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No. 2022AP0718

IN THE SUPREME COURT OF WISCONSIN

WISCONSIN MANUFACTURERS
AND COMMERCE, INC.,
and LEATHER RICH, INC.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
NATURAL RESOURCES BOARD,
and PRESTON COLE, in his official
capacity as Secretary of the WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES,

Defendants-Appellants-Petitioners.

**NON-PARTY BRIEF OF CITIZENS FOR A CLEAN
WAUSAU, CLEAN WATER ACTION COUNCIL OF NE
WISCONSIN, RIVER ALLIANCE OF WISCONSIN,
WISCONSIN ENVIRONMENTAL HEALTH NETWORK,
AND DOUG OITZINGER IN SUPPORT OF PETITION FOR
REVIEW**

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STATEMENT OF INTEREST

Citizens for a Clean Wausau, Clean Water Action Council of NE Wisconsin, River Alliance of Wisconsin, and Wisconsin Environmental Health Network, through their collective membership, represent thousands of individuals, businesses, and local groups located in and around areas throughout the state contaminated by per- and polyfluoroalkyl substances (“PFAS”) and other hazardous substances. These organizations and their members have a substantial interest in this matter, which will be directly and adversely impacted by the decision of the Court of Appeals if it stands.

Citizens for a Clean Wausau, Clean Water Action Council of NE Wisconsin, River Alliance of Wisconsin, and Wisconsin Environmental Health Network are Wisconsin-based organizations working to protect natural resources and the public health from environmental contamination. These organizations vary in their methods and focus but are united in their aim to promote the proper application of the Spills Law, Wis. Stat. § 292.11 *et seq.*, to all hazardous substances, including PFAS.

Doug Oitzinger also has a substantial interest in this matter and will be directly and adversely impacted by the decision of the Court of Appeals. Mr. Oitzinger is a former mayor of the City of Marinette and current Marinette City Council Member representing Ward 3, where he lives. His ward contains

areas with PFAS contamination from Tyco Fire Products' (Tyco) fire-fighting foam manufacturing and testing operations. Those operations have directly and adversely impacted Mr. Oitzinger, his friends, his neighbors, and his constituents. Defendant-Respondent-Petitioner Wisconsin Department of Natural Resources ("DNR") relies on its authority under the Spills Law to ensure Tyco is addressing the contamination it caused and mitigating impacts to the public health. As such, Mr. Oitzinger's friends and neighbors living in the Town of Peshtigo could lose access to bottled water, which DNR has been providing residents since late 2017. The broader community would also lose services such as the requirement that Tyco complete a more comprehensive site investigation of the entire contaminated area. Additional services stemming from the Spills Law that could be disrupted include the operation and maintenance of treatment systems designed to protect both the City of Marinette's wastewater treatment plant and surface waters such as the bay of Green Bay.

Without the application of the Spills Law to PFAS, *Amici Curiae* identified above and their members or constituents may be at an increased risk of exposure and of developing associated adverse health impacts from drinking contaminated water, recreating in and consuming fish from contaminated waterways, consuming food from community gardens irrigated with

contaminated water, or from any of the other myriad exposure pathways. Those same people are also potentially subject to significant financial loss if DNR loses its authority to require environmental restoration and minimization of the harmful effects of PFAS discharges. Those physical and economic harms translate to mental harms as well.

Amici also have a substantial interest in the outcome of this case because they participated in the proceedings below. The Waukesha County Circuit Court granted *Amici*'s motion to participate in all substantive proceedings as friends of the court. (R.87.) As a result, *Amici* briefed and provided oral argument on the parties' cross motions for summary judgment and Petitioners' subsequent motion to stay pending appeal. (R.93, 133.) *Amici* were also granted permission by the Court of Appeals to file a non-party brief, which *Amici* did. *Br. of Amicus Curiae, Wis. Mfrs. & Commerce, Inc. v. DNR*, No. 2022AP718 (Wis. Ct. App. Nov. 22, 2022). By filing this brief and corresponding motion in support of the Petition for Review, *Amici* seek to continue that participation and protect their interests.

INTRODUCTION

This case threatens to turn the Spills Law on its head. The Spills Law has been protecting the people of Wisconsin from tens of thousands of hazardous substance discharges for nearly 50 years. During that time, DNR has never promulgated a rule designating any substance as hazardous under the Spills Law, and the logic underpinning the Court of Appeals' decision has the potential to functionally repeal that law if allowed to stand. Resolution of the novel issues presented to the Court in the Petition for Review will therefore have significant statewide impacts. *See* Wis. Stat. § 809.62(1r)(c)2.

