mendment freedoms must be examined in light of the facts of the case at hand." (alterations in original) (citation omitted)); *State v. Barrett*, 2020 WI App 13, ¶ 26, 391 Wis. 2d 283, 941 N.W.2d 866 ("[I]f the alleged conduct of a defendant plainly falls within the prohibition of the statute, the defendant may not base a constitutional vagueness challenge on hypothetical facts, unless a First Amendment right is at issue." (citation omitted)).

courts. *Id.* at 55 n.22. That is because "the threshold for facial challenges is a species of third party . . . standing, which [the U.S. Supreme Court] [has] recognized as a prudential doctrine and not one mandated by Article III of the Constitution." *Id.* And since "state courts need not apply prudential notions of standing created by [the U.S. Supreme Court]," the "assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law" and "contradicts 'essential principles of federalism.'" *Id.* (citation omitted).[4]

Appellants make the same mistaken "assumption" here that Justice Scalia made in *Morales*: that state courts *must* apply a federal facial challenge standard to a federal due process claim. Just as *Salerno*'s strict facial challenge standard did not bind the Illinois Supreme Court in *Morales*, so too *Johnson*'s more lenient standard does not bind this Court here. And because a federal standard does not control, Wisconsin's state standard necessarily does. That leads Appellants right back into *SEIU* and *Wood*'s roadblock.

B. Even if Appellants did not need to show vagueness in every application, their challenge still would fail.

Appellants' challenges would still fail, even under a more lenient facial challenge standard.

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[4] *See also Com. v. Ickes*, 873 A.2d 698, 702 (Pa. 2005) ("The *Salerno* test . . . is not controlling for state courts.") (citing *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999)); *State v. Burke*, 360 P.3d 118, 121 n.2 (Ariz. Ct. App. 2015) (applying strict state facial challenge standard to federal due process claim rather than *Morales*' more lenient standard because states are "free to adopt a different test to determine facial invalidity for vagueness"); *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir. 2001) ("[T]he rule allowing facial challenges is a prudential doctrine, not a personal constitutional right.") (citing *Morales*, 527 U.S. at 55 n.22).

A provision challenged on vagueness grounds is presumed to be constitutional. *State v. Hibbard*, 2022 WI App 53, ¶ 23, 404 Wis. 2d 668, 982 N.W.2d 105. Appellants must show that the challenged provisions are unconstitutionally vague beyond any reasonable doubt. *State v. Grandberry*, 2018 WI 29, ¶ 12, 380 Wis. 2d 541, 910 N.W.2d 214. Courts therefore review provisions "with an eye towards preserving [their] constitutionality" and will reject vagueness challenges "if any reasonable and practical construction can be given its language." *Hibbard*, 2022 WI App 53, ¶ 23 (citation omitted).

Some degree of vagueness and indefiniteness is inherent in all statutes. *See Grayned*, 408 U.S. at 110. If prohibited absolutely, "nearly all penal statutes would be void." *State v. Neumann*, 2013 WI 58, ¶ 34, 348 Wis. 2d 455, 832 N.W.2d 560. So, a statute "need not define with absolute clarity and precision what is and is not unlawful conduct." *Id.* "Hazy" boundaries between prohibited and acceptable conduct are permitted. *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 33, 426 N.W.2d 329 (1988). Similarly, "[a] statute is not void for vagueness merely because its applicability may be uncertain in some situations." *Hibbard*, 2022 WI App 53, ¶ 24 (citation omitted).

At bottom, a "fair degree of definiteness is all that is required." *Neumann*, 2013 WI 58, ¶ 34. A regulated individual must simply be "able to discern when they are approaching the zone of proscribed conduct." *State v. LaPlant*, 204 Wis. 2d 412, 423, 555 N.W.2d 389 (Ct. App. 1996). It therefore does not matter whether there are differing reasonable views about a statute's meaning, whether these questions must be resolved by the courts, or even whether courts interpret the statute differently. *See State v. Hahn*, 221 Wis. 2d 670, 586 N.W.2d 5 (Ct. App. 1998). If a practical or sensible meaning can be ascertained through the ordinary process of statutory

construction and examining words' common meanings, even a criminal statute is not void for vagueness. *Id.* at 677–78.

The vagueness doctrine generally employs an "ordinary person" standard. See *id.* at 679. In this context—a challenge to landlord-tenant provisions—the question becomes whether "a reasonably prudent landlord" would "be able to understand, by reviewing the relevant statutes and administrative code provisions," what is prohibited. *State v. Lasecki*, 2020 WI App 36, ¶ 14, 392 Wis. 2d 807, 946 N.W.2d 137. The landlord-tenant industry is highly regulated, and individuals choosing to be landlords are expected to consult the laws and understand them. *Id.* ¶ 39.

The degree of vagueness that is constitutionally permitted depends on the type of statute at issue. *See Vill. of Hoffman Ests.v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The strictest vagueness test applies to strict-liability criminal statutes. *Cook*, 970 F.3d at 873. In contrast, civil statutes are held to a less strict standard because the penalties are less severe. *Vill. of Hoffman Ests.,* 455 U.S. at 499. Similarly, economic and business-related statutes, even those carrying criminal penalties, are subject to a lenient vagueness test. *Id.* at 498.

