WISCONSIN COURT OF APPEALS
DISTRICT II

CLEAN WISCONSIN, INC. and
PLEASANT LAKE MANAGEMENT
DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

Appeal No. 2018AP000059

Circuit Court Case No.
2016CV002817, 2016CV002818
2016CV002819, 2016CV002820
2016CV002821, 2016CV002822
2016CV002823, 2016CV002824

WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION, WISCONSIN CHEESE MAKERS ASSOCIATION, WISCONSIN FARM BUREAU FEDERATION, WISCONSIN PAPER COUNCIL and WISCONSIN CORN GROWERS ASSOCIATION

Co-Appellants

ON APPEAL FROM FINAL ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONRABLE VALERIE L. BAILEY-RIHN, PRESIDING

CO-APPELLANT'S INITIAL BRIEF

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INTRODUCTION

Through 2011 Wis. Act 21 (Act 21), the legislature exercised its prerogative by directing courts to change course on the required level of specificity for legislative delegation of authorities to administrative agencies. It found the well-worn principles of *express* and *necessarily implied* authority insufficient to constrain the expanding administrative state. Courts are now to apply an *explicit authority doctrine*.

Act 21 created Wis. Stat. § 227.10 (2m) prohibiting administrative agencies from imposing regulatory mandates not explicitly allowed by statute or administrative rule. There is no public trust exemption – this provision requires explicit delegation of the legislature's public trust authorities. Wis. Stat. §§ 227.11 (2)(a)1. and 2., also created by Act 21, provide that statutory preambles – declarations of legislative intent, purpose, findings, or policy, as well as descriptions of an agency's general powers or duties – are not to be used as a regulatory wildcard by agencies (or courts) where explicit statutory authority does not exist. Because these provisions are descriptive only and not substantive requirements, no explicit public trust delegation resides therein.

Reining in expansive court interpretations of agencies' authority was the primary intent of Act 21. It illustrates the legislature exercising its exclusive constitutional authority to make the law. Petitioners Clean Wisconsin, Inc. (Clean Wisconsin) and Pleasant Lake Management District urged the circuit court to void eight high capacity well permits targeted in this litigation. The circuit court vacated seven of the permits, remanding one

for reconsideration. These lawfully issued permits are essential to Wisconsin agricultural operations. The circuit court improperly imposed its policy preference by simply finding "explicit" authorities in the preamble statutory clauses specifically targeted by the governor and legislature in Act 21.

STATEMENT OF ISSUES FOR REVIEW

Do Wis. Stat. § 227.10(2m) and § 227.11(2)(a) limit the Wisconsin Department of Natural Resources (DNR) authority under Wis. Stat. § 281.34 and § 281.35, to the specific standards contained in those sections when issuing high capacity well permits?

The circuit court answered "no".

This court should answer "yes".

ORAL ARGUMENT AND PUBLICATION

Oral argument is necessary because of the complex inter-play of the relevant legal authority, particularly the complexity of the interaction of the constitutional provision and separation of powers principles at issue in this case.

Publication of this Court's opinion is warranted because of the substantial and continuing public interest in the subject of this case. Moreover, a published decision will clarify the scope of the Wisconsin Legislature's constitutional authority with respect to executive branch administrative agencies such as the DNR under the provisions of the Wisconsin Administrative Procedure Act, at Wis. Stat. §§ 227.10(2m) and

227.11(2)a, by requiring DNR to operate within limits of explicitly delegated legislative authority when issuing high capacity well permits.

Notably, circuit courts have differed from the circuit court in this case in their interpretation of DNR's authority as explicitly defined by the Wisconsin Legislature at Wis. Stat. § 281.34 and § 281.35, under Wis. Stat. § 227.10(2m), in issuing high capacity well permits. *See New Chester Dairy, LLC and MS Real Estate Holdings, LLC, and Petitioner Intervenor Wisconsin Manufacturers and Commerce, et al v. Department of Natural Resources, and Clean Wisconsin, Inc.* Outagamie County Case No. 14CV1055 (concluding the DNR exceeded its authority under Wis. Admin. Code § 812.09 when imposing monitoring conditions on high capacity wells because it lacked explicit authority required by Wis. Stat. § 227.10(2m) to do so.)

STATEMENT OF THE CASE

This matter is an administrative agency review case appealing the DNR approval of eight high-capacity well permits under Wis. Stat. § 281.34, to be used in agricultural production. The circuit court ordered that the seven high-capacity well permits be vacated.

The backdrop for this case is the interaction of: the Wisconsin State Legislature, as the trustee for the Wisconsin Public Trust Doctrine (PTD) found at Art. IX, Section 1 of the Wisconsin Constitution; the delegated statutory authorities by the legislature to the Wisconsin DNR under Wis. Stats. §§ 281.34 and 281.35 to issue permits for high-capacity wells; and the

limits of that delegated statutory authority on DNR's permitting process, founded on Wis. Stat. §§227.10(2m) and 227.11(2)a.

Administrative agencies are creatures of the legislature under our constitutional system, possessing only those powers delegated to them (see *Brown Cty. v. Dep't of Health & Soc. Servs*., 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981). Therefore, as the legislature has the power to delegate duties and responsibilities to an agency, it also has the power to define, clarify, and if it chooses, to circumscribe those duties. The Wisconsin Legislature has delegated responsibility to the DNR to regulate groundwater withdrawals in a variety of circumstances, and also with a range of explicit conditions and limitations under Wis. Stat. § 281.34.

It is the legislature's duty and its responsibility to oversee that that delegated authority is performed within its prescribed legislative parameters. To that end, in May of 2011 the Legislature adopted and the governor signed into law 2011 Act 21 (Act 21), one provision of which, Wis. Stat. §§ 227.10(2m) and 227.11(2)a.

