STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2017AP001823

LAMAR CENTRAL OUTDOOR, LLC
d/b/a Lamar Advertising of Central Wisconsin

-and-

TLC PROPERTIES, INC.,

Petitioners-Appellants-Petitioners,

v.

STATE OF WISCONSIN
DIVISION OF HEARING & APPEALS,

Respondent-Respondent,

-and-

STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION,
Other Party.

ON APPEAL FROM A JUDGMENT OF THE CIRCUIT COURT, PORTAGE COUNTY, HONORABLE JON M. COUNSELL, PRESIDING, CASE NO. 16 CV 0196

NON-PARTY BRIEF BY WISCONSIN MANUFACTURERS & COMMERCE, MIDWEST FOOD PRODUCTS ASSOCIATION, OUTDOOR ADVERTISING ASSOCIATION OF WISCONSIN, WISCONSIN CHEESE MAKERS ASSOCIATION, AND WISCONSIN DAIRY ALLIANCE

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INTRODUCTION

Amici Wisconsin Manufacturers & Commerce, Midwest Food Products Association, Outdoor Advertising Association of Wisconsin, Wisconsin Cheese Makers Association, and Wisconsin Dairy Alliance (Wisconsin Employers) are Wisconsin business associations with members of every type and size. They are diverse, but share concerns over the complexity, volume, and burdens imposed by unchecked state and federal administrative agencies. Wisconsin Employers are united in their advocacy for fair and balanced government regulation.

Wisconsin Employers have an interest in assuring that Wisconsin executive branch agencies follow the rulemaking procedures set forth in Wisconsin Statutes Chapter 227. Rulemaking plays a critical role in promoting fairness by providing notice, consistency, and opportunity to comment. In most instances, agency compliance with rulemaking procedures is a legal prerequisite to regulation.

Thus, Wisconsin Employers primary interest in this case relates to the concept coined by the court of appeals of an "error-correcting exception" to Chapter 227 rulemaking procedures. The exception claimed lessens protections afforded the regulated community by allowing

agencies to make major policy changes without Chapter 227 rulemaking. Under this exception—not grounded in Chapter 227—an agency merely needs to pronounce that its desired policy change is necessary to comport to the statutes. If this loophole stands, it will encourage agencies to avoid required rulemaking procedures, inevitably leading to regulation by agency edict.

Wisconsin Employers generally support the arguments set forth by Lamar in its opening and reply briefs. Our focus, however, is the Wisconsin Department of Transportation (DOT) failure to promulgate a rule when interpreting and enforcing Wis. Stat. § 84.30. Even if an agency feels it needs to change its interpretation to correctly apply a statute, it can only do so through the rulemaking process *as required by law*.

ARGUMENT

I. The Court of Appeals' Error-Correcting Exception to Rulemaking is Inconsistent with Wisconsin's Administrative Procedure Act.

A. The Court of Appeals' Exception to Rulemaking Amounts to a Statement of Law, Not an Exception.

Let's first identify the elephant in the room—the court of appeals' *error-correcting exception* to rulemaking:

> If an agency is merely following its duty to ***administer the statute according to its plain terms***, the agency's action is not a regulation, standard, statement

> of policy or general order … [nor] is it a statement of general policy or interpretation of a statute, and the agency need not comply with formal rulemaking procedures. We refer to this exception as the error-correcting exception.

Lamar Cent. Outdoor, LLC v. DHA, 2019 WI App 1, ¶76, 385 Wis.2d 211, 923 N.W.2d 168 (emphasis added) (citation omitted).

The court of appeals correctly noted an agency has a "duty to administer the statute according to its plain terms." *Id*. But that is a statement of the law, not an exception to the law. An agency must always administer a statute according to its terms. An agency does not get a pass on rulemaking because it follows a statute. But that is exactly what the error-correcting exception claims. In effect, it excuses an agency from rulemaking just because the agency chooses to do what it must—*follow the law*.

Equally problematic, the court of appeals' terminology for its exception to rulemaking tracks the basic requirements for rulemaking found in Wis. Stat. § 227.10(1) which requires all agencies to "promulgate as a rule each statement of general policy and each interpretation *of a statute* which it specifically adopts *to govern its enforcement or administration of that statute*." (emphasis added). That is, Chapter 227's requirement for rulemaking mirrors the court of appeals' exception. This

exception would indeed swallow the rule. It is overly broad and completely unworkable. A return to the statutory premise for rulemaking is in order.