For the sake of argument, DATCP will assume that a relatively strict level of review applies, even though these provisions are enforced almost exclusively civilly.

1. ATCP § 134.06(3) is sufficiently clear.

In ATCP § 134.06(3)(a)1. and (c), Appellants contend that the phrases "normal wear and tear," "tenant damage, waste, or neglect," and "responsible under applicable law" are unconstitutionally vague. They also challenge the term "legally responsible" in ATCP § 134.06(3)(a)2., which allows landlords to withhold "[u]npaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats."

None of these challenges succeed. First and foremost, the court of appeals in *Lasecki* indicated that ATCP § 134.06 has a plain, understandable meaning. *Lasecki* noted how the provision has "since 1980, required a landlord to return a security deposit to a tenant . . . subject to certain authorized withholdings for tenant-related expenses, including rent and property damages." 2020 WI App 36, ¶ 22. Then, while rejecting a similar due process challenge, the court explained that "a reasonably prudent landlord would be able to locate [this] provision[ ] and understand [its] meaning[ ], which [is] plain." *Id* ¶ 40. True, as Appellants note, *Lasecki* did not specifically involve subsection (3) (App. Br. 42), but the decision described *all* ATCP § 134.06 as having a "plain" meaning.

Even if *Lasecki* left any room for Appellants' theory, each of the challenged phrases survives scrutiny because they all provide a "fair degree of definiteness" about the conduct they cover. *Neumann*, 2013 WI 58, ¶ 34.

a. "Wear and tear."

Appellants' position that the term "wear and tear" is unconstitutionally vague would come as news to the landlord-tenant bar nationwide. Most states—if not all—have virtually identical rules for withholding security deposits based on property damage, most of which use the same "wear and tear" language.[5] Even the Uniform Residential Landlord and Tenant Act (URLTA)—a version of which has been adopted in 19 states—provides that tenants are not responsible for "normal wear and tear." URLTA § 501(b)(11)(A) (R-App 147).

The universal "wear-and-tear" rule embodies a concept long found in the common law: that tenants are responsible

[5] *See, e.g.*, Ill. Comp. Stat. ch. 765, § 710/1; Minn. Stat. § 504B.178.3(2)(b)(2); Mich. Comp. Stat. § 554.607(7); Iowa Stat. § 562A.12.3.a.(2); Indiana Code § 32-31-3-13.

only for property damage above and beyond that caused by ordinary use. Nearly 150 years ago, the U.S. Supreme Court recognized that "in every lease there is, unless excluded . . . , an implied obligation on the part of the lessee to so use the property as not unnecessarily to injur[e] it," such that the property "'may revert to the lessor undeteriorated by the wil[l]ful or negligent conduct of the lessee.'" *United States v. Bostwick*, 94 U.S. 53, 65–66 (1876) (citation omitted). Where tenants have the "free and unrestricted right to use the property for any and all purposes . . . [w]hatever damages would necessarily result from a use for the same purpose by a good tenant must fall upon the lessor." *Id.* at 66. This is not a tenant obligation to "repair generally, but to so use the property as to make repairs unnecessary, as far as possible," or, in other words "a covenant against voluntary waste." *Id.* at 68.

Our supreme court has recognized the same principle. In *Finnegan v. McGavock*, 230 Wis. 112, 283 N.W. 321 (1939), the court explained the "normal and proper construction" of the rule exempting tenants for wear-and-tear liability as such:

> [T]he tenant's duty of surrender should be considered to have been discharged when the property redelivered to the lessor has been subjected to ordinary use and given ordinary care by the tenant, and that all other risks which may result in surrender of the property in impaired physical condition should properly be borne by the lessor.

Id. at 324.

The supreme court also considered the term "ordinary wear and tear" in *Lindsay Bros. v. Milwaukee Cold Storage Co.*, 58 Wis. 2d 658, 207 N.W.2d 639 (1973). Generally, it noted that the term entails a "[tenant] duty of . . . ordinary care and that only such items of damages that resulted from the lessee's lack of ordinary care were to be excepted from the

reasonable wear and tear exoneration otherwise afforded to the lessee." *Id.* at 664. It went on to explain:

> The exception of ordinary wear and tear contemplates that deterioration will occur by reason of time and use despite ordinary care for its preservation . . . . A tenant is not required to renovate the premises at the expiration of his lease; a covenant to repair should be reasonably interpreted to avoid placing any unwarranted burden of improvement of the lessor's premises on the lessee.

Id. at 664–65 (citation omitted).

Prominent landlord-tenant treatises recognize this same concept using "wear-and-tear" language. *See, e.g.*, 49 Am. Jur. 2d Landlord and Tenant § 713 ("A common exception to a lessee's covenant to keep or maintain premises in repair or to redeliver the premises in a certain condition is *an exception for reasonable wear and tear, or ordinary wear and tear*." (emphasis added)) (R-App 122); 10 A.L.R.2d 1012 § 2[a] (similar) (R-App 105); 52 C.J.S. Landlord & Tenant § 570 (similar) (R-App 128); 45 A.L.R. 12, §VI.c. (similar) (R-App 112). The URLTA contains the same concept. URLTA § 501(a) (defining "normal wear and tear") (R-App 145–46). And Black's Dictionary agrees, defining "wear and tear" as "[d]eterioration caused by ordinary use; the depreciation of property resulting from its reasonable use." *Wear and tear*, Black's Law Dictionary (12th ed. 2024) (R-App 143).

