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In the Supreme Court of Wisconsin

No. 2019AP1007

CONTAINER LIFE CYCLE MANAGEMENT, LLC,
Petitioner-Appellant-Petitioner

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,
Respondent-Respondent,

ON REVIEW OF A DECISION BY THE COURT OF APPEALS, AFFIRMING AN ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

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INTRODUCTION

This Court should hold that Container Life Cycle Management, LLC ("CLCM") has a right to judicial review of the Department of Natural Resources' ("DNR") determination that CLCM must undergo a costly permitting process. The court of appeals held that DNR's determination was not a "final" decision and thus not subject to judicial review under Wis. Stat. § 227.52. That reasoning is problematic because this statute, by its plain language, does not limit judicial review to final agency decisions. This statute broadly allows judicial review of "[a]dministrative decisions which adversely affect the substantial interests of any person." Wis. Stat. § 227.52. This Court should construe that language as creating a strong presumption in favor of judicial review. It should reject the notion that an agency decision must be final before it is reviewable under this statute.

As Wisconsin's chamber of commerce and manufacturers' association, Wisconsin Manufacturers and Commerce recognizes that state agencies often require businesses to go through an expensive, time-consuming process to obtain a specific permit. When a business disagrees with an agency's decision that a specific permit is required, the business has a right to judicial review of that decision under Wis. Stat. § 227.52. A

contrary conclusion would force some businesses to go through a costly permitting process that might not be legally required. Even if a court ends up agreeing with a business that a particular permit is not required, the business cannot recoup the time and money that it spent obtaining that permit. Worse yet, some businesses might decide to avoid a costly permitting process altogether. This alternative could result in businesses forgoing planned construction or expansion of their facilities—and possibly shutting down their operations in Wisconsin. A narrow view of Wis. Stat. § 227.52 could cause real harm to our state's economy.

ARGUMENT

I. This Court should liberally construe Wis. Stat. § 227.52 in favor of judicial review and clarify that it has no finality requirement.

A. This Court should hold that Wis. Stat. § 227.52 creates a strong presumption of judicial review.

Judicial review of administrative decisions is more vital now than ever before because "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). The power of judicial review has been a bedrock of our nation's system of constitutional law since the founding era, and it still is. "'It is emphatically the province and duty of the judicial

department to say what the law is.' *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The rise of the modern administrative state has not changed that duty." *City of Arlington*, 569 U.S. at 316 (Roberts, C.J., dissenting).

The judiciary's power to review executive action is central to our nation's commitment to individual liberty and the division of powers among three branches of government. In *Marbury*, "a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'" *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (alteration in original) (quoting *Marbury*, 1 Cranch at 163). A robust system of judicial review recognizes "the place of administrative agencies in a regime of separate and divided powers." *Id.* at 670–71. And, of course, "the separation of powers is designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021).

"But if the judiciary is to serve as a meaningful check against the possibility of error, abuse, and overreach in the ever-expanding administrative state," some courts "will need to adopt a more robust and assertive program of judicial review of agency action." *In re Application of Minnesota Power for Auth. to Increase Rates for Elec. Serv. in Minnesota*,

838 N.W.2d 747, 769 (Minn. 2013) (Anderson, J., dissenting). This Court should take a step in that direction by adopting a broad view of the availability of judicial review of administrative decisions.

Federal courts have "long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citation omitted). This presumption stems from a section of the federal Administrative Procedure Act, 5 U.S.C. § 702, which provides judicial review for anyone "suffering legal wrong because of agency action." *Weyerhaeuser Co.*, 139 S. Ct. at 370 (citation omitted). The Supreme Court has interpreted this statutory language as creating a presumption of judicial review because administrative agencies sometimes commit "legal lapses and violations." *Id.* (citation omitted).

This Court should interpret Wisconsin's analogue provision, Wis. Stat. § 227.52, as adopting a strong presumption in favor of judicial review. Under this statute, "[a]dministrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter," with limited exceptions. Wis. Stat. § 227.52. This language is at least as broad as that in 5 U.S.C. § 702. Adopting a presumption of judicial

review would not only be consistent with section 227.52, but it would also help protect individual liberty by ensuring that administrative agencies follow the law.

B. This Court should hold that Wis. Stat. § 227.52 does not limit judicial review to final agency decisions.

"Although [Wis. Stat. § 227.52] does not require that an administrative decision be 'final' in order to be subject to judicial review, case law has established that the legislative intent was to limit judicial review to 'final orders of the agency.'" *Sierra Club v. Wisconsin Dep't of Nat. Res.*, 2007 WI App 181, ¶ 13, 304 Wis. 2d 614, 736 N.W.2d 918 (quoting *Pasch v. Wisconsin Dep't of Revenue*, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973)). This Court should make clear that section 227.52 does not have a finality requirement. It should modify or withdraw any language in case law that suggests otherwise.