To assist in the implementation of Act 21, as it applies to oversight of the DNR's high capacity well program's permitting administration, the Wisconsin State Assembly requested the Wisconsin Attorney General provide a formal Attorney General Opinion 16-OAG-1, issued May 10, 2016. The attorney general concluded that Act 21 precludes DNR from relying on implied authority to regulate high-capacity wells. The DNR subsequently conformed its high capacity well permitting program to be consistent with

Act 21, relying exclusively on its explicitly delegated statutory authority to regulate high-capacity wells, found in Wis. Stat. § 281.34.

Subsequently, on September 30, 2016, DNR approved the eight high-capacity well applications that are now under review here. Petitioner Clean Wisconsin, Inc. filed challenges in Dane County Circuit Court to those permits on October 28, 2016. These separate challenges were consolidated and constitute the case now before this court.

The Great Lakes Legal Foundation sought, and was subsequently granted by the circuit court, the intervenor status of eight Wisconsin businesses associations. The associations' members are either challenged permit holders in this case, or rely on the availability of raw agricultural products of the challenged permit holders. Following the circuit court's order to vacate those same permits, issued October 11, 2017, Great Lakes Legal Foundation, along with the DNR, filed this appeal.

As the Wisconsin Legislature sought the guidance of the Wisconsin Attorney General in fulfilling its constitutional oversight role appropriately in both delegating and overseeing the DNR's administration of responsibilities for high-capacity well permitting, the eight business associations that Great Lakes Legal Foundation represents here seek the guidance of this court regarding constitutional separation of powers principles as applied to the legislature's role in establishing clear parameters of delegated authority to executive branch administrative agencies when regulating Wisconsin citizens.

STANDARD OF REVIEW

Application of Wis. Stat. § 227.10(2m) in issuing these contested well permits is at the core of this case. We do not take issue with the circuit court's standard of review limiting agency deference in the application of Wis. Stat. 227.10(2m). However, Wisconsin attorney general opinion, OAG 16-1 (OAG) provides important, and we believe persuasive, guidance to the court, as it did to DNR, in identifying the distinct responsibilities of these branches in this case.

In *The Voice of Wisconsin Rapids, LLC and Jeff Williams, v. Wisconsin Rapids Public School District and Colleen Dickman,* CA 364 Wis. 2d 429 ¶13, 867 N.W. 2d 825, an open records dispute, the District IV Court of Appeals noted: "[O]pinions of the attorney general are not binding as precedent, *but they may be persuasive as to the meaning of statutes*." (Emphasis ours)

The February 2016 letter from Wisconsin Assembly Speaker Vos and the Assembly Committee on Organization requesting the OAG to resolve substantial regulatory uncertainty resulting from the *Lake Beulah* decision. This confusion at DNR led to a substantial high-capacity well permitting backlog at DNR. The subsequent interpretation of Act 21 advanced by the attorney general was of importance, and we believe persuasive.

ARGUMENT

I. Agencies Are Only Afforded That Authority Delegated by The Legislature. 2011 Act 21 Fundamentally Altered Wisconsin Administrative Law Requiring Explicit Delegations That Can Not Arise from Statutory Preambles.

A. Agencies Have Only Those Authorities Delegated to Them by The Legislature, Including Authorities Relating to The Public Trust Doctrine.

Administrative agencies are creations of the legislative branch. As such, their authorities may be expanded, diminished, or if necessary, the legislature may "wipe out the agency entirely." *Schmidt v. Dept of Resource Development* 39 Wis. 2d 46, 57158 N.W.2d 306 (1968). Thus, to determine an agency's authority, one must look to the manner and extent of its explicit legislative delegation.

Delegation issues are necessarily entwined with separation of powers concepts. Wisconsin is in the forefront in recognizing of the nature of legislative regulatory delegation. In 1928, Wisconsin Supreme Court Justice Rosenberry explained that "The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate – is a power which is vested by our Constitution in the Legislature and may not be delegated. When, however, the Legislature has laid down these fundamentals of a law, it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose. *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928).

Wisconsin is acclaimed by administrative law experts for its clarity and constitutional underpinnings.

> Only occasionally does one encounter realism of the kind expressed by the Wisconsin court as early as 1928; 'It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power.' Unfortunately the insight of the Wisconsin court and of a few other courts has had little effect; the old idea that filling up the details does not

> involve law-making persists. 1 Davis, Administrative Law Treatise, p. 102, sec. 2.07.

The fundamental legal precept that agencies have only those authorities delegated to them by the legislature applies to public trust regulatory authorities. A fair reading of C*ity of Madison v. Tolzman* is that any delegation of public trust authority, arising from the Constitution, must be held to an even higher standard of clarity and specificity than general statutory delegations.

> [S]uch delegation of authority should be in clear and unmistakable language and cannot be implied from the language of a general statute delegating police powers to cities. C*ity of Madison v. Tolzman*, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959).

The court recognized in *Schmidt* the necessity for the legislature to "fix limits" in which the agency may operate. 39 Wis. 2d 46 at 59. This is precisely what the legislature did with the enactment of Act 21 – fix the limits of administrative agency functions to within explicit legislative delegations.

B. 2011 Wis. Act 21 Fundamentally Altered Wisconsin Administrative Law by Requiring Explicit Delegations Can Not Arise from Statutory Preambles.

1. Relevant Act 21 Provisions Must Be Given Their Plain Meaning, In the Context of The Entire Act, With Consideration of Legislative History.

Two sections of Act 21 fundamentally altered Wisconsin administrative law relating to agency delegation. First, the application of Wis. Stat. § 227.10 (2m) anchors agency authority to explicit legislative delegations. Second, Wis. Stat. §§ 227.11 (2)(a)1. and 2. provide that statutory preambles – declarations of legislative intent, purpose, findings, or

policy, as well as descriptions of an agency's general powers or duties – are not to be used as a regulatory wildcard by agencies that cannot otherwise find explicit statutory authority.