All these sources are in accord: "wear and tear" refers to the gradual deterioration of property over time caused by its proper and expected use by a tenant exercising due care.[6]

It is difficult to understand how this core concept in both the common law and state statutory law could be

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[6] If this is definition is a "tautology" (App. Br. 34), what does that mean for the tort of negligence, which is "the failure to exercise ordinary care under the circumstances"? *Dakter v. Cavallino*, 2015 WI 67, ¶ 40, 363 Wis. 2d 738, 866 N.W.2d 656.

unconstitutionally vague. In essence, Appellants contend that a fundamental premise upon which nationwide landlord-tenant relations have rested for at least 150 years is so vague that it denies landlords the due process of law. That cannot possibly be true.

If it were, one would surely expect to find countless court decisions invalidating these state statutes on vagueness grounds. Yet Appellants have not identified even one. As far as the State can tell, a landlord has made a similar argument only once in a reported case nationwide, 50 years ago in *Bauman v. Islay Invs.*, 106 Cal. Rptr. 889 (Cal. Ct. App. 1973). There, the plaintiff challenged as unconstitutionally vague a state law allowing landlords to withhold from security deposits "such amounts as are reasonably necessary . . . to repair damages to the premises caused by the tenant." *Id.* at 891. The court brushed off the argument as "frivolous," noting that "[p]rovisions for 'reasonable' costs are familiar; the provision here should give no difficulty." *Id.* at 893. *Cf. Younker v. Inv. Realty, Inc.*, 461 S.W.3d 1, 9 (Mo. Ct. App. 2015) (finding that undefined term "ordinary wear and tear" has a "plain and ordinary meaning" that is "commonly understood without further definition").

As for Appellants' complaint that the term "normal wear and tear" is not expressly defined in Wisconsin's statutes or administrative code, courts "will not invalidate a statute on vagueness grounds 'if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources.'" *Hibbard*, 2022 WI App 53, ¶ 23 (citation omitted). Many such sources are identified above.

As for commentators (including interested law firms) who disagree on specific applications or use exaggerated rhetoric (App. Br. 31–33), "[t]he test for unconstitutional vagueness is not whether reasonable persons, including judges, can in good faith disagree over the meaning of a

statute; the test is whether appropriate legal analysis can resolve that disagreement and result in a reasonably definite meaning." *Hahn*, 221 Wis. 2d at 682.

To be sure, disputes might sometimes arise over how to apply the term to specific factual circumstances. Appellants cite, for instance, *Howells v. Grosso Inv. Properties, LLC*, 2009 WL 3127925 (Wis. Ct. App. Oct. 1, 2009), in which the court spent eight paragraphs (not 28, as Appellants suggest) analyzing whether carpet cleaning costs reflected "normal wear and tear."[7] Appellants also flag some questions that might arise over how to handle painting and other kinds of cleaning. (App. Br. 32.) Might questions exist on the margins? Perhaps. But "speculation" over a few applications of wear-and-tear liability hardly suffices to cast serious doubt on the entire provision's constitutionality. *Hill*, 530 U.S. at 733.

Apparently realizing that legal authorities are virtually unanimous on what "ordinary wear and tear" means, Appellants try to manufacture ambiguity out of the word "normal" that ATCP § 134.06(3)(c) places before "wear and tear." (App. Br. 30.) But that adds nothing new; the term "normal" or "ordinary" is baked into the concept of "wear-and-tear" itself, which again entails the expected deterioration of a property based on its expected use by a tenant exercising due care.

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[7] The other cases Appellants cite did not even involve landlord-tenant disputes over "wear and tear." (App. Br. 31.) The quoted language from *Sunflower Condo. Ass'n, Inc. v. Everest Nat'l Ins. Co.*, No. 19-CV-80743, 2020 WL 7061597, at *3 (S.D. Fla. Nov. 12, 2020), is from testimony by an interested witness on behalf of an insurance company disputing coverage; it can hardly be considered objective legal analysis. As for the other three cited cases, they simply found ambiguity in contractual terms (App. Br. 31), but ambiguity does not equate to unconstitutional vagueness.

Appellants cite nothing that demonstrates unconstitutional vagueness in the wear-and-tear context. Instead, they refer to uses of words like "normal" and "regular" paired with phrases that may have a less universal meaning than "wear and tear." (App. Br. 33–34.) Yes, in the context of "familial relations" the word "normal" may not provide much guidance. (App. Br. 34.) Similarly, what it means for a building to provide recreational services on "a regular basis" may be difficult to discern, as there is no baseline to determine regularity in this context. (App. Br. 34–35.)[8]

The baseline for "ordinary wear-and-tear" of a residential property is not similarly indeterminate. Virtually everyone experiences the "ordinary" aspects of living in a residence each day: if it's a workday, get up, eat breakfast, get the kids (if any) ready for daycare or school, get ready for work, come home, make dinner, go to sleep; if it's a day off, maybe do some housekeeping, lounge at home, or invite friends and family over for a meal. Sometimes you haul in a new dresser or hang a new picture on the wall. There is nothing puzzling about ordinary daily life in a dwelling.

b. "Tenant damage, waste, or neglect."