That case law is internally inconsistent and confusing. On the one hand, Wisconsin courts have stated that the Legislature had intended "to limit judicial review of administrative agency 'decisions' to final orders of the agency." *Pasch*, 58 Wis. 2d at 353. "A preliminary or interlocutory proceeding is excluded from judicial review . . . ." *Kimberly Area Sch. Dist.*

v. Lab. & Indus. Rev. Comm'n, 2005 WI App 262, ¶ 12, 288 Wis. 2d 542, 707 N.W.2d 872.

Yet, on the other hand, this Court has acknowledged that finality of an agency decision is not really a prerequisite to judicial review. This Court has noted that "[a]n order that directly affects the legal rights, duties or privileges of a person is appealable . . . whether such order is denominated 'final' or 'interlocutory.'" *Pasch*, 58 Wis. 2d at 356. This Court "recognized the futility of strict adherence to the labels 'final' and 'interlocutory,' in the determination of whether a particular administrative decision is reviewable." *Id.*

So, this Court in *Pasch* simply used the word "final" as a shorthand for an agency decision that satisfies Wis. Stat. § 227.52 (which then was Wis. Stat. § 227.15). Again, judicial review is generally available if an agency decision "adversely affect[s] the substantial interests of any person." Wis. Stat. § 227.52. This Court has explained that "[a]n order has been defined as interlocutory when the *substantial rights* of the parties involved in the action remain *undetermined* and when the cause is retained for further action." *Pasch*, 58 Wis. 2d at 354 (emphases added). In other words, the Legislature did not intend "to authorize the review of mere preliminary action on the part

of an agency which does not of itself *directly affect such legal rights, duties, or privileges of any party*." *Id.* at 356 (emphasis added). By contrast, "a final order 'determine[s] the further legal rights of the person seeking review.'" *Sierra Club*, 2007 WI App 181, ¶ 15 (alteration in original) (quoting *Waste Management of Wis., Inc. v. Wisconsin Dep't of Nat. Res.*, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986), in turn summarizing *Pasch*).

This Court in *Pasch* thus did not add a finality requirement to the statute, despite what the court of appeals seems to think. Instead, *Pasch* used words like "interlocutory" and "preliminary" to mean an agency decision that has not affected a person's substantial rights, while the word "final" refers to an agency decision that has had such an effect. *Pasch* did not hold that judicial review is available only after an administrative proceeding has completely run its course. To the contrary, this Court recognized that judicial review is available if an agency decision has affected a person's rights, even if the decision can be labeled "interlocutory." *Pasch*, 58 Wis. 2d at 356.

This Court should disavow the use of confusing labels like "final" and "interlocutory" when applying Wis. Stat. § 227.52. As CLCM persuasively explains in its principal brief, this statute's plain language does not have a finality requirement, and courts have violated basic rules of statutory

interpretation to the extent they have suggested otherwise. (CLCM's Br. 29–39.)[1] To avoid further confusion, this Court should hold that the availability of judicial review depends on whether an agency decision has "adversely affect[ed] the substantial interests of any person." Wis. Stat. § 227.52. This Court should end the practice of referring to this statutory language in terms of the "finality" of an agency decision.

II. The court of appeals' reasoning would harm Wisconsin's economy and businesses.

CLCM faced a proverbial fork in the road: it either had to comply with "major source" or "minor source" permitting standards. DNR decided that CLCM must go down the much more-expensive and time-consuming path. Many businesses face a similar situation when a government agency tells them to obtain a license or permit (or a specific type of license or permit) that they think they are not required to get.

If CLCM has no right to judicial review of DNR's "major source" determination, the result would be disastrous for Wisconsin businesses. Without prompt judicial review of an agency's decision that a costly permit

[1] This non-party brief cites to the page numbers at the top of the pages in CLCM's brief.

is required, a business in CLCM's situation has only two options. Either option would be untenable.

One option is for a business to spend a significant amount of time and money going through a permitting process that arguably is not applicable to the business—and then challenge the need for the permit after it is issued. The problem with this option is that a business cannot recoup the time and money that it spends obtaining an unnecessary, costly permit. Prompt judicial review, before going through the permitting process, could avoid those costs.

The second option is for a business to avoid a costly permitting process altogether by scrapping a planned expansion, shutting down business operations, or relocating to a state with a friendlier regulatory environment. This option could result in job cuts and hurt our state's economy. If a business chooses this option, it would never receive judicial review of an agency's determination that a costly permit is required.

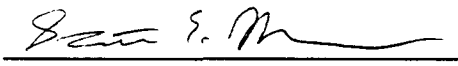
The Legislature did not intend those results when it enacted Wis. Stat. § 227.52. This statute broadly authorizes judicial review of an agency decision that "adversely affect[s] the substantial interests of any person." Wis. Stat. § 227.52. An agency's decision that a business must obtain a costly license or permit adversely affects the business's substantial interests.

CONCLUSION

This Court should reverse the court of appeals' decision and remand this case to the circuit court for further proceedings.

Dated this 3rd day of November 2021.

Respectfully Submitted,



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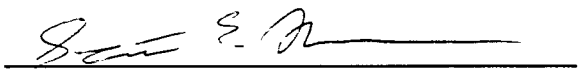
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,942 words.

Dated this 3rd day of November 2021.



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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of November 2021.

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