IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH RUFFOLO and
MARY RUFFOLO,

Plaintiffs,

Case No. 23-CV-0635

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

ADAM PAYNE, *in his official capacity as secretary of the Wisconsin Department of Natural Resources*,

and

JOSH KAUL, *in his official capacity as attorney general of Wisconsin*,

Defendants.

PLAINTIFFS' RESPONSE BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Ralph and Mary Ruffolo sought to sell their bicycle and skateboard shop so they could retire. A potential buyer's financial lender requested an environmental assessment of the property, so the Ruffolos hired consultants to perform the assessment. The consultants discovered underground petroleum contamination, which most likely was caused by a filling station that previously owned the property. The assessment also revealed the presence of trichloroethene vapors in the Ruffolos' commercial building. One of the consultants notified the Wisconsin Department of Natural Resources (DNR) of the contamination. The DNR subsequently sent a "responsible party" letter to Ralph Ruffolo, asserting that he must remediate the contamination and describing his regulatory requirements.

The Ruffolos filed this action in state court to obtain a declaration that they are not liable under Wis. Stat. § 292.11(3) for remediating underground petroleum contamination that they did not cause—and for which they cannot constitutionally be held liable. The Ruffolos are also seeking a declaration that Wis. Stat. § 292.11(3) does not authorize the DNR to compel the Ruffolos to mitigate air vapors in their commercial building.

The DNR removed this case to federal court and filed a motion to dismiss one week later, raising various jurisdictional defenses and asserting the Ruffolos have failed to state a claim. (Dkt. 1; 2; 3.)[1] The Ruffolos filed a motion to remand this case to state court on non-jurisdictional grounds. (Dkt. 5; 6.) Both motions are still pending.

The Ruffolos now file this response to the motion to dismiss, providing jurisdictional grounds for remanding this case to state court. Specifically, the DNR argues that this case is unripe under Article III of the U.S. Constitution, and it asserts sovereign immunity under the Eleventh Amendment to the U.S. Constitution. Those arguments *against* federal jurisdiction are the antithesis of establishing federal jurisdiction. The DNR has utterly failed to meet its burden of establishing federal jurisdiction. For the reasons stated in this brief and in the Ruffolos' previously filed brief (Dkt. 5:2–8), this Court should remand this entire case to state court.

If the Court does not remand this entire case, then it should remand the Ruffolos' state-law claims and stay their federal claims. (Dkt. 5:8–13.)

If the Court reaches the merits of any of the Ruffolos' claims, it should deny the DNR's motion to dismiss because the Ruffolos' claims are at least plausible. In addition, the Court may

[1] This brief collectively refers to the Defendants as the DNR except where they are discussed individually.

grant the Ruffolos summary judgment on these pleadings alone. Because the DNR argues in its motion to dismiss that the Ruffolos failed to state a claim, the Court shall convert the DNR's motion to dismiss into a motion for summary judgment if the Court considers matters outside the pleadings. *See* Fed. R. Civ. P. 12(d). If the Court makes that conversion, it may grant summary judgment to the Ruffolos under Federal Rule of Civil Procedure 56(f)(1). Alternatively, the Ruffolos request the opportunity to file a motion for summary judgment and supporting materials.

ARGUMENT

I. The Court should remand this entire case to state court because the DNR's ripeness argument disavows federal subject-matter jurisdiction.

The DNR urges this Court to "dismiss the Ruffolos' claims as unripe." (Dkt. 3:41; *see also* Dkt. 3:35 ("The Ruffolos' claims must be dismissed because they are not ripe for adjudication.").) In making that argument, the DNR relies on Article III of the U.S. Constitution. (Dkt. 3:36 & n.7.)

However, the correct remedy is to remand this case to state court for lack of federal jurisdiction, not dismiss it. In a case removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*." 28 U.S.C. § 1447(c) (emphasis added). "[T]he point of § 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance." *Smith v. Wisconsin Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1139 n.10 (7th Cir. 1994).

For a case to be removable to federal court, Article III subject-matter jurisdiction must exist. *See Collier v. SP Plus Corp.*, 889 F.3d 894, 895 (7th Cir. 2018) (per curiam). For Article III subject-matter jurisdiction to exist, it must be proven. In all cases, the "proponent of jurisdiction"—the party asserting federal jurisdiction—must prove the court has jurisdiction. Typically, that burden is on the plaintiff, but when "a case is removed from state court, the roles are reversed and the burden flips." *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1151 (7th Cir. 2020). "Whichever side chooses federal court must establish jurisdiction[.]" *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005).

"Article III, § 2 of the Constitution 'limits the "judicial power" to the resolution of "cases" and "controversies."'" *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007) (citation omitted). "A case or controversy requires a claim that is ripe and a plaintiff who has standing." *Id.* "The doctrines of standing and ripeness 'originate' from the same Article III limitation." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). So "[f]ederal courts

lack jurisdiction to consider an unripe claim." *Kathrein v. City of Evanston*, 636 F.3d 906, 915 (7th Cir. 2011); *see also Siebers v. Barca*, No. 20-CV-1109-JDP, 2022 WL 2438605, at *4 (W.D. Wis. July 5, 2022) (This Court "does not have subject-matter jurisdiction over unripe claims.").

So when a removal case is unripe, a federal district court must remand the case to the state court from which it came. *See, e.g.*, *Smith*, 23 F.3d at 1142. In *Smith*, a federal district court "erred in dismissing" a removed claim on ripeness grounds. *Id.* Although the Seventh Circuit agreed that the claim was unripe, the Seventh Circuit concluded that a remand to state court (rather than dismissal) was the correct remedy. *Id.* As the Seventh Circuit explained, "Because [the plaintiff's] claim is not yet ripe, the district court lacked subject-matter jurisdiction and was required under § 1447(c) to remand the claim to the state court from which it was removed." *Id.*

To establish jurisdiction, "it is not enough to file a pleading[2] and leave it to the court or the adverse party to negate jurisdiction." *Brill*, 427 F.3d at 447. The defendant must affirmatively argue that jurisdiction exists. In deciding whether a defendant has fulfilled this burden, courts must resolve "any doubt in favor of the plaintiff's choice of forum in state court." *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 758 (7th Cir. 2009).

A remand to state court is required when, as here, a defendant removes a case to federal court and then moves to dismiss for lack of jurisdiction. *See, e.g.*, *Collier*, 889 F.3d at 895; *Barnes v. ARYZTA, LLC*, 288 F. Supp. 3d 834, 837 (N.D. Ill. 2017); *Mocek v. Allsaints USA Ltd.*, 220 F. Supp. 3d 910, 912 (N.D. Ill. 2016).

Collier is highly instructive here. In *Collier*, "both parties insist[ed] that the plaintiffs lack[ed] Article III standing to sue." *Collier*, 889 F.3d at 895. "The plaintiffs [argued] that without standing their case could not be removed from state court using 28 U.S.C. § 1441; the defendant justifie[d] removal but [argued] the case then required dismissal for lack of standing." *Id.* "The district court agreed with the defendant and dismissed the case." *Id.* The Seventh Circuit, however, concluded that "the case was not removable, because the plaintiffs lack[ed] Article III standing—negating federal subject-matter jurisdiction." *Id.* The Seventh Circuit noted that "[a]s the party invoking federal jurisdiction, [the defendant] had to establish that all elements of jurisdiction—including Article III standing—existed at the time of removal." *Id.* at 896. Removal was improper

[2] As used here, "pleading" refers to a notice of removal. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) ("A defendant's notice of removal [ ] serves the same function as the complaint would in a suit filed in federal court.").

even though the plaintiffs had raised a federal-law claim, "because federal courts have subject-matter jurisdiction only if constitutional standing requirements also are satisfied." *Id.* Citing *Smith* and other cases, the Seventh Circuit noted that dismissal for lack of standing was the wrong remedy. *Id.* at 897. Instead, "§ 1447(c) required the district court to remand this case to state court, because it [did] not satisfy Article III's requirements." *Id.* The Seventh Circuit thus "vacate[d] the judgment and remand[ed] for the district court to return the case to state court." *Id.* at 895.