B. The Court of Appeals' Error-Correcting Exception Fails to Follow *Schoolway* by Unmooring It from Chapter 227 Rulemaking Requirements.

Over the years, legislation has carved out specific agency actions as exceptions to the definition of a "rule." Wis. Stat. §§ 227.01(13)(a)-(zz). Overall, the Wisconsin Legislature enacted over 70 exceptions to Chapter 227's rulemaking requirement. If legislators wanted to add another, they could. But they did not.

The court of appeals' sweeping exception to agency rulemaking conjures up a well-established principle of statutory interpretation: the legislature does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). In other words, if the legislature meant to provide such a far-reaching exception to a fundamental agency duty like rulemaking, it would have said so. Legislatures do not play games of hide and seek hoping an agency or court will guess how far the legislative directives extend. It is one reason the court begins with the plain language when reviewing a statute. The words

mean what they say in the context they say it. S*tate ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46 271 Wis.2d 633, 681 N.W.2d 110. But there are no words in the statutes that give rise to an error-correcting exception to rulemaking procedures.

Rather than statutory text, the court of appeals' error-correcting exception to Chapter 227 rests awkwardly on a strained reading of *Schoolway Transp. Co., Inc. v. Division of Motor Vehicles, Dept. of Transp*., 72 Wis.2d 223, 240 N.W.2d 403 (Wis. 1976). But in the over 40 years since *Schoolway* was decided, there have been no other cases that cite it as an exception to Chapter 227 rulemaking requirements.

Schoolway's holding arises out of a very narrow fact-pattern where a clear statutory directive required no agency interpretation, and thus, no rulemaking. In the case, the Department of Motor Vehicles (DMV) licensed buses under a statute that provided discounted licensing rates for vehicles engaged in bussing schoolchildren. *Id*. at 227. Prior DMV policy allowed discounted dual-licensing for buses that operated both as school buses and as buses for charter and contract work. *Id*. at 225. However, the governing statute specifically stated it applied only to buses "operated…*exclusively* for transportation of students to or from school."

Id. at 227 (emphasis added). Subsequently, the agency ceased allowing discounted dual licensing rates. *Id*. at 225-26.

The court found that DMV's change in policy did not require rulemaking since the statute explicitly required the opposite of the agency practice. This determination rested, then, on a single finding—the agency's action did not involve an interpretation of a statute:

> [T]he dual licensing practice is prohibited by the clear exclusivity requirements of the school bus licensing provisions of sec. 341.26(2)(d) and (da), Stats. Thus, no interpretation of that section is necessary.

Id. at 235-236.

As discussed later, interpreting statutory language is a component of the underlying rulemaking directive at Wis. Stat. § 227.10(1) and one of the five elements of a rule defined by Wis. Stat. § 227.01(13). Because there was no interpretation of the statute, the *Schoolway* court held "there is no requirement that the department comply with the filing procedures mandated in connection with promulgation of administrative rules. . ." *Id*. at 236 (citations omitted).

There is a reason *Schoolway* has not previously been cited for an exception to Chapter 227 rulemaking procedures—it is not an exception to Chapter 227 rulemaking procedures. The *Schoolway* decision, appropriately, arises out of the statutory requirements for rulemaking.

Specifically, *Schoolway* stands for the well-established proposition that all five statutory elements of a rule must exist for an agency action to be a rule, including statutory interpretation.

Only the legislature can establish exceptions to Chapter 227 rulemaking procedures. There is simply nothing in Chapter 227 or prior court decisions, including *Schoolway*, that allows for an error-correcting exception as articulated by the court of appeals in this case. Granting agencies an exception whenever they "administer the statute according to its plain terms" is a judicial elephant without a statutory mousehole.

C. The Court Should Clarify Schoolway in a Way that Better Reflects the Case's Commitment to Chapter 227 Rulemaking Procedures.

Wisconsin Employers expect that the court of appeals' sweeping exception to rulemaking, particularly if affirmed by this Court, will wind its way through the corridors of the administrative state as a "Get Out of Jail Free" card to avoid rulemaking. It's not even clear what would not be exempt if an agency merely needs to find its policies relate to *administering the statute according to its plain terms*.