Wis. Stat. § 227.10(2m) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including a term or condition of any license issued by the agency, *unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule* that has been promulgated in accordance with this subchapter. . . . (Emphasis ours.) 2011 Wis. Act 21, Section 1r.

Sections Wis. Stat. 227.11 (2)(a)1. and 2, both created by Act 21, provide in part:

> A statutory or nonstatutory provision containing a statement or declaration of legislative intent, *purpose*, findings, or *policy* does not confer rule-making authority on the agency or augment the agency's rule−making authority beyond the rule−making authority that is *explicitly* conferred on the agency by the legislature.
>
> A statutory provision describing the agency's general *powers* or *duties* does not confer rule−making authority on the agency or augment the agency's rule−making authority beyond the rule−making authority that is *explicitly* conferred on the agency by the legislature. (Emphasis ours) 2011 Wis. Act 21, Section 3.

To determine the meaning of statutes the court will focus on their text, context, and structure.

> [S]tatutory interpretation "begins with the language of the statute," and we give that language its "common, ordinary, and accepted meaning." *Kalal*, 271 Wis. 2d 633, ¶¶45-46 (Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . . .).
>
> We may also look to the statute's history where, as here, there has been a significant revision to the language in which we are interested. *Cty. Of Dane v. LIRC*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571 (A review of statutory history is part of a plain meaning analysis because it is part of the context in which we interpret statutory terms. (citation omitted)). If we determine the statute's plain meaning

> through this methodology, we go no further. *Kalal*, 271 Wis. 2d 633, ¶45 (If the meaning of the statute is plain, we ordinarily stop the inquiry." (internal marks and citation omitted)).
>
> *State ex rel. Dep't of Nat. Res. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶15, 380 Wis. 2d 354, 909 N.W.2d 114.

Given these parameters, Act 21 provisions at issue should be interpreted as follows:

- The statutory language should be given its "common, ordinary, and accepted meaning."
- The legislative context of Act 21 must be considered as well as the structure of this language, including how the two Act 21 provisions are contextually linked.
- Given the significance of the Act 21 changes to Wisconsin administrative law, its legislative history should be considered.

2. The Term "Explicit" Was Purposefully Chosen to Roll Back Expansive Regulatory Delegations Arising From Statutory Preambles.

The dispositive language in Wis. Stat. § 227.10(2m) is the term "explicitly." Its plain meaning is:

> **Explicit**. 1. clearly stated and leaving nothing implied; distinctly expressed; definite; *distinguished from implicit*. *Webster's New World College Dictionary* (4th Edition). (Emphasis ours.)

The term "explicit" was purposely chosen to heighten what had become a very low delegation threshold upon a finding of authorities that were either "expressly or necessarily implied." The operative meaning of "explicit" is "leaving nothing implied." Based upon this definition, an Outagamie Circuit Court and a Wisconsin attorney general both determined that "implied authorities" would be incompatible with a requirement for

"explicit authorities."[1] Nevertheless, Act 21's legislative history proves helpful.

Act 21 arose from a Special Legislative Session in 2011, which is a "session of the Legislature convened by the governor to accomplish a special purpose."[2] Act 21 was introduced as Assembly Bill 8 by the Committee on Assembly Organization by request of Governor Scott Walker.[3] In essence, Gov. Walker was a co-author of Act 21, with Rep. Tiffany.[4]

When introducing 2011 Special Session AB8 (SSAB8) that created Act 21, Gov. Walker specifically noted a Wisconsin appellate court case where the court ignored explicit *enabling* legislation relating to building sprinkler systems, and instead finding sweeping authority in *preamble* provisions.

> The Wisconsin Department of Commerce implemented rules requiring sprinkler systems in all multifamily dwellings except certain townhouse units even though state law *explicitly* stated that the sprinkler systems were required on multifamily dwellings exceeding 16,000 square feet or more than 20 dwelling units.
>
> * * *
>
> Unelected bureaucrats are drafting rules and regulations based on the department's *general duties provisions*, not based on the more specific laws the legislature meant to govern targeted industries or activities. Instead of basing rules on the specific

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[1] "Act 21 makes clear that permit conditions and rulemaking *may no longer be premised on implied agency authority*." OAG-1-16, ¶29.

"Thus, under the plain language of Wis. Stat. § 227.10(2m), *agencies cannot rely on implied authority* to impose conditions. Rather, those agencies must seek amendment to a statute or promulgate a rule." *New Chester Dairy LLC v. DNR*, No. 14-CV-1055 (Wis. Cir. Ct. Outagamie Cty. Dec. 2, 2015). Appendix p. 113.

[2] Wisconsin State Legislature Glossary. http://legis.wisconsin.gov/about/glossary/.
[3] 2011 Assembly Bill 8. http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.
[4] See History of Legislative Actions at:
https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8

> rule of law approved by the legislature, bureaucrats are empowering themselves to use the department's *overall duties provision*.
>
> Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules *without explicit legislative authority* is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens.
>
> Solution: Legislation states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislatures. Specifically stating that the departments broad statement of policies or general duties or powers provisions do not empower the department to create rules not *explicitly* authorized in the state statutes.[5] (Emphasis ours.)

Rep. Tom Tiffany, the lead legislative author of SSAB 8 said, "agency's general powers do not confer rule-making authority. In other words they can't use their mission statement in order to write a rule." (Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8, (Feb. 2, 2011)). Supplemental Appendix at p. 3. It is clear the governor and lead legislative authors relied upon both sections at issue in enacting their intent to eliminate use of implied authorities in preamble clauses by Wisconsin courts.

From the beginning, although not reflected in the initial bill, the governor expressed the need to tether agency authority to "explicit" legislative delegation. (As discussed later, the term "explicitly" was the primary purpose behind the Senate and Assembly amending the legislation.)