Amici submit this brief to explain those statewide impacts in greater detail, including the physical, mental, and economic harms that Wisconsinites will suffer through no fault of their own. To demonstrate those harms, this brief first explains what PFAS are, how they have been used, why they are so toxic, and the adverse health impacts associated with exposure. This brief then explains the distribution of known PFAS contamination throughout Wisconsin, which has expanded significantly since this case was filed. Next, this brief relies on affidavits *Amici* previously filed with the circuit court below to exemplify the current assistance impacted community members receive due to the Spills Law and what harms may occur if that assistance is disrupted. Finally, this brief discusses how the high mobility and

persistence of PFAS in the environment will exacerbate harms if compliance with the Spills Law is disrupted. Extrapolated to all substances that may pose a hazard to the public health or environment when discharged, the significant statewide impacts of this case are even more stark.

The Petition for Review should be granted.

ARGUMENT

I. PER- AND POLYFLUOROALKYL SUBSTANCES

No one can seriously dispute as a factual matter that PFAS are hazardous to both humans and the environment when discharged. That PFAS are indeed hazardous is sufficient for this Court to consider the merits. But appreciating just how toxic these substances are, their characteristics, and the scope of known PFAS contamination throughout Wisconsin is integral to understanding the statewide impacts that will result should the Court of Appeals' decision stand.

A. The Toxicity of PFAS and Adverse Health Impacts Associated with Exposure

PFAS are highly toxic, human-made chemicals that have been used in industrial processes and to manufacture a wide range of consumer products for decades. (R.92 ¶¶6, 10.) Such products include food packaging, non-stick cookware, water-resistant clothing, stain-resistant fabrics used in carpet and upholstery, certain fire-fighting foams, and more. (*Id.* ¶10.) PFAS can be so toxic that they are measured in parts per trillion (“ppt”). To put that in context, four ppt is equivalent to one drop of water in five Olympic-sized swimming pools.¹ (*See id.* ¶7.) Due

¹ We use four ppt because that is the maximum contaminant level (“MCL”) the U.S. EPA recently established for two PFAS under the Safe Drinking Water Act. *See* U.S. EPA, *Per- and Polyfluoroalkyl Substances, Final PFAS*

to the inability of humans to metabolize most PFAS, even intermittent exposures to extremely low concentrations can lead them to build up in the body over time. (*Id.* ¶¶8-9.) For example, the biological half-lives—i.e., the time to eliminate 50% of a substance from the body once exposed—for commonly used PFAS range from several years to several decades. (*Id.* ¶8.) There is no definitive medical procedure for removing PFAS from the body. (*Id.* ¶9.)

Major pathways of exposure to PFAS include: (1) drinking contaminated water; (2) eating contaminated food; (3) hand-to-mouth activities after contacting contaminated surfaces, which is common among infants and small children; and (4) occupational exposure. (*Id.* ¶11.) Toxicological and epidemiological studies have identified a range of adverse health impacts associated with exposure to PFAS in people and animals. (*Id.* ¶12.) For example, the C8 Health Study, which included 69,030 adults and is the most comprehensive longitudinal evidence for adverse health impacts of PFAS, linked six diseases to PFAS exposure, including testicular cancer, thyroid disease, high cholesterol, ulcerative colitis, and preeclampsia. (*Id.* ¶13.)

While PFAS are harmful to all humans, the most vulnerable are children, infants, and developing fetuses. (*Id.*

National Primary Drinking Water Regulation (April 8, 2024), available at <https://www.epa.gov/sdwa/and-polyfluoroalkyl-substances-pfas> (accessed April 17, 2024).

¶14.) Infants and children drink more water in proportion to their size, their brains and organs are growing rapidly, their immune systems are still developing, and they have more time to bioaccumulate environmental toxins. (*Id.*) As opposed to adults and children who eat a variety of food, infants only consume formula or breastmilk, which, if contaminated, leads to overall higher concentrations of contaminants in their bodies at any given time. (*Id.*) In addition, studies on children have shown links with PFAS exposure to impacts on the immune system with a decreased response to vaccines. (*Id.* ¶15.) These results may have long term effects on immune function resulting in increased risk for future infections, auto immune disease, and cancer. (*Id.*)

Ultimately, PFAS are so toxic that they may pose a hazard to public health and the environment virtually every time they are discharged.

B. PFAS Contamination Throughout Wisconsin

When this case started, DNR's database of contaminated sites identified 87 PFAS-contaminated sites in Wisconsin. (*See* R.93:6.) That number is now 138. *See* Midwest Environmental Advocates, *A Report on Wisconsin's Spills Law* at 1 (March 26, 2024) [hereafter, "Spills Law Report"].² Simply put, the number of known PFAS-contaminated sites is increasing, and any

² Available at <https://midwestadvocates.org/assets/resources/Spills-Law-Report-2024-03-26.pdf>.

consideration of the statewide impacts of this case should appreciate that more sites are likely to be discovered in the future.