Appellants also launch a duplicative attack on the phrase "tenant damage, waste, or neglect." Again, similar

[8] The same problem infected use of the word "regular" in the context of "regularly operat[ing] any vehicle" in *Doe v. Snyder*, 101 F. Supp. 3d 672, 686 (E.D. Mich. 2015) and "normal compensation" in *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006). Appellants also misdescribe *Johnson v. United States*, 576 U.S. 591 (2015). The problem there was not a statute's use of a word like "ordinary," but rather how it turned on "judge-imagined abstraction[s]" untethered from "real-world facts." *Id.* at 598. Here, the "wear-and-tear" standard is inherently fact-bound, as it must be applied to the specific property damage at issue.

terms have long resided in landlord-tenant common law. *See Bostwick*, 94 U.S. 53 at 68 (describing tenant's obligation as "a covenant against voluntary waste").[9] These terms merely reflect the other side of the "wear-and-tear" coin: tenants are not responsible for deterioration due to ordinary use (i.e. wear-and-tear), but they are responsible for damage above and beyond that.[10] Because the "wear-and-tear" concept is not unconstitutionally vague, its necessary complement is not either.

In fact, Appellants never really identify any uncertainty over what the terms "damage, waste, or neglect" themselves mean. They offer only one purportedly unclear application of the law to facts: ripped carpets and heavily stained walls. (App. Br. 36.) But, again, a provision is not unconstitutionally vague "merely because its applicability may be uncertain in some situations." *Hibbard*, 2022 WI App 53, ¶ 24. The supposed "leading property management website" on which Appellants rely (App. Br. 36) cites many examples of tenant damage that are clear enough: "[h]eavily stained, burned, or torn carpets," "[b]roken tiles or windows," "[h]oles in the wall," and "[m]issing fixtures."[11]

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[9] That the U.S. Supreme Court has found the term "waste" unconstitutionally vague in the context of oil production involving "general expressions . . . not known to the common law or shown to have any meaning in the oil industry" has no relevance here. (App. Br. 22–23 (citing *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 243 (1932)).)

[10] *See, e.g.*, 52 C.J.S. Landlord & Tenant § 563 ("A tenant is generally liable for wrongful or negligent injury to the premises that is permanent and over and above ordinary wear and tear.") (R-App 126); 49 Am. Jur. 2d Landlord and Tenant § 652 (similar) (R-App 120).

[11] *See Wisconsin Security Deposit Returns & Deductions,* iProperty Management, https://ipropertymanagement.com/laws/wisconsin-security-deposit-returns (last updated Feb. 1, 2024).

c. "Responsible under applicable law" and "legally responsible."

Appellants next challenge how ATCP § 134.06(3)(c) provides that tenants may not be charged for "other damages or losses for which the tenant cannot reasonably be held responsible under applicable law." (App. Br. 37–39.) That proviso recognizes how other provisions in Wisconsin law already limit the kinds of costs that a landlord may transfer to tenants. *See, e.g.*, Wis. Stat. §§ 704.07(2)–(3), 704.28(1)(a), 704.28(3), 704.44(7).

If Appellants are contending that landlords may not know what other "applicable law" exists, "every person is expected to know the law." *Neumann*, 2013 WI 58, ¶ 50 n.29. And "a reasonably prudent landlord would commonly consult Wis. Stat. ch. 704, titled 'Landlord and Tenant.'" *Lasecki*, 2020 WI App 36, ¶ 39. A single cherrypicked disagreement over the term's meaning comes nowhere near showing unconstitutional vagueness. (App. Br. 37.)

Separately, ATCP § 134.06(3)(a)2. allows landlords to withhold "[u]npaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats." Appellants seem to contend that both this provision and the "applicable law" proviso in ATCP § 134.06(3)(c) are unconstitutionally vague because Wis. Stat. § 704.29 is unconstitutionally vague, too. (App. Br. 37–38.) But Appellants have only pleaded claims that the two administrative code provisions are unconstitutionally vague; they do not also plead a claim that Wis. Stat. § 704.29—which is presumed constitutional—itself is invalid. Whatever might explain that litigation choice, it defeats their only pleaded claims. The challenged regulations merely cross-reference the substantive limitations on withholding unpaid rent in Wis. Stat. § 704.29. There is nothing vague about a cross-reference.

2. ATCP § 134.06(4)(a) is sufficiently clear.

In ATCP § 134.06(4)(a), Appellants challenge only the requirement that landlords "describe each item of physical damages or other claim," not the "written statement" requirement itself.