Like in *Collier*, the defendant in *Mocek* removed the case to federal court and then moved to dismiss for lack of standing. *Mocek*, 220 F. Supp. 3d at 911. The plaintiff moved to remand the case to state court "in view of defendant's affirmative disavowal of jurisdiction." *Id.* The district court remanded the case instead of dismissing it. *Id.* at 911–12. The court reasoned that "when 'no party shoulders the burden of proving jurisdiction,' remand is required under § 1447(c)." *Id.* at 912 (citation omitted). "[W]ith no party willing to overcome the presumption against federal jurisdiction, remand is appropriate on any analysis." *Id.* at 914.

The district court followed *Mocek* in *Barnes*. There, the defendant removed the case to federal court, moved to dismiss for lack of jurisdiction, and then withdrew its motion to dismiss "in a ploy to avoid being forced out of federal court." *Barnes*, 288 F. Supp. 3d at 839. The plaintiff subsequently filed a motion to remand the case to state court. *Id.* at 836. The district court "decline[d] to decide whether there [was] Article III standing because neither party [was] willing to address the issue." *Id.* at 839. The court noted that "Plaintiff does not have to take a position on the standing issue while Defendant does, because Defendant bears the burden of establishing jurisdiction in this Court." *Id.* The court granted the motion for remand because "Defendant [did] not even attempt and thus necessarily fail[ed] to persuade the Court that federal jurisdiction exist[ed]." *Id.* at 839–40.[3]

Here, too, this Court should remand this case to state court. As the party who removed this case to federal court, the DNR "had to establish that all elements of jurisdiction," including Article III requirements, "existed at the time of removal." *See Collier*, 889 F.3d at 896. While the Ruffolos raised some claims under federal law, that fact is immaterial because the DNR argues the Ruffolos' claims are not ripe. Ripeness is a jurisdictional prerequisite for removal to federal court. *Smith*, 23 F.3d at 1142. When presented with a similar situation, the Seventh Circuit held that removal was

[3] Like the plaintiff in *Barnes*, the Ruffolos take no position on whether Article III jurisdiction exists in this case.

improper where the removing party argued lack of standing, despite the existence of "federal question" original jurisdiction. *Collier*, 889 F.3d at 896. Like the defendants in *Collier* and *Mocek*, the DNR utterly failed to meet its burden of establishing Article III jurisdiction because it has moved to dismiss for *lack* of jurisdiction. This case must therefore be remanded to state court rather than dismissed.

Indeed, the DNR has totally contradicted its initial effort to establish federal jurisdiction. In its notice of removal, the DNR asserted that "[t]he United States District Court for the Western District of Wisconsin has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343." (Dkt. 1:3.) But now, the DNR argues that federal jurisdiction is *lacking* because the Ruffolos' claims are unripe. (Dkt. 3:35–41.) In arguing lack of ripeness, the DNR fails to meet its burden as the proponent of federal jurisdiction. Indeed, "to say that a court is without jurisdiction to decide a case on its merits [yet] has jurisdiction merely to remove the case is to state a contradiction." *Barnes*, 288 F. Supp. 3d at 839 (quoting *Richman Bros. Co. v. Amalgamated Clothing Workers of Am.*, 114 F. Supp. 185, 190 (N.D. Ohio 1953)). By arguing *against* jurisdiction on ripeness grounds, the DNR did "not even attempt and thus necessarily fails to persuade the Court that federal jurisdiction exists." *See Barnes*, 288 F.Supp.3d at 839–40.

In effect, the DNR seeks "to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes of achieving outright dismissal, with prejudice, rather than the remand required by § 1447(c)." *See Mocek*, 220 F. Supp. 3d at 914. The DNR tried to "justif[y] removal" in its notice of removal but now argues the case "require[s] dismissal for lack of [ripeness]." *See Collier*, 889 F.3d at 895. In this circumstance, a district court must "return the case to state court." *Id.*

On remand, the state court may determine whether the case is ripe under state law. Whether a claim is ripe under state law is an issue for a state court to resolve on remand. *Smith*, 23 F.3d at 1142. "[A] state court might have the authority to hear a federal constitutional claim in a setting where a federal court would not" because "Article III's 'case or controversy' limitations apply only to the federal courts." *Id.* (citations omitted). "Wisconsin's doctrines of standing and ripeness are the business of the Wisconsin courts, and it is not for [federal courts] to venture how the case would there be resolved." *Id.* So this Court should not decide whether the Ruffolos' claims are ripe under *Wisconsin* law. That issue is for the Jefferson County Circuit Court to resolve on remand.

In sum, because "it appears that [this Court] lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The DNR's own argument *against* federal jurisdiction requires a remand to the Jefferson County Circuit Court. By moving to dismiss this case on Article III ripeness grounds, the DNR has utterly failed to meet its burden of establishing federal jurisdiction.

II. The Court should remand this entire case because the DNR is asserting sovereign immunity under the U.S. Constitution—and if the Court addresses the DNR's state-law immunity defense, it should reject that defense.

The DNR asserts sovereign immunity under the U.S. Constitution. Based on that assertion, this Court should remand this case to state court due to lack of federal jurisdiction.

The DNR also argues that sovereign immunity under the Wisconsin Constitution bars this lawsuit. This Court should not decide that issue. Instead, the Court should remand that state-law defense to the Jefferson County Circuit Court along with the rest of this case.

If this Court resolves the DNR's state-law defense of sovereign immunity, it should reject that defense. Wisconsin's doctrine of sovereign immunity applies only to lawsuits that seek money from the State. It does not apply to lawsuits that seek only non-monetary declaratory and injunctive relief, such as this lawsuit.

A. The Court should remand the entire case to state court because the DNR is asserting sovereign immunity under the U.S. Constitution.

As explained above in section I regarding ripeness and in the Ruffolos' separate brief (Dkt. 5:2–8), this Court should remand this entire case to the Jefferson County Circuit Court.

In addition to its ripeness defense, the DNR presents another ground for remanding this case: the DNR asserts sovereign immunity under the Eleventh Amendment to the U.S. Constitution. (Dkt. 3:31.) Based on this defense, the DNR argues that the Ruffolos' "complaint should be dismissed on these threshold grounds." (Dkt. 3:35.)

The correct remedy is to remand this case to state court, not dismiss it. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). And "the Eleventh Amendment is 'jurisdictional' in the sense that a defendant invoking its sovereign immunity deprives a federal court of jurisdiction over the claims against that defendant." *McHugh v. Illinois Dep't of Transportation*, 55 F.4th 529, 533 (7th Cir. 2022). "A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 392 (1998). So a federal district court must remand a removal case to state court if the case

is barred by the Eleventh Amendment. *See, e.g.*, *Smith*, 23 F.3d at 1140; *Engelking v. Lab. & Indus. Rev. Comm'n*, No. 14-CV-314-JDP, 2014 WL 3891652, at *4 (W.D. Wis. Aug. 7, 2014).

Based on the DNR's assertion that Eleventh Amendment sovereign immunity forecloses this federal action, this Court should remand this entire case to state court.[4]

On remand, the state court can determine whether sovereign immunity under Wisconsin law applies to this case. The DNR also asserts sovereign immunity under the Wisconsin Constitution. (Dkt. 3:24.) However, when a federal court remands a case to state court, it must also remand state-law defenses, including a defense under state-law sovereign immunity. *See, e.g.*, *Gossmeyer v. McDonald*, 128 F.3d 481, 488–89 (7th Cir. 1997); *Smith*, 23 F.3d at 1139.