Investigations or remedial actions under the Spills Law are currently ongoing at 94 of the 138 sites, which include residential areas, rural areas, shopping centers, landfills, industrial properties, airports, military bases, and more. *See generally* Spills Law Report. Entire communities such as Marinette, Peshtigo, French Island, Wausau, and Stella have learned that their surrounding environments have been inundated with PFAS, that these toxic chemicals have infiltrated their drinking water supplies, and that they have been involuntarily exposed for years.³ Municipal drinking water wells in Madison, Eau Claire, and Rhinelander have been shut down due to PFAS

³ See, e.g., John McCracken, *Wisconsin residents combat water contamination aftereffects of PFAS*, WISCONSIN STATE JOURNAL (May 9, 2021), available at https://madison.com/wsj/news/local/environment/wisconsin-residentscombat-water-contamination-aftereffects-of-pfas/article_ee461840-1ffd-5559-ba88-12abef147dbc.html (accessed April 14, 2024); Olivia Herken, *Wisconsin to provide bottled water to La Crosse County town due to PFAS Contamination*, LA CROSSE TRIBUNE (March 25, 2021), available at https://madison.com/news/local/govt-and-politics/wisconsin-to-provide-bottled-water-to-la-crosse-county-town-due-to-pfas-contamination/article_53ff10b2-a309-51c5-8543-d42011a7eb17.html (accessed April 14, 2024); Rob Mentzer, *Wausau finds all city wells contain elevated PFAS levels, will study reduction methods*, WISCONSIN PUBLIC RADIO (Feb. 9, 2022) available at <https://www.wpr.org/environment/wausau-finds-all-city-wells-contain-elevated-pfas-levels-will-study-reduction-methods> (accessed April 14, 2024); Wis. Dep't of Nat. Res., *PFAS Contamination in the Town of Stella*, available at <https://dnr.wisconsin.gov/topic/PFAS/Stella.html> (accessed April 17, 2024).

contamination,⁴ and communities such as Wausau have had to expend significant resources to upgrade their public drinking water systems.⁵

II. DISRUPTION OF THE SPILLS LAW WILL IMPOSE PHYSICAL, MENTAL, AND ECONOMIC HARMS ON THE PEOPLE OF WISCONSIN

The disruption of the Spills Law would exact a physical, mental, and economic toll on impacted community members who receive a variety of services from DNR. Immediately below, we exemplify potential harms stemming from the loss of bottled water access, but those harms are not all encompassing. The loss in property value, for example, is an economic harm that will likely persist to some extent until the contamination is fully remediated.

⁴ Abigail Becker, *With Well 15 still closed, Madison Water Utility OKs conservation strategies*, THE CAP TIMES (May 26, 2021), available at https://madison.com/ct/news/local/govt-and-politics/with-well-15-still-closed-madisonwater-utility-oks-conservation-strategies/article_bac94fff-2f9a-554b-bb65-f6b02b793a2d.html (accessed April 17, 2024); Laura Schulte, *Eau Claire is latest city facing ‘forever chemical’ contamination after substance is found in 4 city wells*, MILWAUKEE JOURNAL SENTINEL (July 13, 2021), available at <https://www.jsonline.com/story/news/local/wisconsin/2021/07/13/eau-claire-closes-4-city-wells-pfas-foreverchemical-contamination/7949070002/> (accessed April 17, 2024); Elizabeth Dohms-Harter, *Researchers Look for Ways to Stop Flow of PFAS Into Rhinelander’s Water Supply*, WISCONSIN PUBLIC RADIO (Aug. 6, 2021), available at <https://www.wpr.org/researchers-look-ways-stop-flow-pfas-rhinelanders-water-supply> (accessed April 17, 2024).

⁵ Rob Mentzer, *Wausau water treatment plant removes PFAS from city water*, WISCONSIN PUBLIC RADIO (Jan. 13, 2023), available at <https://www.wpr.org/environment/wausau-water-treatment-plant-removes-pfas> (accessed April 17, 2024).

Given the distribution of PFAS throughout Wisconsin, impacts to community members stemming from the loss of services is alone sufficient for this Court to grant the Petition for Review. *See* Wis. Stat. § 809.62(1r)(c)2. Again, extrapolated to all substances regulated under the Spills Law, the significant statewide impact of this case is even more pronounced.