[5] Walker, Regulatory Reform Informational Paper, (Dec. 21, 2010.). http://walker.wi.gov/newsroom/pressrelease/regulatory-reform-info-paper.

In the case Gov. Walker referenced, *Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845, the court of appeals found that Wis. Stat. § 101.14 (4m) (b) does not set *limits* on the authority of the Department of Commerce, despite clear language that automatic fire sprinkler systems were to be required for only those multifamily dwellings that meet specific statutory criteria, such as exceeding 16,000 square feet with more than 20 dwelling units. *See* Wis. Stat. § 101.14 (4m) (b). Instead, the court concluded that *under the Department's general powers, duties and jurisdiction provisions*, specifically Wis. Stat. § 101.02(15), "the Department has the *general authority* to enforce and administer all laws and lawful orders that require public buildings to be safe and that require the protection of the life, health, safety and welfare of ... the public or tenants in any such public building." *Id*. ¶10. (Emphasis ours.)

In effect, the court rendered meaningless the explicit legislative thresholds on surface area and number of units set forth in statutes specifically addressing fire sprinkler systems. Thus, the entire sprinkler system enabling legislation became unnecessary if the plenary powers under Wis. Stat. § 101.02 allow for any rules touching upon public building safety. By invoking "general authorities" the court gave the agency *carte blanc* authority over policies relating to building safety, which in turn, made the specific statutory fire sprinkler system provisions superfluous or meaningless.

In *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2010 WI App 85, 327 Wis. 2d 222, 787 N.W.2d 926, *aff'd in part, rev'd in part*, 335 Wis. 2d 47 (2011), a different court of appeals concluded that broad general policy

and purpose statutory provisions granted DNR the authority to regulate activities that were not expressly conferred in the statutes. The court notes:

> There are four statutes at issue here: two statutes provide a broad, general grant of authority to the DNR – Wis. Stat. §§ 281.11 and 281.12 – and two statutes create specific rules for high capacity wells – Wis. Stat. §§ 281.34 and 281.35. *Id*. ¶17

The court found: "We interpret these *general statutes* [Wis. Stat. §§ 281.11 and .12] as *expressly* delegating regulatory authority to the DNR necessary to fulfill its mandatory duty to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *Id*. ¶19 (Emphasis ours.) Like the *Wisconsin Builders* case, *Lake Beulah* rendered the specific high capacity well enabling statutory sections superfluous and meaningless because the plenary powers conferred upon DNR under Wis. Stat. §§ 281.11 and .12 subsumes the more specific and deliberately developed high-capacity well enabling legislation set forth at Wis. Stat. §§ 281.34 and .35.[6] (Emphasis ours.)

Sections Wis. Stat. § 227.11 (2)(a)1. and 2 took clear aim at what Rep. Tiffany calls agency "mission statements." The legislature made it clear that statements of policy and purpose referring to DNR's role in *managing the waters of the state* and its general powers and duties to *supervise and control the waters of the state*, under Wis. Stat. §§ 281.11 and 281.12, respectively, are not to be a basis for rulemaking authority. It necessarily follows that these prefatory provisions are not explicit authority for permit conditions or public

[6] The target of Act 21, as reflected in its legislative history, was two earlier appellate court decisions, and not the Wisconsin Supreme Court *Lake Beulah* decision. As discussed later, the *Lake Beulah* court undertook the same analysis with similar conclusions as the appellate court. Act 21 was part of the Supreme Court's analysis when rendering its *Lake Beulah* decision.

trust delegation because they are simply not "explicit" in any plain meaning of that word; something "clearly stated and leaving nothing implied."

Incorporating the term "explicitly" in Act 21 took a somewhat circular path, but one that underscored legislative intent behind use of that term. As introduced, sections 1 and 3 of SSAB 8 included the following language:

> **SECTION 1.** 227.10 (2m) of the statutes is created to read:
>
> 227.10 **(2m)** No agency may implement or enforce any standard, requirement, or threshold as a term or condition of any license issued by the agency unless such implementation or enforcement is *expressly* required or permitted by statute or by a rule that has been promulgated in accordance with this subchapter.
>
> **SECTION 3.** 227.11 (2) (a) 1. to 3. of the statutes are created to read:
>
> 227.11 **(2)** (a) 1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is *expressly* conferred on the agency by the legislature.
>
> 2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is *expressly* conferred on the agency by the legislature.[7]

In the initial provisions, the word "expressly" was used instead of "explicitly." Senate Amendment 1 to SSAB8 replaces "expressly" with "explicitly." That amendment was adopted on February 10, 2011 and later concurred in by the Assembly on May 17, 2011.[8]

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[7] Special Session 2011 AB 8. http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.

[8] Legislative activity, Special Session 2011 AB 8. https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8

Gov. Walker and Rep. Tiffany made it clear from the beginning they intended to eliminate the practice of agencies and courts finding delegated authority in preamble clauses. Part of that effort addressed the broad interpretation courts were giving the term "expressly" for finding agency delegations. Notably, the *Lake Beulah* appellate court opinion rested on the court interpreting "these *general statutes* [Wis. Stat. §§ 281.11 and .12] as *expressly* delegating regulatory authority to the DNR."[9]

The legislature clearly understood the difference between these two terms, deliberately choosing "explicitly" to shore up its intent regarding use of preamble clauses. Rep. Tiffany stated in Assembly floor debate during concurrence on this amendment:

> The primary change that was made to [the assembly bill] in the Senate was changing the term expressly to explicitly. The courts have interpreted expressly very broadly, and in order for our legislation that comes out of this body today to reflect the intent that we want. It was important to change the word to explicitly and that was the primary change that was made to the bill in the Senate. (Transcript of Jan. 2011 Special Session Assembly Floor Debate on AB 8, (May 17, 2011), Supplemental Appendix pp. 4-5.