1. Rulemaking Promotes Fairness by Providing Notice, Consistency, and Opportunity to Comment.

Rulemaking is vital in promoting fairness by providing notice, consistency, and opportunity to comment. 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 (4th ed. 2002). Most important, rulemaking allows for "clear advance notice of permissible and impermissible conduct." *Id*. at 372.

Rulemaking also reduces interagency inconsistencies in implementing the law. Pierce, *supra*, at 373. The regulated community benefits because application of a statute depends upon a previously determined standards, not the discretion of an individual—and potentially changing—employee.

Finally, it allows "potentially affected members of the public an opportunity to participate in the process of determining the rules that affect them." *Id*. at 374. The notice and comment portion of the rulemaking process gives the regulated community the opportunity to engage with potential regulations and express concerns before it binds them.

2. To Remove Ambiguity and Lessen Rulemaking Avoidance, the Court Should Clarify Schoolway.

Given the import of rulemaking process Wisconsin Employers have significant concerns over the upsurge in agency avoidance of rulemaking procedures. Rulemaking should be difficult. After all, rules

have the full force and effect of statutory law. And frankly, while rulemaking has become a more rigorous process, it's easy compared to the political process of enacting legislation by elected officials.

As early as 1981, Justice Antonin Scalia observed a trend by agencies to avoid rulemaking. Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, Regulation, July/August 1981. Empirical evidence finds that agencies invoke exceptions to avoid rulemaking procedures more frequently as the threat of a lawsuit challenging that avoidance declines. Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 Admin. L. Rev. 65, 68 (2015). Even when litigation ensues, courts do not consistently require agencies to comply with rulemaking procedures. *Id.*

It has been documented that lack of legal clarity is a key factor leading to rulemaking avoidance. "[A]gencies seize upon [] ambiguity to avoid rulemaking procedures more frequently as the threat of a successful lawsuit challenging the avoidance declines." *Id*. If the court of appeals' *Schoolway* interpretation remains, even only as persuasive authority, it leaves an avenue open for agencies to avoid rulemaking requirements by

claiming the error-correcting exception. That path to rulemaking avoidance will be too well traveled.

Even if the error-correcting exemption becomes moot in this case through a ruling based upon other factors, this court should clarify the matter because "the issue is likely to arise again and should be resolved by the court to avoid uncertainty." *State v. Fitzgerald*, 2019 WI 69, ¶22, 929 N.W.2d 165.

II. DOT Triggered Chapter 227 Rulemaking Requirements When Interpreting Wis. Stat. § 84.30(11) for Enforcement Purposes.

When an agency receives a delegating statute and its actions under the statute meet the requirements of a rule, it must promulgate a rule in accordance with Chapter 227. DOT's interpretation of Wis. Stat. § 84.30(11) plainly meets the definition of a rule and requires rulemaking.

A. An Agency Must Promulgate as a Rule Each Interpretation of a Statute It Adopts to Govern Its Enforcement or Administration of That Statute.

To exercise legislatively delegated policymaking authority, an agency generally must promulgate a rule. Chapter 227, Subchapter II (Administrative Rules and Guidance Documents) covers the requirements for agency rulemaking. It begins by stating:

> Each agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute.

Wis. Stat. § 227.10(1).

In turn, if not a rule, no rulemaking procedure applies. Wis. Stat. § 227.01(13) defines "rule" and provides the functional interpretation for Wis. Stat. § 227.10(1)'s rule requirement.

A rule consists of five, equally necessary elements: "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis.2d 804, 814, 280 N.W.2d 702 (1979) (citing Wis. Stat. § 227.01(13)).

The first element, "(1) a regulation, standard, statement of policy or general order," quite broadly covers an agency's position relating to a statute. A statement of policy can take several different forms, but what matters most is that in some way it sets forth an agency's policies on the issues under its authority.

To meet the requirements "(2) of general application," an agency action does not need to apply to everyone. *Citizens for Sensible Zoning*, 90 Wis.2d 804 at 815-16. Rather, "even though an action applies only to

persons within a small class, the action is of general application if that class is described in general terms and new members can be added." *Id*.

An action "(3) having the effect of law" occurs "where criminal or civil sanctions can result as a violation; where licensure can be denied; and where the interest of individuals in a class can be legally affected through enforcement of the agency action." *Cholvin v. DHFS*, 2008 WI App 127, 313 Wis.2d 749, 758 N.W.2d 118.

"(4) issued by an agency" is defined by Wis. Stat. § 227.01(1) "a board, commission, committee, department or officer in the state government, except the governor, a district attorney or a military or judicial officer."