A. Physical and Economic Harms Related to Loss of Bottled Water Access

Restoring the environment under the Spills Law can take years and even decades to complete. To interrupt exposures in the interim, the Spills Law provides DNR the ability to provide emergency drinking water when private wells are contaminated with a “hazardous substance.” *See* Wis. Stat. § 292.31(3)(b)7; Wis. Admin. Code NR § 738.11(2). This is important for two reasons: (1) avoiding the clear health risks associated with even intermittent exposure to bioaccumulative chemicals like PFAS; and (2) covering the cost of an interim alternative water source that would otherwise be externalized to impacted community members.

Before the circuit court, Petitioners identified a potential inability to continue providing free bottled water access to approximately 1,300 households impacted by PFAS contamination. (R.122:8-9.) Petitioners explained that “[s]ome families likely will not be able to cover costs DNR has been

paying” and that “[f]or those families, drinking contaminated well water may be the only remaining option...” (*Id.* at 9.)

Importantly, that number of 1,300 households is likely understated because more contaminated sites have been discovered since this case began. That number also does not include households receiving bottled water directly from responsible parties, like some households on French Island who receive water from the City of La Crosse. (*See, e.g.*, R.132, ¶¶6-7.)⁶

1. Impacted French Island community members

Before the circuit court, *Amici* filed four affidavits of individuals living with PFAS contamination on French Island who receive bottled water due to the Spills Law. (R.129-132). Together, these affidavits, which we summarize for the Court below, exemplify the consequences of disrupting access to bottled water provided under the Spills Law.

Each of the Affiants own property on French Island and have had PFAS detected in their private wells. The

⁶ Despite recent regulatory developments, the risk of losing bottled water access remains. For example, the promulgation of MCLs for six PFAS under the Safe Drinking Water Act may mitigate *some* of the impacts stemming from bottled water loss by providing access to funding through Wisconsin’s Well Compensation Program. *See* Wis. Stat. § 281.75(1)(b). However, access is based on exceedances of MCLs and those are unequivocally *not* health-based standards. *See* 42 USC § 300g-1(b)(4)(a)-(b). Further, income limitations in the program may exclude some households whose fixed income exceeds the rigid income threshold or exclude those households who cannot afford the matching requirements. *See* Wis. Stat. § 281.75(4m), (7).

concentrations in one Affiant's well were 45 times the health-based groundwater standards recommended by the Wisconsin Department of Health Services. In other words, each of the Affiants and their families, which include infants and young children, have been exposed to PFAS through drinking water, and the bottled water they receive interrupts that exposure pathway.

Without access to that bottled water, Affiants, and others like them who are living on fixed incomes and do not have the disposable income to pay for replacement bottled water, may be faced with the prospect of resuming use of contaminated water. For example, several Affiants and their family members are on social security. Other Affiants with households supported by two working adults also report an overall difficulty in making ends meet based on rising costs of necessities like groceries, baby, formula, gasoline, and electricity. Two Affiants have had recent unavoidable medical expenses contributing to their financial hardship. And one Affiant reports his adult children and their families having to move into his home given recent financial hardships.

Since the presence of PFAS in Affiants' well water has devalued their properties, it may not be as simple as selling their homes and relocating. Even if they could find a buyer, Affiants would suffer significant financial loss and, as a result, may not be

able to secure comparable housing to meet their needs. That is not to mention the loss in sentimental value of having to sell homes where Affiants have lived for years, if not decades. The task of moving itself also comes with costs.

In short, Affiants, their families, and others similarly situated may have no viable option except to resume the use of PFAS-contaminated water for drinking, cooking, bathing, and brushing teeth. That prospect comes with all the health risks associated with continued exposure to PFAS, and further demonstrates the statewide impact of this case.

B. Related Mental Harms

In addition to these kinds of physical and economic harms, this Court should consider the mental harms exacted on people faced with the prospect of their loved ones consuming contaminated water when assessing the impact of this case and ruling on the Petition for Review. Each of the four French Island residents described above, who exemplify individuals across the state living with PFAS contamination, have indicated that losing access to free bottled water would cause significant additional stress and anxiety. (R.132, ¶11; R.129, ¶13; R.131, ¶13; R.132, ¶13.) For two of them who have small children living at home and understand that children are especially vulnerable, the mental anguish may be even more acute. (See R.129, ¶13; R.130, ¶14.)