Act 21 intended to restore Wisconsin's history of requiring clear delegation of authority in enabling legislation, and not from preamble pronouncements that are often aspirational and not directive. To restore these limitations, the legislature had to address recent expansive court interpretations finding prefatory, general statutory provisions provide express or necessarily implied agency authorities that, in turn, make specific enabling legislation inoperative, superfluous, or otherwise meaningless.

[9] *Lake Beulah*, 2010 WI App 85, ¶ 19

The legislature has clearly spoken on this fundamental matter and it is being heard. The Wisconsin Supreme Court recently reprised the concept: It is "the fundamental principle that both our state and the federal Republic separate governmental powers between independent legislative, executive, and judicial branches." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶3, 376 Wis. 2d 147, 897 N.W.2d 384.

Alexander Hamilton wrote, "[t]he interpretation of laws is the proper and particular province of the courts." *The Federalist Papers,* No. 78 (Alexander Hamilton). Highlighting the role of the judicial branch in *Gabler*, the court found "[n]o aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." *Gabler,* 2017 WI 67, ¶37. Yet, James Madison explains that "[i]n republican government, the legislative authority necessarily predominates." *The Federalist Papers,* No. 51, ¶6.

The *Wisconsin Builder* and *Lake Beulah* line of cases that led, in part, to Act 21 reflects an effective, permissive and robust interaction between the executive, legislative and judicial branches. The legislative branch exercised its core right to clarify or otherwise restate the law which they deemed the judiciary to have miscalculated. Then Judge (now Justice) Neil Gorsuch observes that if the executive or legislative branches believe the courts missed the mark, "the Constitution prescribes the appropriate remedial process. It's called legislation." *Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (2016) (Gorsuch, J., concurring).

C. The *Lake Beulah* Supreme Court Did Not Take Up the Invitation to Interpret Wis. Stat. § 227.10(2m).

Section 227.10(2m) was created by Act 21, effective June 8, 2011. The provision that controls here did not exist until after the briefing and oral argument in the *Lake Beulah* Supreme Court decision that is the primary underpinning of the circuit court's decision here. *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.[10]

In what appears in retrospect to have been a miscalculation, a group of *amici*, including Intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, and Midwest Food Processors Association, asked the supreme court to consider Wis. Stat. § 227.10(2m) as a supplemental authority pursuant to Wis. Stat. § 809.19(10). Confusion rather than clarity resulted. Appendix at pp 94.

In response to the request for the court to consider the effect of Act 21, all parties in the case, including DNR, asserted for multiple reasons that Wis. Stat. § 227.10(2m) was not relevant in the *Lake Beulah* case. Merely referencing the attempt by the *amici* group in a footnote, the supreme court stated that they "agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis *in this case*. Therefore, we do not address this statutory

[10] Shortly after its decision in *Lake Beulah*, the Wisconsin Supreme Court issued a decision in *Rock-Koshkonong Lake District v. DNR*, 2013 WI 74, 350 Wis.2d 45, 833 N.W. 2d 800. In Rock Koshkonong the court held that public trust regulatory authority do not reach beyond navigable waters to non-navigable wetlands above the ordinary high water mark. Although we assert the delegation issues presented in this case are paramount, the it should be noted that the lands on which the eight contested well permits are located are lands above the OHWM of navigable water bodies. The Public Trust Doctrine therefore is not applicable.

change any further." *Lake Beulah*, 2011 WI 54, ¶ 39 n. 31 (emphasis ours). Nowhere else in the 48-page decision did the supreme court reference Wis. Stat. § 227.10(2m).

A fair interpretation of this footnote is that the supreme court merely chose to find the newly enacted law inapplicable to the case before them for reasons not clearly stated. On the other hand, it would be absurd to interpret this footnote to conclude the supreme court rendered its views on such sweeping changes to Wisconsin's administrative law in this way.

The circuit court here opined that "If these subsections were so radical as to limit the ability of the DNR to consider other factors not expressed in Wis. Stat. § 281.34 and § 281.35, the Wisconsin Supreme Court would have addressed it further." Decision, pp. 10. We wholeheartedly agree and expect the supreme court will address Act 21 in the future. In the interim, this court has the opportunity and we believe the obligation to interpret for the first time at the appellate level in what manner and to what extent Act 21 affects the delegation of legislative authorities to regulatory agencies.

II. The Legislature Has Not Explicitly Delegated DNR Authority to Regulate High Capacity Wells Beyond The Comprehensive Regulatory Scheme Set Forth in Wis. Stat. 281.34.

A. Inconsistent with Act 21, The Circuit Court Finds Broad Delegated Authorities Arising from Statutory Preamble and Purpose Clauses.

The legal underpinning of the circuit court decision is that DNR has been delegated broad "explicit" authorities under Chapter 281's preamble and purpose clauses; Wis. Stat. §§281.11 (Statement of policy and purpose)

and 281.12 (General department powers and duties).[11] Specifically, the court found:

> Wis. Stat. § 281.11 explicitly states that the purpose of this subchapter is to grant necessary powers and organize a comprehensive program under a single state agency for the enhancement of the quality management and *protection of all others of the state,* ground and surface, public and private. (Emphasis theirs) Decision pp 11.
>
> Wis. Stat. § 281.12 explicitly grants the DNR authority to 'have general supervision and control over the waters of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of the state. It shall carry out the planning, management and regulatory programs necessary for implementing the policy and purpose of the *chapter*…' (Emphasis theirs). Decision pp 12.

The circuit court also found Wis. Stat. § 281.31 provides explicit regulatory authorities to justify voiding the issued well permits.

> To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make claims… for the efficient use, conservation, development, and protection of the State water resources…" Wis. Stat. § 281.31.