Yet the DNR argues that the question "[o]n removal" is whether the state officials "would be entitled to sovereign immunity from those claims if asserted in state court." (Dkt. 3:32 (citing *T. S. v. County of Cook*, 67 F.4th 884, 894 (7th Cir. 2023)).) But *T. S.* involved a lawsuit that was filed in federal court, not a case removed from state court. *See T. S.*, 67 F.4th at 888–89. Accordingly, *T. S.* provides no support for this Court to resolve the DNR's defense of sovereign immunity under state law. Pursuant to *Gossmeyer* and *Smith*, this Court should remand the DNR's state-law immunity defense along with the rest of this case. On remand, the state court may determine whether state-law sovereign immunity applies.

B. At any rate, the Ruffolos properly filed this lawsuit under Wis. Stat. § 806.04, which provides an exception to state-law sovereign immunity.

If this Court resolves the DNR's state-law defense of sovereign immunity, it should reject that defense because Wisconsin's Declaratory Judgments Act authorizes this lawsuit. "The Declaratory Judgments Act allows litigants to seek a declaration of the 'construction or validity' of a statute." *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856 (quoting Wis. Stat. § 806.04(2)).

That is what the Ruffolos are doing. The Ruffolos are seeking declaratory relief on the construction or validity of Wis. Stat. § 292.11(3). This case falls squarely within the Declaratory Judgments Act. According to the DNR's view of section 292.11, "Wisconsin law considers a property owner to be liable for contamination, no matter when it occurred, and even when another person that caused the contamination is also liable, unless the owner falls under one of . . . four

[4] The Ruffolos take no position on whether Eleventh Amendment sovereign immunity bars this federal case.

liability exemptions….” Wis. Dep’t of Nat. Res., “Environmental Liability,” https://dnr.wisconsin.gov/topic/Brownfields/Liability.html. The Ruffolos filed this declaratory judgment action to challenge that construction of the statute and its constitutional validity.

The DNR argues that sovereign immunity under the Wisconsin Constitution bars this lawsuit. The DNR is wrong.

“Whether the defense of sovereign immunity may be asserted depends upon the nature of the relief that is sought.” *Manitowoc Co. v. City of Sturgeon Bay*, 122 Wis. 2d 406, 412, 362 N.W.2d 432 (Ct. App. 1984). “The state . . . is entitled to invoke its sovereign immunity only when an action is in essence for the recovery of money from the state.” *Id.* So if “the purpose of the declaratory ruling is to establish the State’s liability for the payment of money, it is, in effect, one for damages.” *Brown v. State*, 230 Wis. 2d 355, 381, 602 N.W.2d 79 (Ct. App. 1999). In that context, “the doctrine of sovereign immunity applies just as it would were damages directly requested.” *Id.* at 381–82. By contrast, “sovereign immunity does not bar a suit for a declaratory ruling that an individual state official or agency has violated a statute when there is an anticipatory or preventive purpose for the ruling; the underlying theory is that the suit is not really against the State because the officer or agency is acting in excess of his, her or its authority.” *Id.* at 382.

Those legal principles doom the DNR’s assertion of sovereign immunity under state law. This lawsuit does not seek to impose monetary liability on the State. It seeks anticipatory or preventive relief in the form of declarations that the DNR has violated the law and injunctions prohibiting future violations. (Dkt. 1-1:874–75.) Because this lawsuit alleges that a state agency and two state officials exceeded their authority, this lawsuit “is not really against the State” and thus sovereign immunity under Wisconsin law does not apply here. *See Brown*, 230 Wis. 2d at 382.

The DNR argues that sovereign immunity applies here because the Ruffolos are not asserting that the DNR is exceeding its jurisdictional authority or acting unconstitutionally. (Dkt. 3:29–30.) But the Ruffolos are making such an assertion. The Ruffolos have alleged that the DNR sent a letter to Ralph Ruffolo in which the DNR instructed him to comply with a host of costly mandates that the Spills Law does not (and constitutionally cannot) impose on innocent landowners such as the Ruffolos. (*See* Dkt. 1-1:850–75.) The Ruffolos are alleging that the DNR and its secretary have acted beyond their statutory and constitutional authority by instructing Ralph to remediate contamination that he legally is not required to remediate (and that he cannot

constitutionally be required to remediate). The DNR may be dismissive of this letter, but a "responsible party" letter from the DNR is significant. Such a letter obligates its recipient to begin the remediation process. *See Nischke v. Farmers & Merchants Bank & Tr.*, 187 Wis. 2d 96, 120, 522 N.W.2d 542 (Ct. App. 1994).

Again, under Wisconsin law, "[t]he state . . . is entitled to invoke its sovereign immunity only when an action is in essence for the recovery of money from the state." *Manitowoc Co.*, 122 Wis. 2d at 412. As just explained, this lawsuit is not an action for the recovery of money from the State. Sovereign immunity under Wisconsin law does not apply here.

The DNR also argues that the Ruffolos could not bring this lawsuit under the Declaratory Judgments Act because Wis. Stat. § 227.52 is the exclusive avenue for challenging an agency decision. (Dkt. 3:25–27.) The DNR's reliance on the exclusivity rule is misplaced for two independent reasons.

First, this lawsuit does not implicate the exclusivity rule. This rule provides that "where administrative action has taken place, and where a statute sets forth a specific procedure for review of that action, the statutory remedy is exclusive and the parties cannot seek judicial review of the agency action through other means." *Ass'n of Career Emps. v. Klauser*, 195 Wis. 2d 602, 612, 536 N.W.2d 478 (Ct. App. 1995). The exclusivity rule has spawned two complementary doctrines: "exhaustion of administrative remedies, which contemplates a situation in which administrative action has begun but has not yet been completed, and primary jurisdiction, which applies when there has been no administrative proceeding." *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 12, 305 Wis. 2d 788, 741 N.W.2d 244. The exhaustion doctrine does not bar judicial review unless, among other things, an administrative remedy "is available to the party on his initiative." *St. Croix Valley Home Builders Ass'n, Inc. v. Twp. of Oak Grove*, 2010 WI App 96, ¶ 21, 327 Wis. 2d 510, 787 N.W.2d 454 (citation omitted).

Under those principles, the exclusivity rule does not apply here. As the DNR recognizes, it has not taken any administrative action against the Ruffolos that would be reviewable under Wis. Stat. § 227.52. (Dkt. 3:26.) Because no "administrative action has taken place" that would be reviewable under section 227.52, the exclusivity rule does not apply here. *See Klauser*, 195 Wis. 2d at 612. For similar reasons, an administrative remedy is *not* available to the Ruffolos on their initiative. The Ruffolos cannot seek judicial review under section 227.52 unless and until the DNR pursues administrative action against the Ruffolos (if it ever does) and then issues a decision that

would be reviewable under this statute. Because the Ruffolos have no recourse under this statute, it is not an exclusive avenue for their claims.

Second, even if the exclusivity rule were relevant here, it still would not apply. "Where an appeal to an administrative agency would not provide a party with adequate relief, a challenge may be properly made by commencing an action for declaratory relief." *Jackson Cnty. Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986). Because an administrative agency cannot declare a statute unconstitutional, the exclusivity rule and exhaustion doctrine do not bar a lawsuit seeking to declare a statute facially unconstitutional. *Metz*, 2007 WI App 220, ¶ 21. That principle applies to the DNR. *See id.* ¶ 15 n.14 (citing *Omernick v. DNR*, 71 Wis.2d 370, 374–75, 238 N.W.2d 114 (1976)). Here, the Ruffolos assert that the Spills Law is facially unconstitutional to the extent it imposes liability based on ownership of contaminated property. (Dkt. 1-1:850–75.) Because the DNR and executive-branch officials may not declare the Spills Law facially unconstitutional, the Ruffolos have no administrative avenue for pursuing their constitutional claims. In other words, because "an appeal to [the DNR] would not provide [the Ruffolos] adequate relief," the Ruffolos properly brought this "action for declaratory relief." *See Musolf*, 134 Wis. 2d at 101.