III. DISRUPTION OF THE SPILLS LAW WILL EXACERBATE HARMS TO PUBLIC HEALTH AND THE ENVIRONMENT

Even if DNR could conceivably promulgate administrative rules designating PFAS as hazardous substances, any disruption in the Spills Law's requirements of notification, investigation, and remediation will exacerbate harms to public health and the environment and increase costs for responsible parties. That is because PFAS are persistent and highly mobile in the environment, meaning plumes of contamination expand over time. *See, e.g.,* Wis. Dep't of Nat. Res., *Environmental and Health Impacts of PFAS*.⁷

No better example of the consequences of such a disruption exists than the plume in the Marinette and Peshtigo area attributed to Tyco. *See* Lee Bergquist, *Johnson Controls unit Tyco knew since 2013 it was polluting wells. It took 4 years to notify neighbors*, MILWAUKEE JOURNAL SENTINEL (Feb. 4, 2019).⁸ Tyco first discovered PFAS contamination on its property in 2013 but failed to immediately notify DNR. *Id.* Tyco did not formally notify DNR of the contamination until 2016. In fall 2017, Tyco began sampling private wells near its facility under the supervision of

⁷ Available at <https://dnr.wisconsin.gov/topic/PFAS/Impacts.html> (accessed April 17, 2024).

⁸ Available at <https://www.jsonline.com/story/news/local/wisconsin/2019/02/04/tyco-waited-4-years-disclose-toxins-wisconsin-drinking-wells/2727670002/> (accessed April 17, 2024).

DNR, and DNR began sampling in an “expanded site investigation area.” Wis. Dep’t of Nat. Res., *PFAS Contamination in the Marinette and Peshtigo Area*.⁹ Hundreds of wells have been discovered to be contaminated with PFAS, and dozens of wells have concentrations of PFAS above recommended levels. *Id.* The highest combined concentrations of PFAS detected exceed 2,000 ppt. *Id.*

Tyco’s failure to notify DNR in 2013 prevented DNR from informing Tyco of its responsibilities under the Spills Law to conduct a site investigation and determine “the nature, degree and extent, both areal and vertical, of the hazardous substance...in all affected media” under Wis. Admin. Code NR § 716.11(3)(a). Had Tyco completed such an investigation, it would have been able to discover whether PFAS had migrated off-site years earlier, would have been able to take action to prevent further migration, and would have been able to inform the impacted public. Instead, Tyco kept up with business as usual, failed to notify DNR, and allowed the plume to spread, thereby increasing its costs while failing to take action to interrupt exposure pathways.

That is largely the scenario that will play out for new or yet undiscovered PFAS discharges if the Court of Appeals’ decision

⁹ Available at <https://dnr.wisconsin.gov/topic/PFAS/Marinette.html> (accessed April 17, 2024).

stands. Entities that are otherwise responsible parties would have no obligation under the Spills Law to notify DNR, much less investigate and remediate. Since PFAS are highly mobile and persistent in the environment, harms to the public health and environment will be exacerbated while DNR attempts to promulgate a rule that would retrigger those responsibilities. Ongoing remedial efforts at any number of the 94 PFAS-contaminated sites across Wisconsin may also be delayed, which would also result in the unnecessary expansion of plumes and exposure of people.

All that assumes DNR would be able to promulgate the necessary rules, which may be virtually impossible considering limitations imposed on the rulemaking process in recent years. The high cost of remediating PFAS,¹⁰ for example, likely means that any rule designating PFAS as a hazardous substance would run headlong into the Regulations from the Executive in Need of Scrutiny (“REINS”) Act. Wis. Stat. § 227.139(1)-(2). The REINS Act requires the legislature to pass a bill authorizing any rulemaking that exceeds \$10 million in compliance costs over any

¹⁰ As an example, Tyco’s parent company set aside \$140 million to address PFAS contamination in the Marinette and Peshtigo area. *See* Lee Bergquist, *Johnson Controls International takes \$140 million charge for cleanup of ‘forever’ chemicals*, MILWAUKEE JOURNAL SENTINEL (Aug. 5, 2019) available at <https://www.jsonline.com/story/news/2019/08/05/johnson-controls-takes-140-million-charge-chemical-cleanup/1924882001/> (accessed April 17, 2024).

two-year period. *Id.* Without such authorization, that rulemaking cannot proceed. *Id.*

In other words, for DNR to regain the authority the legislature provided it nearly 50 years ago, DNR would effectively need the legislature to re-enact the Spills Law on a contaminant-by-contaminant basis. That is why the logic underpinning the Court of Appeals' decision has the potential to functionally repeal the Spills Law on a permanent basis, and why the harms inflicted on the people of Wisconsin would be innumerable if that decision stands.

CONCLUSION

For these reasons, the Petition for Review should be granted.

Dated this 18th day of April 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 2,944 words.

Dated: April 18, 2024.

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