Arising from this section, according to the court, is an "explicit" grant of authority to DNR "to make studies… for the protection of the state's water resources." Decision pp. 12. Like Wis. Stat. §§281.11 (Statement of policy and purpose) and 281.12 (General department powers and duties), Wis. Stat. § 281.31 is a preamble clause to chapter 281, subchapter III (water quality and quantity; general regulations).

[11] The circuit court also cites *Lake Beulah* as authority but begs the question. The source of any delegation must come from the legislature and set forth in the statutes. For the purposes of delegated authorities, then, the issue is whether the circuit court's findings relating to preamble statutory provisions is supported by the law.

Finding explicit authority in preamble clauses does not comport with and undermines Act 21. The circuit court decision is also inconsistent with the court's responsibility to enforce the required "rigid control by the legislature." *Schmidt*, 39 Wis. 2d at 57.

Wis. Stat. §§ 227.11 (2)(a)1. and 2. made clear that statements of policy and purpose referring to DNR's role in *managing the waters of the state* and its general powers and duties to *supervise and control the waters of the state*, under Wis. Stat. §§ 281.11 and 281.12, respectively, are not a basis for rulemaking authority. It follows that these prefatory provisions do not provide explicit delegation of authorities to regulate high capacity wells. The terms used in these provisions describe general *responsibilities*, not *authorities* to regulate. If there is doubt on this issue before, there is none post Act 21.

Rather than using prefatory clauses as a regulatory wildcard, the legislature conferred DNR explicit authority when it enacted high capacity well regulatory authority under Wis. Stat. § 281.34. This section provides a comprehensive permitting framework with explicit standards that do not trump general prefatory clauses.

B. Consistent with Act 21, Preamble, Purpose or Other Descriptive Prefatory Clauses Cannot Create Ambiguities in Specific Statutory Text Where None Exists.

The principles set forth in Act 21 are consistent with many courts' and commentators' views that a statutory prologue cannot be invoked when the text is clear. *See Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (finding "It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to

materials like preambles and titles only if the text of the instrument is ambiguous.") The court in *Jogi* also cites Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.04 at 146 (5th ed.1992) ("The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms."). In addition, use of a statute's preamble is inconsistent with another tenet of statutory construction that "the purpose clause cannot override the operative language" in the statute. *Reading Law*, Anthony Scalia, Brian Gardner, pp. 220.

The United States Supreme Court in *United States v. Article of Drug . . . Bacto-Unidisk . . .*, 394 U.S. 784, 800 (1969). articulated a specific challenge courts face in cases involving statutory construction of delegated regulatory authority, such as here. The court found that "[i]n upholding the Secretary's construction of the Act, we are not unmindful of our warning that '(i)n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" (Internal citation omitted.) The court continued: "Our holding simply involves an obvious corollary to that principle, that we must take care not to narrow the coverage of a statute short of the point where Congress indicated it should extend." *Id*. Thus, courts in their exclusive constitutional role of determining what the law is, must discern the boundaries of a regulatory enabling framework. Within those boundaries, the agency has authority to regulate; but they may not go any further.

In *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998), again regarding the judicial task of statutory construction, the Supreme

Court determined "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended," at 530-31. Thus, as here, where the legislature has continued to amend – and prescribe – the explicit responsibilities delegated to DNR in operating the high-capacity well permitting program found in Wis. Stat. § 281.34, any reliance on earlier statutory statements or declarations of legislative intent are inapplicable to the question here of determining the scope of DNR's statutory authority, even if those more general statutory statements have not been amended.

The Supreme Court observed in *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*, "As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. 120, 160 (2000). Similarly, the legislature does not condone, as expressed in Act 21, the DNR getting a regulatory wildcard from unbounded prefatory clauses.

Groundwater resources are vital to Wisconsin's economy. Access to groundwater is imperative for major economic sectors such as agriculture, manufacturing, and recreation. The interests of various groups in Wisconsin's groundwater resources are sometimes at odds. It is for the legislature, however, not an agency or the courts, to balance these interests through a legislative process that provides input from all perspectives.

C. The Statutory Framework for Regulating High Capacity Wells Under Wis. Stat. § 281.34 Arises from Continued and Deliberate Legislative Choices. It is the Exclusive Source of DNR's Explicit Authority to Regulate High Capacity Wells.

The legislative history of high capacity well legislation is instructive regarding the legislature's preference agency authorities be defined by explicit enabling legislation rather than by courts using general statutory provisions. The current statutory framework for high capacity well permits resulted from collaborative and deliberate legislative debate and policy choices. If the Court finds, as Clean Wisconsin urges, that DNR has Public Trust Authority arising out of Chapter 281 prefatory clauses, then the Wis. Stat. § 281.34 framework, deliberately developed over decades, is rendered meaningless. DNR would be allowed, in fact directed, to impose conditions not enumerated in the statutes, on an ad hoc permit by permit basis. The result will be regulatory uncertainty as permit applicants await DNR verdicts as to what conditions will apply, or if, a permit is even allowed.

Until 1985, the general standard at § 281.34(5)(a), which protected public utility wells, was the only standard applicable to high capacity well permits. In 1985 Wis. Act 60, the legislature expanded DNR's permit authority for high capacity wells over 2 million gallons per day (gpd). In 2003 Wis. Act 310 ("Act 310"), the legislature expanded DNR's permit authority for high capacity wells once again, explicitly regulating wells with capacities of between 100,000 and 2 million gpd.

Act 310 also evidences the deliberative legislative approach desired for the regulation of high capacity well. It created the Groundwater Advisory Committee for purposes of reporting to the legislature in 2007 on any additional recommended changes to DNR's high capacity well permit authority (GAC).