Finally, "(5) to implement, interpret *or* make specific legislation enforced or administered by such agency" covers a wide range of agency actions that require rulemaking. The use of the word "or" means any of the three listed actions—singularly or collectively—fulfill (5). Thus, the other four elements met, if an agency interprets and implements a statute, it must promulgate a rule. If it implements a statute without interpretation, it must promulgate a rule. And if it interprets a statute but does not

implement it—say, by determining a former policy no longer applies—*it still must promulgate a rule*.

B. DOT's Interpretation when Wis. Stat. § 84.30(11) is Applicable Triggered Chapter 227 Rulemaking.

Under Wisconsin law, DOT can regulate outdoor advertising on highways. Wis. Stat. § 84.30(14). Wis. Admin. Code Trans § 201.10(2)(e) did so: "The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged." Violations of Wis. Admin. Code § 201.10(2)(e) can result in removal of the sign under Wis. Admin Code Trans § 201.09 ("[A]ny nonconforming sign which subsequently violates s. 84.30, Stats., or these rules, shall be subject to removal as an illegal sign.").

However, a sign owner can avoid removal in some instances by returning the sign to its original size. Wis. Stat. § 84.30(11) provides:

> Any sign erected in an adjacent area after March 18, 1972, in violation of this section or the rules promulgated under this section, may be removed by the department upon 60 days' prior notice...unless such sign is brought into conformance within said 60 days.

Two points of ambiguity exist within the statute and cause controversy here: which signs the right to cure applies to and what it means to bring a sign into conformance. Lamar argues "any sign" includes

formally lawful but now noncompliant signs. Petitioners-Appellant-Petitioners Br. 28. According to Lamar's reading, "in violation" modifies "any sign." *Id.* Thus, "any sign…in violation" gets the right to cure. *Id.* Under this understanding, "brought into conformance" means a sign returns to its previously lawful but noncompliant status. Wisconsin Employers supports Lamar's reading.

DOT argues that "any sign" only includes signs *erected* in violation of the section. DHA Resp. Br. 21. In other words, the right to cure only applies to signs built illegally, not later rendered illegal. DHA argues that otherwise "brought into conformance" would be meaningless since definitionally a non-compliant sign cannot become compliant. *Id.*

Depending on how construed, Wis. Stat. § 84.30(11) can be understood to support either side. In fact, DOT applied both interpretations at different points in the statute's history. *Lamar Cent. Outdoor, LLC*, 2019 WI App 1, ¶76. The court of appeals noted: "Lamar has presented ample evidence that the Department's application and enforcement *have indeed changed*, and the DHA does not dispute this point." *Id.* (emphasis added). That change resulted from a changed interpretation. Axiomatically, a changed interpretation of the law.

Regardless of the correct reading, the agency's interpretation required rulemaking because it met the elements of a rule. (1) DOT stated Wis. Stat. § 84.30(11) did not apply to nonconforming signs—a statement of policy. (2) The policy had general application because it denied *all* nonconforming sign owners the right to cure. (3) DOT's interpretation of Wis. Stat. § 84.30(11) had the effect of law since it limited the statute's applicability and resulted in the removal notice for Lamar's nonconforming sign. (4) DOT is an agency.

Finally, (5) DOT's actions clearly involved interpretation and enforcement of Wis. Stat. § 84.30(11). DOT interpreted the statute as not applying to nonconforming signs. But it used to read the same statute and interpret it to mean the opposite. Regardless of application, DOT's actions involved interpretation.

Contrary to DOT's argument, this does not fall under contested case exception in Wis. Stat. § 227.10(1). Clearly, DOT's interpretation of Wis. Stat. § 84.30(11) applies to all nonconforming signs, not just Lamar's. The interpretation did not arise from a private ruling.

The agency actions here met all five elements of a rule. Thus, Wis. Stat. § 227.10(1) and all the rulemaking requirements of Supchapter II apply.

DOT failed to properly promulgate a rule when interpreting and enforcing Wis. Stat. § 84.30. This interpretation is an indispensable underpinning of DOT's sign removal order. Thus, the order is invalid and unenforceable.

CONCLUSION

For the foregoing reasons, Wisconsin Employers respectfully request that the Court reversed the decision of the DHA and the court of appeals.

DATED this twelfth day of July 2019.

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 2,992 words.

/s/

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

CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of July, 2019, 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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