In short, this case falls within the Declaratory Judgments Act. The DNR's assertion of sovereign immunity under state law fails.[5]

III. If the Court reaches the merits of the Ruffolos' federal claims, it should remand the Ruffolos' state-law claims to state court.

The Ruffolos filed a motion to remand this entire case to state court or, alternatively, remand the state-law claims and stay the federal claims. (Dkt. 5; 6.) The Ruffolos provide additional, jurisdictional grounds above for remanding this entire case. *See supra* §§ I, II.A.

If the Court declines to remand this case and decides the Ruffolos' federal claims, then it should remand the state-law claims to state court.

A federal district court has discretion whether to exercise supplemental jurisdiction over a state-law claim. *Wright v. Associated Ins. Companies Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994).

[5] Because Wisconsin's Declaratory Judgments Act authorizes all the Ruffolos' claims against all the Defendants, this Court need not determine whether 42 U.S.C. § 1983 separately authorizes the Ruffolos' federal claims. Nevertheless, the Ruffolos concede that the DNR is outside the scope of § 1983, although the attorney general and the DNR secretary fall within the scope of § 1983. (*See* Dkt. 3:41–42.) *See also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989).

After deciding the federal claims in a case, a district court must make "a considered determination" as to whether it should hear the state-law claims. *Miller v. Herman*, 600 F.3d 726, 738 (7th Cir. 2010). "[A] district court should consider and weigh the factors of judicial economy, convenience, fairness and comity in deciding whether to exercise jurisdiction over pendent state-law claims." *Wright*, 29 F.3d at 1251.

"In the usual case in which all federal claims are dismissed before trial, the balance of these factors will point to declining to exercise jurisdiction over any remaining pendent state-law claims." *Id.* "Hence the general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Id.* In other words, "[w]hen the federal claim in a case drops out before trial, the presumption is that the district judge will relinquish jurisdiction over any supplemental claim to the state courts." *Leister v. Dovetail, Inc.*, 546 F.3d 875, 882 (7th Cir. 2008).

"There are, however, unusual cases in which the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness and comity—will point to federal decision of the state-law claims on the merits." *Wright*, 29 F.3d at 1251. "One such unusual case may arise when the statute of limitations has run on the pendent claim, precluding the filing of a separate suit in state court." *Id.* "Another occasion for retaining state-law claims occurs when 'substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort.'" *Id.* (citation omitted). "The third circumstance in which judicial economy, convenience, fairness and comity may point to federal retention of state-law claims occurs when it is absolutely clear how the pendent claims can be decided." *Id.*

Here, this case falls within the general rule that state-law claims should return to state court after the federal claims are resolved. For four reasons, this Court should remand the Ruffolos' state-law claims to the Jefferson County Circuit Court if this Court decides the Ruffolos' federal-law claims.

First, judicial economy supports remanding the state-law claims. "[R]arely when a case is dismissed on the pleadings can 'judicial economy' be a good reason to retain jurisdiction." *Wright*, 29 F.3d at 1251. Here, the DNR filed a motion to dismiss *one week* after removing this case to federal court. (Dkt. 1; 2.) This factor plainly supports a remand. In *Wright*, this factor favored a remand because "[t]he defendants filed their motions to dismiss within *two months* after the case

was filed, and the district court granted the motions to dismiss before discovery commenced." *Wright*, 29 F.3d at 1251 (emphasis added). The present case is being fast-tracked even more so.

Second, the Ruffolos would not have a statute-of-limitations problem if this Court declined to exercise jurisdiction over the state-law claims. When, as here, a case is removed to federal court based on federal-question jurisdiction, a district court may remand state-law claims to state court. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988); *Rothner v. City of Chicago*, 879 F.2d 1402, 1406 (7th Cir. 1989). "After a case is returned to state court on remand from a federal district court, Wisconsin law allows a party 'within one year . . ., [to] make appropriate motion for further proceedings.'" *St. Augustine Sch. v. Underly*, 78 F.4th 349, 354 (7th Cir. 2023) (alterations in original) (quoting Wis. Stat. § 808.08). Also, the Ruffolos filed this case under Wisconsin's Declaratory Judgments Act, which has "no statute of limitations." *E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, ¶ 28, 335 Wis. 2d 720, 800 N.W.2d 421. This factor weighs in favor of remanding the Ruffolos' state-law claims.

Third, it is not absolutely clear how the state-law claims will be decided. As explained below in section IV, the Ruffolos argue that they are not liable for the underground petroleum at their commercial property because two Wisconsin Supreme Court cases—*State v. Mauthe*, 123 Wis. 2d 288, 366 N.W.2d 871 (1985), and *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 580 N.W.2d 203 (1998)—are distinguishable from the Ruffolos' situation. Specifically, the Ruffolos are not liable under *Mauthe* because the underground petroleum is not migrating onto neighboring property, and they are not liable under *Chrysler* because they did not generate the petroleum waste. The Ruffolos further argue that if they are liable under *Mauthe*, then the Wisconsin Supreme Court should overrule *Mauthe*'s view of possession. (Dkt. 1-1:21 n.3; 1-1:865 n.4.) The Ruffolos' other state-law claim, involving vapor intrusion, is also novel and complex. *See infra* § VIII.

Because these state-law claims are novel and complex, this Court should remand them to state court. "The presence of 'a novel or complex issue of State law', [28 U.S.C.] § 1367(c)(1), in a suit where all federal claims have been finally resolved, § 1367(c)(3), implies the wisdom of sending those state-law theories back to state court." *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003). In other words, "[a] general presumption in favor of relinquishment applies and is particularly strong where, as here, the state-law claims are complex and raise unsettled legal issues." *RWJ Mgmt. Co. v. BP Prod. N. Am., Inc.*, 672 F.3d 476, 478 (7th Cir. 2012)

Even the DNR characterizes the Ruffolos' state-law claims as "novel." (Dkt. 3:22.) This factor heavily weighs in favor of remanding the state-law claims if this Court resolves the Ruffolos' federal claims.

Fourth and finally, fairness supports remanding the state-law claims. "The plaintiff's right to choose his forum is superior to the defendant's right of removal." *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001). The Ruffolos filed this case in state court because, if the lower courts disagree with the Ruffolos' interpretation of the Spills Law and the case law under it, then the Ruffolos may need to request the Wisconsin Supreme Court to overturn part of *Mauthe*. (*See* Dkt. 1-1:21 n.3; 1-1:865 n.4.) This Court lacks the power to overrule *Mauthe* because federal courts "are bound by authoritative state court rulings on matters of state law." *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 272 (7th Cir. 1983). Unless this Court remands the Ruffolos' state-law claims, the Ruffolos would be deprived of the ability to seek a change in Wisconsin case law by seeking review in the Wisconsin Supreme Court. That result would be fundamentally unfair. Indeed, federal courts often remand state-law claims that may require a state supreme court to overrule precedent. *See, e.g.*, *Connection Training Servs. v. City of Philadelphia*, No. CIV. A. 06-3753, 2009 WL 484201, at *4 (E.D. Pa. Feb. 25, 2009).

In sum, if this Court decides the Ruffolos' federal claims, then it should remand the Ruffolos' state-law claims to the Jefferson County Circuit Court. (But this Court should not resolve the federal claims, either. It should remand this entire case. *See supra* §§ I, II.A; Dkt. 5:2–8.)

IV. The Ruffolos stated a plausible claim that the Spills Law does not impose liability on innocent landowners like them.

A federal court must determine whether it has jurisdiction before reaching the merits of a party's claims. *See Kathrein*, 636 F.3d at 915–16. As explained above and in other briefing (Dkt. 5:2–8), this Court should remand this entire case to state court. The Court thus should not address the merits of the Ruffolos' claims.