It would again surprise landlord-tenant practitioners nationwide if itemizing provisions like these were unconstitutionally vague. Like "wear-and-tear" provisions, virtually all states require landlords to "itemize" a statement of withholdings from tenants' security deposits.[12] And, again, both treatises and URLTA concur:

- "Security deposit statutes typically have . . . a requirement that if the landlord retains all or any part of the security deposit because of claims which the landlord has against the tenant, the landlord furnish to the tenant *an itemized statement of damages*." 63 A.L.R.4th 901, §2[a] (emphasis added) (R-App 136); *see also* 52A C.J.S. Landlord & Tenant § 1103 (similar) (R-App 130).
- "[T]he landlord shall provide the tenant or tenant representative . . . a record *specifying each item of property damage or other unfulfilled obligation* of the tenant to which the security deposit or unearned rent was applied and the amount applied to each item." URLTA § 1204(c) (emphasis added) (R-App 151).

Given the ubiquity of such provisions, one would again expect to find cases striking them down left and right, if Appellants are correct. But, once more, Appellants' conspicuous inability to cite even one such case is evidence

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[12] *See, e.g.*, Ill. Comp. Stat. ch. 765, § 710/1(a); Minn. Stat. § 504B.178.3(2); Mich. Comp. Stat. § 554.609; Iowa Stat. § 562A.12.3.a.; Indiana Code § 32-31-3-14.

enough that they are wrong. Instead, they cherry-pick three cases that supposedly involve disagreements over the term. (App. Br. 41–42.) The only Wisconsin case they cite, *Heiman v. Roe*, No. 20AP2066, 2022 WL 14177251, ¶ 23 (Wis. Ct. App. Oct. 25, 2022) (unpublished), is irrelevant: it involved only the need to attribute specific dollar amounts withheld for each item. And the two other cases they cite, coming out different ways on a general cleaning charge, come nowhere near showing unconstitutional vagueness in most applications.

The lack of vagueness challenges is unsurprising since it is not hard to discern the thrust of these provisions. An "item" of property damage has a plain meaning in this context: a discrete type of damage to an element of the property, like a hole in the wall, a broken window, or smashed floor tiling. Appellants again feign ignorance, claiming that they cannot possibly know which definition of "item" in Merriam-Webster to apply. (App. Br. 41.) This is nothing more than a semantic quibble; it hardly matters whether one calls an item "a distinct part in an enumeration" or "an object of attention." *Item*, Merriam-Webster, https://www.merriam-webster.com/dictionary/item. Both definitions lead to the same result.

The term "claim" in this context also has a plain meaning: any other lawful reason a landlord might have for withholding some of a security deposit, aside from property damage. Some obvious examples are mentioned in ATCP § 134.06(3), including unpaid rent or utilities.

Appellants unhelpfully focus on the insurance context where more doubt over the word "claim" might exist, given how coverage eligibility can depend on precisely identifying the relevant facts. (App. Br. 42.) The provision at issue here, by contrast, is simply meant to provide a "means by which a tenant can learn why the landlord did not return some or all of the security deposit" so that the tenant "can reasonably

assess the merit of the withholdings and whether to challenge them." *Lasecki*, 2020 WI App 36, ¶ 32.

Appellants aver uncertainty over the required level of generality when describing "items" or "claims," but they offer no reason to suspect anyone would take a strict approach to the issue. (App. Br. 41.) Multiple holes on a wall? List each individual hole or the wall itself. Utilities owed for multiple months? List the total or split it out by month. Any of these approaches would adequately inform tenants of what was withheld and why.

3. ATCP § 134.09(2) is sufficiently clear.

Finally, Appellants contend that the terms "repair," "inspect," and "health and safety emergency" in ATCP § 134.09(2) are impermissibly vague.

Again, numerous states and municipalities regulate landlord entry using the same or similar terms.[13] And URLTA contains similar provisions stating that a tenant may not unreasonably withhold consent for the landlord to enter the dwelling to "inspect the unit" or "make a necessary or agreed-to repair, alteration, or improvement." URLTA § 701(b) (R-App 149). It further states that "in an emergency," the landlord may enter the dwelling without consent if the landlord provides adequate notice. URLTA § 701(e) (R-App 149).

Just as with the other challenged provisions, limits on landlord entry reflect fundamental, long-standing principles in landlord-tenant law.

On one hand, "a tenant has an interest in the private residence of the leasehold." *State v. Carls*, 186 Wis. 2d 533,

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[13] *See, e.g.*, Ind. Code § 32-31-5-6; Iowa Code § 562A.19; Ohio Rev. Code § 5321.04; Minn. Stat. § 504B.211; Chicago Municipal Code § 5-12-050.

537, 521 N.W.2d 181 (Ct. App. 1994). Accordingly, Wisconsin "recognize[s] this interest by imposing rules for landlord entry." *Id.*; *see also* 49 Am. Jur. 2d Landlord and Tenant § 391 ("[A] landlord does not have an absolute right to enter a property he or she owns because the landlord conveys the right of possession to the tenant . . . .") (R-App 115); 52 C.J.S. Landlord & Tenant § 506 (similar) (R-App 124).

On the other hand, landlords have ownership rights and must be allowed access in certain circumstances. Leases and states therefore "usually allow the landlord to enter for emergencies, maintenance, inspections, showing the premises to prospective buyers and renters, and the like." 49 A.L.R.7th Art. 4 (introduction) (R-App 114); *see also* 49 Am. Jur. 2d Landlord and Tenant § 391 (similar) (R-App 116).