The 2007 GAC report to the legislature evaluated various changes to existing law, including expanding DNR authority to require additional environmental review for wells potentially affecting surface waters. The legislative committee rejected that proposal.[12]

Under the high capacity well program, any person owning property on which a high capacity well is to be located must obtain approval from DNR before construction of such well. Wis. Stat. § 281.34(2). A high capacity well is defined as any well or combination of wells on the same property that have the capacity to pump 100,000 gallons of water per day. Wis. Stat. § 281.34(1)(b). Every high capacity well application must include information allowing DNR to determine the proposed well complies with location, construction, installation, and operation requirements at Wis. Admin. Code ch. NR 812. Based on information in the application, DNR is able to determine:

- When the proposed pumping rate and consumptive use triggers a "water loss" approval. Wis. Stat. § 281.35.
- If a public water supply well may be affected by the proposed well. Wis. Stat. § 281.34 (5)(a).
- If the location of the proposed well is near sensitive resources that would trigger Wisconsin Environmental Policy Act (WEPA) review or require additional conditions for approval. Such heightened environmental review is required for a high capacity well that:

[12] *2007 Report to Legislature*, Wisconsin Groundwater Advisory Committee (December 2007). Available at: http://www.friendsofthelittleploverriver.org/assets/Reports/2007-GAC-Final-Report.pdf.

- Is located in a groundwater protection area.
- Will result in a water loss of more than 95% of the amount of water withdrawn.
- May have a significant environmental impact on a spring.

Wis. Stat. § 281.34 (4)

DNR must follow these clear, explicit requirements established by the legislature over decades of deliberation. DNR's review and approval of the well permits at issue in these cases followed these explicit requirements. DNR determined that the high capacity wells as proposed did not trigger heightened environmental review under WEPA. Thus, no further analysis was neither required or allowed.

2017 Wis. Act 10 sets forth the legislature's current approach to addressing cumulative impacts and challenges associated with the central sands region.[13] Moreover, the legislative process to develop 2017 Act 10 is a case study on why the legislature is better equipped to address the issues before the court.

The legislative process in Wisconsin is many things to many people, and it is accurate to say it provides extensive opportunity for public input and debate. The Wisconsin Legislative Reference Bureau describes the process

[13] With respect to cumulative impacts, 2013 Wis. Act 20 created Wis. Stat. § 281.34(5m), which states: No person may challenge an approval, or an application for approval, of a high capacity well based on the lack of consideration of the cumulative environmental impacts of that high capacity well together with existing wells. Intervenors-Co-Appellants concur in DNR's position that this provision bars Clean Wisconsin's challenge that is based on cumulative impacts. 2013 Wisconsin Act 20 (2013 budget)–Section 2092g (page 514). https://docs.legis.wisconsin.gov/2013/related/acts/20.pdf.

in a 67-page research bulletin.[14] Beyond extensive process requirements, Wisconsin's bicameral legislative body has a complex organizational, structural, and leadership framework. The legislature must also adhere to protocols for drafting, introduction, committee consideration, including public hearings, and floor action. And finally, gubernatorial approval, and legislative veto review. The most recent update to Wisconsin's high capacity well program is a case study of this legislative process.

2017 Senate Bill 76 was introduced on February 21, 2017.[15] Its companion bill, Assembly Bill 105, was introduced on March 1, 2017. The bills were referred to respective standing committees in the Senate and Assembly. Those committees held a joint hearing on March 15, 2017. At that hearing, over 300 organizations and individuals testified or registered positions on the bills.[16] Wisconsin Legislative Council hearing material included 142 pages of testimony.[17] Notably, seven of the eight intervenors in this case testified in support of the bill. Petitioner Clean Wisconsin and *Amici*

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[14] *Legislative Process in Wisconsin*, State of Wisconsin Legislative Reference Bureau, Research Bulletin 14-2, December 2014. http://legis.wisconsin.gov/lrb/media/1093/14rb2.pdf.

[15] The legislative history of Senate Bill 76 and related documents can be found at: https://docs.legis.wisconsin.gov/2017/proposals/sb76.

[16] *Senate Record of Committee Proceedings*. https://docs.legis.wisconsin.gov/2017/related/records/senate/labor_and_regulatory_reform/1378189.

[17] *Legislative Council Hearing Materials for SB76* (3/15/2017). https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sb76/sb0076_2017_03_15.pdf. The Legislative Council collects material during the public hearing of a bill or joint resolution. The materials are not the official committee record, but generally represent items distributed to the committee. Some documents may not be scanned due to volume or copyright.

Central Sands Water Action Coalition and the Town of Rome testified against the bill.

The Senate Committee on Labor and Regulatory Reform recommended passage of SB 76 on March 28, 2017. Ten Senate amendments to SB 76 were introduced and considered. The bill was placed on the Senate calendar and passed that body on April 4, 2017. The legislation was received in the Assembly on April 5, 2017. Four Assembly amendments were introduced and considered. The Assembly concurred in SB 76 on May 2, 2017. It was enrolled on May 11, 2017, and presented to the Governor on May 31, 2017. The Governor approved the legislation on June 1, 2017, which became 2017 Wisconsin Act 10 ("Act 10"). It was published on June 2, 2017.

Act 10 authorizes the owner of a previously approved high capacity well to repair, replace, reconstruct, or transfer ownership of the well without obtaining additional DNR approval. Wis. Stat. § 281.34(2g). The Act also requires DNR to evaluate and model the hydrology of three specified lakes and allows DNR to evaluate the hydrology of other streams and lakes in Wisconsin's central sands region, specified in the act as the Designated Study Area. DNR may request funding and positions for the evaluation of modeling. Wis. Stat. § 281.34(7m)(b).