If the Court reaches the merits of the Ruffolos' claims, it should deny the DNR's motion to dismiss and grant summary judgment to the Ruffolos.

A. Plaintiffs need only raise a plausible claim to survive a motion to dismiss for failure to state a claim.

For the purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts must assume "that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In other words, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Ruffolos' statutory (and constitutional) claims easily satisfy the plausibility threshold. Under controlling Wisconsin Supreme Court precedent, the Ruffolos are not liable under the Spills Law for the underground petroleum at their property because they did not cause that contamination and it is not discharging. Under controlling Wisconsin precedent, ownership of property is insufficient to establish remediation liability under the Spills Law. Instead, the Wisconsin Supreme Court has held that remediation liability applies if a person owns property *from which a hazardous substance is being discharged*. Because underground petroleum is not being discharged from the Ruffolos' property, they are not liable for it.

B. The Spills Law imposes liability on a person who either causes a hazardous discharge or possesses a hazardous substance when it is discharged.

This case is about the Spills Law's remediation requirement, which states that "[a] person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state." Wis. Stat. § 292.11(3). Interpreting the predecessor to Wis. Stat. § 292.11(3),[6] the Wisconsin Supreme Court held that remediation liability may be imposed under a causation theory or under a possession or control theory. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 161–62, 580 N.W.2d 203 (1998). Accordingly, "liability may be imposed upon anyone who causes a hazardous substance discharge or upon a person who possesses or controls the hazardous substance being discharged even though that person did not cause the discharge." *State v. Mauthe*, 123 Wis. 2d 288, 300, 366 N.W.2d 871 (1985).

The supreme court addressed causation-based liability in *Chrysler*. There, the state argued that Chrysler was liable under a causation theory. *Chrysler*, 219 Wis. 2d at 161–62. The court addressed whether the Spills Law imposes liability on a person who "generated the wastes and failed to remediate their subsequent spillage." *Id.* at 159. The court held that "[b]ecause the leaking

[6] In 1995, the Wisconsin Legislature renumbered Wis. Stat. § 144.76(3) to be Wis. Stat. § 292.11(3). 1995 Wis. Act 227, § 704.

or emitting of hazardous waste is an ongoing process that occurs absent human conduct, one may reasonably conclude that a person can cause that leaking by failing to clean up the hazardous waste *it has generated*." *Id.* at 169 (emphasis added). The court held that Chrysler was liable for Spills Law penalties because it had "generated the hazardous substances" and then "caused their discharge . . . by failing to remediate." *Id.* at 173.

The supreme court addressed possession-based liability in *Mauthe*. Under *Mauthe*, ownership of contaminated land does not establish causation of a discharge, but it does establish possession or control of a hazardous substance. *See Mauthe*, 123 Wis. 2d at 300–01; *see also Chrysler*, 219 Wis. 2d at 161 (noting the defendant in *Mauthe* "did not cause the hazardous substance spill" even though he owned contaminated land).

Crucially, for remediation liability to attach to a person under a possession or control theory, a hazardous discharge must occur while the person has possession or control of the substance. The Spills Law's plain language compels this conclusion. Again, under the Spills Law, "[a] person who possesses or controls a hazardous substance which *is discharged*" is responsible for remediation. Wis. Stat. § 292.11(3) (emphasis added). "Though the present tense of a verb includes the future, sec. 990.001(3), Stats., the legislature has not provided that the use of the present tense in the statutes includes the past." *Debeck v. DNR*, 172 Wis. 2d 382, 388, 493 N.W.2d 234 (Ct. App. 1992). The key language in the Spills Law uses present-tense words: "possesses or controls" and "is discharged." Wis. Stat. § 292.11(3). It does not impose clean-up liability on a person who possesses land where a hazardous substance *was* discharged. By using present-tense words to refer to both the requisite possession and the requisite discharge, the Spills Law imposes liability on a person who possesses a hazardous substance *while* it *is* discharged.

Mauthe compels this conclusion, too. As the *Mauthe* court indicated, the use of present-tense verbiage in the predecessor to Wis. Stat. § 292.11(3) means that the remediation requirement "applies to current discharges." *See Mauthe*, 123 Wis. 2d at 297. The *Mauthe* court held that the Spills Law imposes liability "upon a person who possesses or controls the hazardous substance *being discharged*." *Id.* at 300 (emphasis added). Under *Mauthe*, "the owner of the property which contains contaminated soil from which a hazardous substance *is being discharged* is required to take remedial action under" Wis. Stat. § 292.11(3). *Id.* at 290 (emphasis added). Under the Spills Law, "the possessor shall bear the cost of correcting the condition on [its] land that *is resulting* in the contamination of its neighbor's property." *Id.* at 302 (emphasis added).

The DNR is thus plainly wrong to assert that "Wisconsin law considers a property owner to be liable for contamination, no matter when it occurred." Wis. Dep't of Nat. Res., "Environmental Liability," https://dnr.wisconsin.gov/topic/Brownfields/Liability.html.

In *Mauthe*, the State alleged that Mauthe's company had engaged in chrome electroplating activities that resulted in chromium contamination, which "began seeping into neighboring properties." *Mauthe*, 123 Wis. 2d at 293–94. The supreme court held that "the seepage of a hazardous substance from contaminated soil into neighboring properties is a 'discharge' within the meaning of" the Spills Law. *Mauthe*, 123 Wis. 2d at 290. "Due to surface water runoff and percolation and groundwater flow, the contaminated soil on Mr. Mauthe's property is now sending out, throwing off, or 'emitting' a hazardous substance into neighboring properties. Therefore, under the meaning of the statute, the outflow of chromium is a discharge without regard to human activity." *Id.* at 298–99. Because Mauthe owned the property from which a hazardous substance was "being discharged" into neighboring property, the court held that he possessed that substance and was liable for remediating it. *Id.* at 300–01. Avoiding a potential *ex post facto* problem, the court noted that "[i]t is the abatement of this current discharge that the state is seeking." *Id.* at 301–02.

C. Under controlling Wisconsin Supreme Court precedent, the Ruffolos are not liable for the underground petroleum at their commercial property.

Here, the Ruffolos are not liable under Wis. Stat. § 292.11(3) for remediating the underground petroleum at their commercial property. They are not liable under *Chrysler* or *Mauthe*.

Notably, the DNR does not argue that the Ruffolos are liable for the petroleum under a causation theory ala *Chrysler*. That tacit concession is correct. There is no evidence that the Ruffolos caused the underground petroleum contamination at their property. Instead, the evidence indicates that the cause of the petroleum discharge was a filling station that previously owned the commercial property that the Ruffolos' businesses now occupy. (*See, e.g.*, Dkt. 1-1:753.) Because the Ruffolos did not cause this petroleum contamination, they are not liable for remediating it under a causation theory. Unlike the defendant in *Chrysler*, the Ruffolos did not generate the petroleum waste.

For two independent reasons, the Ruffolos are not liable for the petroleum under a possession or control theory as in *Mauthe*, either. First, they did not possess the petroleum when

it was discharged. Second, they do not "possess" the petroleum simply by owning the land around it.

1. The Ruffolos are not liable for the petroleum because a requisite discharge is absent.

The Ruffolos are not liable under Wis. Stat. § 292.11(3) for remediating the underground petroleum at their commercial property because the petroleum is not discharging and has not discharged to the environment while the Ruffolos allegedly possessed it. Unlike the chromium in *Mauthe*, there is no evidence that the underground petroleum at the Ruffolos' property is migrating onto neighboring property. The defendant in *Mauthe* was responsible for remediation because he possessed the underground contaminant *that was discharging onto neighboring property*. Because the underground petroleum at the Ruffolos' property is not discharging, they are not liable for remediating it under a possession or control theory.