Wisconsin's ATCP § 134.09(2), which reflects these basic and ubiquitous legal principles, is not unconstitutionally vague. Like the other regulations at issue, Appellants cite no case invalidating landlord entry provisions on vagueness grounds. And in the sole example of such a challenge (at least that the State could identify), the court upheld the regulations as sufficiently definite. *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732 (7th Cir. 1987). There, Appellants challenged an ordinance stating that "[e]xcept in case of emergency, the landlord must provide notice two days before entering a unit for maintenance, repairs or inspections" and prohibiting "otherwise lawful entry into leased premises if the entry is accomplished in an 'unreasonable manner'." *Id.* at 734 (citation omitted). The court swiftly concluded that none of the provisions "fail[ed] to provide adequate warning of what violates the Ordinance, and both provisions sufficiently guide enforcement." *Id.* at 739.

The principles of landlord access in Wisconsin's regulations are also sufficiently definite to provide fair notice and enforcement.

a. "Repair."

Appellants contend that the word "repair" is impermissibly vague because it is supposedly unclear whether "replacing" an item is the same as "repairing" it. (App. Br. 44–46.)

But this represents an argument that "repair" is *ambiguous*, not that it is *vague*—and the two are not identical. "[E]ven if a statute is ambiguous, that alone does not render it unconstitutionally vague if the ordinary rules for construing an ambiguous statute result in a practical or sensible meaning." *Hahn*, 221 Wis. 2d at 678. In other words, Appellants' quibble represents a classic statutory interpretation question—does "repair" also mean "replace"? That question can be resolved through ordinary statutory interpretation tools. Appellants offer no argument that the term remains vague, once that interpretation question is resolved.

Nor could they, since there is undoubtedly a substantial core of meaning to the term "repair" that provides a "fair degree of definiteness," which is the real vagueness question. *Neumann*, 2013 WI 58, ¶ 34. The dictionary definition is "to restore by replacing a part or putting together what is torn or broken" or "to restore to a sound or healthy state." *Repair*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repair. Similarly, Black's Law Dictionary defines "repair" as "[t]he process of restoring something that has been subjected to decay, waste, injury, or partial destruction, dilapidation, etc." *Repair*, Black's Law Dictionary (12th ed. 2024) (R-App 142).

These definitions boil down to the same thing: repair means to restore something broken or in poor condition by fixing it, replacing parts, or otherwise bringing it back to sound and working condition. Appellants do not purport to be confused about this meaning of "repair," and so there is no

reason to find the term vague just because there might be a dispute over whether it covers replacements.

In any event, "repair" does include "replace." "Restore," the operative verb in the definition of "repair," means to " put to or bring back into existence or use" or "into a former or original state." *Restore*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/restore. A reasonably prudent landlord reading this term would understand that, if they can enter a unit to fix a broken stove, they can also enter to replace one.

Appellants cite Wis. Stat. § 704.07(2), which refers to "repair or replace," to support the idea that the two words have distinct meanings. But "statutes sometimes contain terms that, by definition, overlap in some manner." *Sojenhomer LLC v. Vill. of Egg Harbor*, 2023 WI App 20, ¶ 32 n.9, 407 Wis. 2d 587, 990 N.W.2d 267; *see also Pawlowski v. Am. Fam. Mut. Ins. Co.*, 322 Wis. 2d 21, 33, 777 N.W.2d 67 (2009) ("The use of different words joined by the disjunctive connector 'or' normally broadens the coverage of the statute to reach distinct, although potentially overlapping sets.").

In the context of a landlord's right to enter, it is therefore not problematic or confusing that the plain meaning of "repair" includes "replacement." Perhaps the distinction has more importance in Wis. Stat. § 704.07(2), which allocates liability for "replacing" certain items to landlords but not tenants. But ATCP § 134.09(2) is simply about landlord entry, and no reasonable reading of the provision would prohibit landlords from entering units to replace broken fixtures, appliances, and the like.

b. "Inspect."

The dictionary defines "inspect" as "to view closely in critical appraisal: look over," and "to examine officially." *Inspect*, Merriam-Webster Dictionary, https://www.merriam-

webster.com/dictionary/inspect; *see also Inspect*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/inspect ("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").

Appellants suggest that these definitions are "numerous" and "varied" and "only add ambiguity" (App. Br. 37), but they do not explain why. Instead, they concoct various inspection-related hypotheticals: must an inspection be official? Need it have an "apparent purpose"? What if a landlord wears a blindfold?

These imaginative hypotheticals miss the point: a statute "is not void for vagueness because in some instances certain conduct may create a question about its impact under the statute." *Hahn*, 221 Wis. 2d at 677. The vagueness test is whether legal analysis can produce a "reasonably definite" result. *Id.* Here, a reasonably prudent landlord would understand "inspection" to cover any viewings to appraise a dwelling's condition and to ensure fitness and compliance with applicable standards.