The purpose of the hydraulic evaluation is to determine whether existing and potential groundwater withdrawals are causing or are likely to cause a significant reduction of a navigable stream's or navigable lake's rate of flow or water level below its average seasonal levels. If DNR concludes such impacts either are or will be occurring, the agency must determine

whether to recommend to the legislature mitigating measures. A decision by DNR to recommend mitigation measures must include the following information:

- The extent DNR has determined that cumulative groundwater withdrawals in all or part of the study area cause, or are expected to cause, a significant reduction in a navigable water body's rate of flow or water level.
- The scientific information DNR used to establish there is a hydraulic connection between the groundwater and navigable waters in the study area.
- The geographical boundaries of the area on which DNR recommends mitigation measures.
- The proposed mitigation measures DNR recommends the legislature adopt, by statute, to mitigate impacts on navigable waters.
- An economic analysis relating to the impact the recommended mitigation measures would have on businesses, utility ratepayers, and local government in the state's economy.

Wis. Stat. § 281.34(7m)(c).

The Wisconsin Legislature carefully crafted a graduated regulatory framework in Wis. Stat. §§ 281.34 and 281.35 to govern the permitting of high capacity wells by DNR. This includes the latest iteration to the program enacted by Act 10 addressing the unique concerns over groundwater withdrawal in Wisconsin central sands region, directing that DNR evaluate and model the hydrology of the region. Upon completion of this study, DNR must issue a decision on whether to recommend the legislature enact mitigating measures. Petitioner and amici were involved in the legislative process resulting in Act 10. But apparently, their desired outcome was not

achieved, so they requested the circuit court to dictate their preferred policy choice.

In testimony at the hearing on SB 76/AB 105, Petitioner Clean Wisconsin and *Amici* argued the bills should provide a more rigorous permitting framework for the high capacity well program. (Legislative Council Hearing Material.) For example, Clean Wisconsin submitted testimony that "the areas designated for study in the bills. . . are arbitrary and a weak attempt at providing a next step." *Id*. *Amicus* Central Sands Water Action Coalition also voiced concerns relating to the study:

> We believe that the most glaring weakness in the proposed studies, is that they come with no guarantees. DNR may make a recommendation for change based [on] the findings of said studies, or they might not. If the DNR did recommend changes, *the legislature would have to pass a bill to affect those changes. Id*. (Emphasis added.)

It would be fair to say that none of the 310 organizations and individuals voicing their opinion at the committee hearing were completely satisfied with the bill. Developing legislative policy is deliberative, comprehensive, and ultimately is based on compromise. The process to develop and enact laws is only accomplished in the legislative arena. Yet, Clean Wisconsin, having failed to achieve their desired results in recently enacted high capacity well legislation, is now urging the court to *enact* their preferred policies.[18]

[18] Neither is this the first encounter among these parties on these issues before a court. Clean Wisconsin and intervenors Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Processors Association, and Potato & Vegetable Growers Association were all intervenors in the *New Chester Dairy* case in Outagamie County Circuit Court. In that case, Judge McGinnis found that DNR imposed unlawful permit conditions for high capacity wells and that, under 2011 WI Act 21, agencies

The DNR evaluation required by Act 10 is a necessary prerequisite to any further regulation of high capacity wells. It is a legislative prerogative to stay further regulation pending the outcome of DNR analysis of the impacts high capacity wells may have on surface waters. It is an issue of utmost import, and getting it right is best left to the deliberations of elective officials, not to agency *experts* or the courts. This study was not a deflection by the legislature. Wisconsin's Joint Committee on Finance authorized $400,000 for this study. In December 2017, DNR released its 39-page work plan relating to modelling those areas designated in Act 10.[19]

Clean Wisconsin's exhibits support the legislature's conclusion a study before more regulation is warranted. For example, Clean Wisconsin's exhibits include emails between DNR and University of Wisconsin Stevens Point staff that notes "we conflict substantially in the diversions. . . Could be because of the different models? Which do you think has the strongest link to reality?" Clean Wisconsin Exhibit 1. In another exhibit, it is noted that "the predicted streamflow depletion may be overestimated, so the stream depletion results given here are used an upper bound on possible impacts." Exhibit 3. In their brief Clean Wisconsin quotes from an exhibit that "the 1.7-inch model drawn down at Pheasant Lake, coupled with the calculated drawdown for the not yet constructed Richfield Dairy well, would reach the level the ALJ considered a significant impact for the lake (more than 2.5-3 inches)." (Pet'rs' Br. at 10.) Clean Wisconsin conveniently omit the next

cannot use implied authorities to impose regulatory requirements. *New Chester Dairy*, at 6. Petitioner Clean Wisconsin did not to appeal that decision.

[19] https://dnr.wi.gov/topic/wells/documents/HighCap/CSLSSOW.pdf.

sentence in that exhibit that states "[h]owever, because the impact is modeled for steady state conditions at the maximum conditioned pumping rate, it is likely that the actual drawdown would be less than 1.7 inches." Exhibit 3, at 3.

The point is that the *facts are not set* on this issue, and even Clean Wisconsin's exhibits in this case provide evidence of the uncertainty relating to the impact of high capacity wells on surface waters.[20] Making a legislative choice for additional information should be recognized as a legislative prerogative not to be second guessed by other branches of government. Beyond collecting vital information, it should allow for more objective balancing of all the competing interests. It is not for the courts to derail or otherwise preempt these efforts.

CONCLUSION

The decision of the Dane County Circuit Court should be reversed.

[20] The circuit court found that Wis. Stat § 227.57 (7) "requires [it] to vacate the approvals as a matter of law. . ." Decision, pp. 13. This is only true if "the facts compel a particular action as a matter of law. Wis. Stat § 227.57 (7). The circuit court was presented no such compelling facts that would justify the harshness of vacating high capacity wells needed for those applicant businesses.

DATED this 3rd day of May, 2018.

Respectfully Submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a non-party brief produced with a proportional serif font. The length of this brief, including footnotes, is 8,899 words.

/s/ Robert I. Fassbender

Robert I. Fassbender

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy 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.

/s/ Robert I. Fassbender

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2018, I caused a copy of this motion to be served upon each of the following persons via U.S. Mail, First Class:

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