As just explained, to be liable for remediation under a possession or control theory, the defendant must possess a substance that is discharged. And to reiterate, "the seepage of a hazardous substance from contaminated soil *into neighboring properties* is a 'discharge' within the meaning of [the Spills Law]," and "the owner of the property which contains contaminated soil *from which a hazardous substance is being discharged* is required to take remedial action [under the Spills Law]." *Mauthe*, 123 Wis. 2d at 290 (emphases added). Under *Mauthe* and the plain language of Wis. Stat. § 292.11(3), ownership of contaminated property is insufficient to establish remediation liability. *Mauthe* holds that ownership is sufficient to establish *possession*, but possession does not automatically create *liability*. Instead, remediation liability stems from possession of a hazardous substance *that is discharged*. Because the petroleum is not discharging and has not discharged while the Ruffolos allegedly possessed it, the Ruffolos are not liable for remediating it.

2. Alternatively, and additionally, the Ruffolos are not liable for the petroleum because the requisite possession is absent.

In the alternative, Wis. Stat. § 292.11(3) does not require the Ruffolos to remediate the petroleum under a possession or control theory of liability because the Ruffolos do not possess or control that petroleum simply by owning the surrounding land. Although the *Mauthe* court held that ownership of contaminated land establishes possession or control of an underground hazardous substance, *Mauthe*'s definition of possession is no longer good law.

"[W]hen interpreting state law, a federal court's task is to determine how the state's highest court would rule." *Smith v. RecordQuest, LLC*, 989 F.3d 513, 517 (7th Cir. 2021). When the

Wisconsin Supreme Court's past decisions conflict, it usually "adhere[s] to the more recent cases." *Purtell v. Tehan*, 29 Wis. 2d 631, 636, 139 N.W.2d 655, 658 (1966).

In contrast to *Mauthe*, the Wisconsin Supreme Court recently explained "that 'possessing' something requires both knowledge and control." *State v. Brantner*, 2020 WI 21, ¶ 14, 390 Wis. 2d 494, 939 N.W.2d 546. The court reaffirmed that a person does not possess an item simply by owning the premises where the item is located. *Id.* ¶¶ 12–16. Instead, under *Brantner*, a person possesses objects "if he knew" what the objects were "and he either: (1) 'had actual physical control' (that is, 'direct bodily power') over them; or (2) they were 'in an area over which [he] ha[d] control and [he] intend[ed] to exercise control over' them." *See id.* ¶ 16.

Under *Brantner*, the Ruffolos' ownership of commercial property does not establish the Ruffolos' possession or control of the underground petroleum under Wis. Stat. § 292.11(3). The Ruffolos do not have actual physical control—*i.e.*, direct bodily power—over the underground petroleum. Notwithstanding any DNR-mandated cleanup, the Ruffolos do not intend to control the underground petroleum. (Dkt. 1-1:866.) The Ruffolos therefore do not possess the underground petroleum.

Under *Mauthe*'s flawed logic, a property owner would possess a hazardous substance—and could be liable for cleaning it up at great cost—even if someone else nefariously dumped the substance on the owner's property without the owner's knowledge or consent. That view of possession is "quite absurd." *See Schwartz v. State*, 192 Wis. 414, 418, 212 N.W. 664 (1927). *Brantner* revived the *Schwartz* rule that ownership of property does not establish possession of an item located at that property. *See Brantner*, 2020 WI 21, ¶¶ 12, 14, 16 (favorably discussing *Schwartz*). The *Mauthe* court's absurd view of possession is no longer controlling. Under *Brantner* and *Schwartz*, property ownership does not automatically establish possession of a substance located on that property.

* * *

In sum, Wis. Stat. § 292.11(3) does not require the Ruffolos to remediate the underground petroleum at their commercial property. As the DNR implicitly concedes, the Ruffolos are not liable under a causation theory because they did not cause the petroleum contamination. They are not liable under a possession or control theory for two independent reasons—(1) the petroleum is not presently discharging and has not discharged while the Ruffolos allegedly possessed it, and (2) the Ruffolos do not possess or control the petroleum under *Brantner*.

D. The DNR largely overlooks the absence of a discharge here.

The DNR contends that "[t]he relevant questions in this case are . . . what constitutes a 'hazardous substance which is discharged,' and when an owner like the Ruffolos 'possesses or controls' a discharge." (Dkt. 3:45.) The DNR claims that the Wisconsin Supreme Court in *Mauthe* answered both those questions. (Dkt. 3:45.)

Regarding the first of those questions—what constitutes a discharge—the DNR largely overlooks the crucial distinction between *Mauthe* and the Ruffolos' situation: the underground petroleum is *not* migrating onto neighboring property or otherwise discharging, unlike the underground contaminant in *Mauthe*. The DNR instead largely focuses on the second question, *i.e.*, the Ruffolos' alternative argument that *Brantner* implicitly abrogated *Mauthe*'s view of possession.

When the DNR briefly acknowledges the "discharge" requirement for possessor liability to attach, the DNR asserts that "the continuing existence of previously spilled (or emitted or leaked) substances" is a discharge under the Spills Law. (Dkt. 3:45.) The DNR specifically suggests that the *Mauthe* court held that an inactive waste site constitutes a discharge. (Dkt. 3:45.)

But the *Mauthe* court held no such thing. Its holding is much narrower: it "concluded that 'discharge' encompasses inactive waste sites *from which hazardous substances are flowing*." *Chrysler*, 219 Wis. 2d at 161 (emphasis added) (discussing *Mauthe*); *see also Mauthe*, 123 Wis. 2d at 297 (rejecting the argument that the Spills Law does not cover "inactive waste sites from which hazardous substances *are currently flowing*" (emphasis added)). As explained above, the *Mauthe* court held "that the seepage of a hazardous substance from contaminated soil into neighboring properties is a 'discharge' within the meaning of" the Spills Law. *Mauthe*, 123 Wis. 2d at 290. The court "also [held] that the owner of the property which contains contaminated soil *from which a hazardous substance is being discharged* is required to take remedial action under" the Spills Law. *Id.* (emphasis added). Contrary to the DNR's characterization, the *Mauthe* court did not hold that the mere existence of an underground contaminant is a discharge or that it automatically renders the landowner liable for clean-up. The DNR's broad gloss on *Mauthe* is unsupportable.

The DNR argues that the *Mauthe* court adopted a broad view of possession. (Dkt. 3:46, 50–51.) But, as explained above, ownership and possession do not automatically create liability under the Spills Law. Possession-based liability may stem from ownership of property from which (or on which) a hazardous substance *is discharging*. *Mauthe*, 123 Wis. 2d at 290, 299–300.

Tellingly, the DNR has not cited any Wisconsin case law applying Spills Law liability under facts like the ones here. As noted above, in *Mauthe*, the State alleged that Mauthe's company had engaged in chrome electroplating activities that resulted in chromium contamination, which "began seeping into neighboring properties." *Mauthe*, 123 Wis. 2d at 293–94. The court held that Mauthe and his company were liable to remediate that contamination when it migrated onto neighboring property. Unlike the defendants in *Mauthe*, the Ruffolos did not cause the petroleum contamination, and there is no evidence that the petroleum is migrating off-site.

In sum, the Ruffolos are not liable for the underground petroleum at their commercial property. There is no evidence that this petroleum is flowing onto neighboring property or otherwise discharging. Absent a discharge of petroleum while the Ruffolos owned this property, they are not liable for it under *Mauthe*.

E. The DNR's attempts to harmonize *Mauthe* and *Brantner* are baseless.

The DNR spends several pages arguing that *Brantner* did not abrogate *Mauthe*'s definition of possession. This Court need not consider that issue because the Ruffolos have an independent reason for why they are not liable for the petroleum under a possession or control theory—unlike in *Mauthe*, the underground petroleum at the Ruffolos' property is *not* discharging and has *not* discharged while the Ruffolos allegedly "possessed" it. Accordingly, there can be no possession-based liability, regardless of whether there is possession here under *Mauthe*.