And Appellants' citation to *American Federation of Government Employees, AFL-CIO v. Glickman*, 127 F. Supp. 2d 243 (D.D.C. 2001), does not help them. In passing, that case said the word "inspection" is "absolutely ambiguous." (App. Br. 46.) But *Glickman* did not even involve a vagueness challenge, and, again, mere ambiguity is not equivalent to unconstitutional vagueness. In any event, ambiguity in one context—there, the federal meat and poultry production process—does not equate to ambiguity in the landlord-tenant context.

c. "Health and safety emergency."

The term "health and safety emergency" also is clear enough. The dictionary defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action" or "an urgent need for assistance or relief." *Emergency*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/emergency; *see also Emergency*, Black's Law Dictionary (12th ed. 2024) ("[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm," or "[a]n urgent need for relief or help.") (R-App 141).

For a landlord, the meaning of a "health and safety emergency" is clear based on these definitions and the ordinary meaning of the phrase. A landlord may enter a unit without providing notice if there is a sudden, urgent need for action to prevent or assist with a serious health or safety harm. Indeed, *LaPlant* concluded that landlords "should not have difficulty" understanding the similar phrase "substantial hazard to health and safety." 204 Wis. 2d at 423.[14] And courts have frequently rejected vagueness challenges to the term "emergency." *See, e.g.*, *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 854 (4th Cir. 1998) ("While 'there is little doubt that imagination can conjure up hypothetical cases' to test the meaning of emergency, these speculative musings do not render this term unconstitutionally vague.") (citation omitted); *McCraw v. City of Oklahoma City*, 324 F. Supp. 3d 1221, 1225 (W.D. Okla. 2018), *aff'd*, 973 F.3d 1057 (10th Cir. 2020) ("The statute is not vague because it fails to provide specific examples of emergencies because the term has a well-known, accepted definition."); *Baltimore & O. R. Co. v. Interstate Com.*

[14] Appellants say *LaPlant*'s phrase is "not akin" to the one here, but the two phrases are close enough. (App. Br. 49.)

Comm'n, 221 U.S. 612, 620 (1911) (phrase "except in case of emergency" did not "make the application of the act so uncertain as to destroy its validity").

Appellants contend that "health and safety emergency" is impermissibly vague because it involves a subjective judgment; what constitutes an emergency to one person may not to another. (App. Br. 41.) But "[a] reasonable person of ordinary intelligence would know if he or she was confronting an 'emergency situation.'" *McCraw*, 324 F. Supp. 3d at 1225. More, the law does not need to draw the line between an emergency and non-emergency with "absolute clarity and precision." *State v. Courtney*, 74 Wis. 2d 705, 710, 247 N.W.2d 714 (1976). Any questions on the margins involving cigar smoke do not make the law unconstitutionally vague.

For the proposition that courts have struggled to define the term "emergency," Appellants cite *Mueller v. McMillian Warner Ins. Co.*, 2006 WI 54, 290 Wis. 2d 571, 714 N.W.2d 183, and the decision below, *Mueller v. McMillan Warner Ins. Co.*, 2005 WI App 210, 287 Wis. 2d 154, 704 N.W.2d 613. These cases do not help Appellants. First, the *Mueller* cases involved standard statutory interpretation questions applied to an immunity clause in Wisconsin's Good Samaritan Law—not a vagueness challenge. *Id.* Second, the cases did not puzzle over the concept of an "emergency" itself; rather, they focused on the specific terms "scene of the emergency" and "emergency care." *Id.* Finally, the cases interpreted and applied the ambiguous statutory provisions. When a statute is "capable of being construed according to the ordinary principles of statutory construction so as to make its meaning reasonably definite," it cannot be impermissibly vague. *Hahn,* 221 Wis. 2d at 683.

And as for Fourth Amendment's exigency doctrine, Appellants cite no cases holding that the concept of an "emergency" there is impermissibly vague. (App. Br. 48–49.)

4. None of these provisions require landlords to know "unknowable" facts.

One of Appellants' featured catch-all attacks on all these provisions is that landlords supposedly must apply them to "yet unknown and potentially unknowable facts." (App. Br. 37.) As an example, they have pointed out that a landlord "has no practical way of knowing *for sure* how … damage was caused" when charging for "tenant damage, waste, or neglect." (R. 44:12.)

For one, this vagueness argument finds no support in Wisconsin law. They do not cite a single Wisconsin case finding a provision vague not due to uncertainty in its language, but rather because of potential difficulty in discerning relevant real-world facts. And the only federal cases they have cited involved facts that were truly impossible for someone to discover. *See Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981) (potential crime turned on "suspicion . . . in the mind of [an] arresting officer"); *Peoples Rts. Org., Inc. v. City of Columbus*, 152 F.3d 522, 535 (6th Cir. 1998) (potential crime turned on whether gun magazines over a certain size existed anywhere in the world).

The relevant facts here are not unknowable, since landlords have direct access to them. As for discerning wear-and-tear versus tenant damage, landlords can inspect units in between tenants and compare move-in and move-out conditions to draw reliable inferences about the cause of damage. And a landlord can enter dwellings during a tenancy for periodic inspections. *See* Wis. Admin. Code ATCP § 134.09(2)(a)1.–2. And as for perceived health and safety emergencies, if they cannot contact the tenant, they can call the police. It is unsurprising that landlords do not have an unqualified right to enter a dwelling to address perceived health and safety emergencies—that simply is not their job. As for damage to the premises, which is an area of legitimate

landlord concern, they can enter based on a "reasonable belief" of danger. *See* Wis. Admin. Code ATCP § 134.09(2)(b)3.