For the sake of completeness, though, the Ruffolos will now explain why the DNR's arguments against *Brantner* do not work.

To begin with, the DNR claims that abandoning *Mauthe* would be to rewrite the Spills Law. The Ruffolos ask this Court to rewrite nothing. They merely ask this Court to recognize the Wisconsin Supreme Court has updated its interpretation of the word possession since *Mauthe* was decided nearly 40 years ago.

To support its contention that *Mauthe*'s view of possession is still good law, the DNR emphasizes the Wisconsin Supreme Court's fidelity to stare decisis. (Dkt. 3:42–43.) The Ruffolos do not question the court's devotion to its precedents, but they do recognize a simple truth: the

supreme court sometimes overrules or abrogates cases. After all, stare decisis is merely a "principle of policy," "not an inexorable command." *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶ 97, 264 Wis. 2d 60, 665 N.W.2d 257. And more to the point, the court sometimes overrules cases not explicitly but tacitly (or, put another way, *sub silentio*). This is nothing new. All Wisconsin appellate courts have recognized this method of abrogation. *See*, *e.g.*, *Sustache v. Am. Fam. Mut. Ins. Co.*, 2007 WI App 144, ¶ 2, 303 Wis. 2d 714, 735 N.W.2d 186 (recognizing precedent had been "tacitly overruled"), *aff'd sub nom. Est. of Sustache v. Am. Fam. Mut. Ins. Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845; *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶ 49 n.14, 244 Wis. 2d 613, 628 N.W.2d 376 (recognizing precedent had been overruled "*sub silentio*").

Against all this, the DNR claims the Wisconsin Supreme Court could not have tacitly overruled *Mauthe* because the court "does not leave circuit courts to guess whether precedent is no longer controlling." (Dkt. 3:43.) But the vertical nature of Wisconsin's judicial system spares lower courts from needing to engage in guesswork. "When the decisions of [the Wisconsin Supreme Corut] appear to be inconsistent, [lower courts] follow its most recent pronouncement." *Lemke v. Lemke*, 2012 WI App 96, ¶ 23, 343 Wis. 2d 748, 820 N.W.2d 470 (citation omitted). This rule reigns not only in Wisconsin. "Lower courts almost uniformly adhere to [this rule]." Bryan A. Garner, *The Law of Judicial Precedent*, 301 (2016). In doing so, a trial court "is simply doing its job as a part of a vertical hierarchy." *Id*. at 302.

As for the DNR's second argument for disregarding *Brantner*—that *Brantner* governs only drug possession (Dkt. 3:45)—this argument misses the mark for two reasons. First, although the *Brantner* court relied on a criminal jury instruction when defining possession, it also relied on *Black's Law Dictionary*, the same dictionary on which the *Mauthe* court relied when defining possession. *Brantner*, 2020 WI 21, ¶¶ 14–16; *Mauthe*, 123 Wis. 2d at 300–01. By relying on the same dictionary as the *Mauthe* court, the *Brantner* court indicated that its definition of possession was not limited to criminal cases.

Second, in civil cases, Wisconsin appellate courts have applied a definition of possession consistent with that in *Brantner* and the criminal jury instructions. *See*, *e.g.*, *Mooney v. Royal Ins. Co. of Am.*, 164 Wis. 2d 516, 523–24, 476 N.W.2d 287 (Ct. App. 1991) (holding that a defendant was not a possessor of land because the defendant "had no intent to control the premises"); *In Int. of R. B.*, 108 Wis. 2d 494, 496, 497–98, 322 N.W.2d 502 (Ct. App. 1982) (holding that possession

requires "actual control" or "an intent to exercise control"; presence combined with knowledge "is insufficient to constitute possession"). The general rule of law discussed in a criminal jury instruction often is applicable in a civil case. *See Root v. Saul*, 2006 WI App 106, ¶¶ 19–20, 293 Wis. 2d 364, 718 N.W.2d 197. Even though *Brantner* relied in part on criminal jury instructions to define possession, the general rule of law in those instructions applies in the civil context. The DNR is thus wrong to suggest that the *Brantner* concept of possession is unique to criminal law.

The DNR also argues that *Brantner* does not control here because the Spills Law includes both the words "possess" and "control," while the jury instructions in *Brantner* included only the word "possess." (Dkt. 3:44–45.) While true, this is not the textual distinction the DNR believes it to be. In *Brantner*, the court was not interpreting only the concept of possession. The *Brantner* court stated that control is an essential component of possession. *Brantner*, 2020 WI 21, ¶ 14. As a result, the *Brantner* court needed to define the concept of control before it could explain possession. *See id.* So although the jury instruction relevant in *Brantner* did not explicitly use the word "control," the *Brantner* court still issued an interpretation of that concept. The *Brantner* decision thus is not divorced from the textual context appearing in the Spills Law; each case was about both control and possession. That means *Brantner* is entirely relevant to—and applicable to—the Spills Law.

Finally, the DNR argues that the Ruffolos possess the underground petroleum because "their agents have been investigating, measuring, and tracking the underground petroleum for over a year." (Dkt. 3:52.) That argument is flawed for two reasons. First, the DNR does not explain how investigation, measurement, and tracking constitute physical possession or an intent to control. Second, the Ruffolos' environmental consultants have been doing those things because the DNR sent a "responsible party" letter to Ralph, instructing him to take remedial measures. The DNR cannot seriously argue that this "Gotcha!" argument creates liability—the DNR cannot plausibly contend that a person becomes liable under the Spills Law if that person complies with a "responsible party" letter. The obvious problem with the DNR's logic is that the DNR should not send a "responsible party" letter to a person if the person does not possess a hazardous substance until *after* he begins to comply with the DNR's letter.

F. The DNR's reliance on legislative inactivity is misplaced.

In one final attempt to coffin *Brantner* and resurrect *Mauthe*'s crooked view of possession, the DNR asserts a theory of legislative acquiescence. (Dkt. 3:48–50.) Because the legislature has

forgone opportunities since *Mauthe* to rewrite the Spills Law, its argument goes, *Mauthe*'s interpretation of the Spills Law is now reinforced.

This reasoning is spurious. The Wisconsin Supreme Court has stated (time and again) that legislative inaction is "a [weak] reed upon which to lean and a poor beacon to follow in construing a statute." *Green Bay Packaging, Inc. v. Dep't of Indus., Lab. & Hum. Rels.*, 72 Wis. 2d 26, 36, 240 N.W.2d 422 (1976) (internal quotation marks omitted); *see also Wenke v. Gehl Co.*, 2004 WI 103, ¶ 32, 274 Wis. 2d 220, 682 N.W.2d 405.

Statutory interpretation in Wisconsin begins and ordinarily ends "with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Although legislative intent can be sometimes divined from statutory text (and thus become part of plain-meaning analyses), legislative intent is typically "not the primary focus of inquiry." *Id*. ¶ 44. Legislative acquiescence is, by nature, "subsidiary … to ascertain[ing] and giv[ing] effect to the statute's intended purpose." *Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 43 n.21, 341 Wis. 2d 607, 815 N.W.2d 367. Finding statutory meaning through legislative acquiescence conflicts with the "general framework for statutory interpretation in Wisconsin." *See Kalal*, 2004 WI 58, ¶ 44.

Assembling its acquiescence-based argument, the DNR cites a slew of legislative history. (Dkt. 3:48–49.) This evidence only underscores the frailty of the DNR's argument. According to the Wisconsin Supreme Court, legislative history is not a component of statutory text. It is a form of extrinsic evidence. *Kalal*, 2004 WI 58, ¶ 49. Extrinsic evidence is probative of statutory meaning in limited scenarios. Typically, it is relevant only after a statute is deemed ambiguous. "Where statutory language is unambiguous," as is the case here, "there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id*. ¶ 46. The DNR's insistence on drawing meaning from legislative history is therefore improper. For that reason alone, its acquiescence-based argument is a nonstarter.