Expecting landlords to learn the facts before they withhold money or enter a unit is entirely reasonable here. These provisions create limited carveouts from general rule that landlords can't unilaterally take money from their tenants or enter their units. In other words, they represent a legitimate concern about landlords improperly using tenants' security deposits to pay for things for which tenants are not liable and inappropriately entering tenants' private residences. So, it is unsurprising these provisions forbid a "shoot first, ask questions later" approach. Simply put, if a landlord is unsure, they shouldn't withhold a tenant's money or enter their unit without permission. It is entirely within landlords' power to avoid any factual uncertainty and thus any potential liability.

C. At worst, only criminal applications of these provisions should be invalidated.

None of the challenged provisions are unconstitutionally vague under any level of scrutiny. But if this Court disagrees with using them for strict liability criminal prosecutions, that does not mean they are invalid for other forms of criminal and civil enforcement.

The State may enforce these provisions in three other ways: civilly (*see* Wis. Stat. §§ 100.20(6) (injunctions and restitution); 100.26(6) (civil forfeitures)); criminally, with an intent requirement (*see* Wis. Stat. § 100.26(3)); and criminally, with a criminal negligence requirement (*see* Wis. Stat. § 100.26(3)). Virtually all enforcement efforts using the challenged provisions are civil. (*See generally* R. 36–39.)

Even if Appellants are right about strict liability criminal prosecutions, that does not mean other civil and criminal enforcement methods are also invalid. At the most forgiving end, "[l]aws carrying only civil penalties receive

greater tolerance for vagueness." (App. Br. 23.) In the middle are "laws imposing criminal penalties" with a *mens rea* requirement, which "must possess 'a high level of definiteness.'" (App. Br. 23.) And at the strictest end is the "'heightened' scrutiny [applied] to a law that 'contains no *mens rea* requirement.'" (App. Br. 23.)

Here, Appellants focus almost entirely on the "extremely demanding review" that applies to strict liability crimes (App. Br. 24), foregoing any real effort to show that the provisions also fail under the less demanding tests for civil and criminal *mens rea* prosecutions. And Appellants will presumably try to distinguish the plethora of authority cited above on the basis that it involves "civil disputes where a much higher degree of vagueness and ambiguity is permissible." (R. 44:13.) Taken together, this nears a tacit admission that at least civil enforcement—which is how these provisions are virtually always enforced—survives vagueness scrutiny.

Appellants' primary response has been that the baby must be thrown out with the bathwater—that even if civil applications survive vagueness scrutiny, they still must be invalidated because the provisions may hypothetically be enforced through strict liability criminal prosecutions. (App. Br. 29 n.3.)

That position conflicts with the basic severability principle that courts should not invalidate laws to any greater extent than is necessary. "The remedy for a constitutional violation is . . . limited by the effect of the violation in the particular case." *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 453, 499 N.W.2d 276 (Ct. App. 1993). Restated, "a remedy must be tailored to curing legal violations." *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 83, 399 Wis. 2d 623, 967 N.W.2d 469 (Hagedorn, J., concurring). Thus, it is a "court's responsibility to sever portions" of a law that are unlawful. *In Int. of Hezzie*

R., 219 Wis. 2d 848, 888 n.14, 580 N.W.2d 660 (1998); *see also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262 ("it is best to 'limit the solution to the problem' rather than enjoining the application of an entire statute due to a limited flaw") (citation omitted).

Nothing in Wis. Stat. § 227.40 changes this basic severability rule, as Appellants suggest. It merely says that a "court shall declare the rule . . . invalid if it finds that it violates constitutional provisions." The best reading is that this creates a one-to-one invalidation rule: *entire* rules are to be invalidated when the *entire* rule is unconstitutional, but when only *part* of a rule is unconstitutional, only that unconstitutional *part* should be invalidated. This best coheres with basic logic, black-letter severability principles, and how statutes and administrative rules both have the force of law and are interpreted the same way.

Nor is there any hard-and-fast rule that criminal and civil applications must rise and fall together—which makes perfect sense, given how they involve different levels of scrutiny. *See, e.g.*, *Flamingo Paradise Gaming, LLC v. Chanos*, 217 P.3d 546 (Nev. 2009) (enjoining criminal but not civil enforcement of law challenged on vagueness grounds). Neither case Appellants cite, *Colautti v. Franklin*, 439 U.S. 379 (1979) and *Brown v. Kemp*, 86 F.4th 745, 770–777 (7th Cir. 2023), expressly addressed this issue and thus do not control. (App. Br. 29. n.3.) *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("such assumptions . . . are not binding in future cases that directly raise [this] question[ ]").

CONCLUSION

The circuit court's decision should be affirmed.

Dated this 3rd day of October 2024.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,991 words.

Dated this 3rd day of October 2024.

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CERTIFICATE OF EFILE/SERVICE

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

Dated this 3rd day of October 2024.

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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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

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