The DNR argues that the Wisconsin Legislature has declined to pass bills "that would change the Spills Law in the way that the Ruffolos now urge this Court to declare." (Dkt. 3:54.) The DNR's argument assumes too much, namely, that those bills would have *changed* the Spills Law. Whether those bills would have changed or merely clarified the law depends on whose interpretation of the Spills Law is correct.

Moreover, even if the legislature interprets the Spills Law the same way that the DNR does, that fact would be irrelevant. Courts "review statutory interpretation questions *de novo*." *United States v. Ford*, 798 F.3d 655, 661 (7th Cir. 2015).

And, crucially, Wisconsin appellate courts have not interpreted the Spills Law as broadly as the DNR does. This point defeats the DNR's reliance on legislative inaction. "At most, the established rule is that '[l]egislative inaction following judicial construction of a statute, while not conclusive, evinces legislative approval of the interpretation.'" *Wenke*, 2004 WI 103, ¶ 33 (alteration in original) (citation omitted). So at most, the legislature may have implicitly adopted the *Mauthe* court's interpretation of the relevant provision of the Spills Law by not amending the statute to overturn *Mauthe*. But, as explained above, the DNR's broad view of the Spills Law goes far beyond *Mauthe*'s holdings. Specifically, the legislature may have implicitly approved of *Mauthe*'s holdings that "the seepage of a hazardous substance from contaminated soil into neighboring properties is a 'discharge'" and that "the owner of the property which contains contaminated soil from which a hazardous substance is being discharged is required to take remedial action." *Mauthe*, 123 Wis. 2d at 290. But any such legislative acquiescence does not help the DNR here because the Ruffolos' property is not discharging petroleum.

* * *

In sum, the Ruffolos have stated a viable statutory claim regarding the underground petroleum. At the motion-to-dismiss stage, this Court must determine whether the complaint contains "sufficient factual matter" that, if "accepted as true," "state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). It does. The case under which the DNR seeks to impose liability on the Ruffolos—*Mauthe*—shows why the Ruffolos are *not* liable under the Spills Law. Unlike in *Mauthe*, the underground petroleum at the Ruffolos' property is *not* migrating onto neighboring property and thus is *not* discharging. A present discharge onto neighboring property was the linchpin to the liability imposed in *Mauthe*. Without it here, the Ruffolos are not liable under the Spills Law for the underground petroleum. This Court should grant summary judgment to the Ruffolos if it resolves this statutory claim—or at least allow the Ruffolos to proceed on this claim.

V. The Ruffolos stated a plausible equal protection facial claim.

A. Innocent-landowner liability under Wis. Stat. § 292.11(3) is subject to and fails strict scrutiny.

The Fourteenth Amendment to the United States Constitution provides in part, "No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Here, the Spills Law violates the Equal Protection Clause to the extent that the Spills Law imposes remediation liability based on ownership of contaminated land.

A litigant may bring a facial challenge to a portion of a statute. In such cases, the rest of the statute remains valid "if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). To succeed on a facial challenge, the challenger must "establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

When determining whether to apply rational-basis or strict scrutiny, the Seventh Circuit applies several steps. A court's "first step is to provide a 'careful description' of the interest said to have been violated." *Christensen v. Cnty. of Boone*, 483 F.3d 454, 462 (7th Cir. 2007) (citation omitted). Second, a court must determine whether that interest is fundamental. *Id.* If so, a court must "then determine whether the government has interfered 'directly' and 'substantially' with the plaintiffs' exercise of that right." *Id.* (citation omitted). If so, a court then applies strict scrutiny to the statute. *Id.* at 462 & n.2.

Under the first step of that analysis, the interest at issue here is the right to property ownership, in particular the right to sell one's property.

As for the second step of the analysis, this right is fundamental. Indeed, "[t]he human right to own property is a *most* fundamental right…." *Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1058 (8th Cir. 1978) (emphasis added), *aff'd*, 440 U.S. 689 (1979); *see also Brusznicki v. Prince George's Cnty.*, 42 F.4th 413, 419 (4th Cir. 2022) (noting the Supreme Court has held the U.S. Constitution protects "a fundamental right to own property"). Rights are fundamental when they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937)). At early English common law, the right to own property received concerted protection. "So great is the regard" for this "absolute right of every Englishman," explained Blackstone, the common law "will not authorize the least violation of it." 1 William Blackstone, *Commentaries on the Laws of*

England 78, 125 (1765). Kin of this philosophical ilk, the Founders too "recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

The right to own property is not a singular right, however. It conveys a whole "bundle" of rights. The right to dispose of one's property is included in that bundle. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Disposal was so included at the common law. David J. Seipp, *The Concept of Property in the Early Common Law*, 12 B. U. L. Rev. 1, 58 (1994). And it is still so included today. In fact, "liquidity . . . is one of the most important sticks in the bundle of rights that constitute ownership." *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005).

Although the Ruffolos have made clear that the fundamental interest at stake is the right to sell one's property (Dkt. 1-1:1063), the DNR does not directly address that point. Instead, the DNR claims—without citing any legal authority—that "there is no fundamental right to *own* property." (Dkt. 3:59.) The DNR also argues that there is no "fundamental right to own property free of government regulation." (Dkt. 3:59.) The Ruffolos do not dispute this latter contention, but it is a red herring.

The DNR cites cases that hurt, rather than advance, its position. The DNR's citation to *Franklin County* is puzzling because the court there held that, in enacting CERCLA,[7] "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites." *Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001). *Franklin County* thus is relevant to whether the Spills Law *satisfies* rational-basis scrutiny, but the DNR does not explain how *Franklin County* helps its argument that strict scrutiny is inapplicable here. Besides, *Franklin County* helps show why the Spills Law does not survive even rational-basis review: unlike CERCLA, the Spills Law does *not* impose liability only on persons who were responsible for creating hazardous contamination.

The DNR's citation to *Pro-Eco, Inc. v. Board of Commissioners of Jay County*, 57 F.3d 505, 514 (7th Cir. 1995), is also puzzling. Addressing a zoning ordinance, the court there noted that "[d]epositing garbage in landfills is not exactly a fundamental right.. . . Disposition of waste

[7] CERCLA refers to the Comprehensive Environmental Response, Compensation, and Liability Act, often known as Superfund.

is a highly regulated industry." *Id.* (alterations in original) (citation omitted). The Ruffolos' case involves a statutory civil-liability scheme that applies to any person, not a zoning ordinance or a highly regulated industry. More importantly, the Ruffolos are not alleging that the Spills Law impermissibly violates a right to dispose of waste; instead, they are alleging that it impermissibly interferes with the right to sell one's property to the extent it attaches civil liability based on property ownership.

Equally confusing is the DNR's string citation to *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020). If anything, that decision highlights why the Spills Law is irrational to the extent it imposes liability on innocent landowners. In *Atlantic Richfield*, the Court noted that CERCLA "seeks 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts [are] borne by those *responsible* for the contamination.'" *Id.* at 1345 (alteration in original) (emphasis added) (citation omitted). It also noted that innocent landowners are "shielded from liability" under CERCLA. *Id.* at 1353. As the DNR recognizes, the Spills Law does not provide liability protection to persons whose land was contaminated by a prior owner. (Dkt. 3:56.) The Spills Law, unlike CERCLA, imposes liability even on persons who were *not* responsible for contamination. And, again, these points are relevant to whether the Spills Law satisfies rational-basis scrutiny. The issue at this stage in the analysis is whether strict scrutiny applies. *Atlantic Richfield* sheds no light on that issue.

Under the third step of the analysis, the DNR does not dispute that Spills Law liability significantly impairs the ability to sell one's property if it requires remediation. So it is undisputed that the Spills Law, to the extent it attaches remediation liability to property ownership, directly and substantially interferes with a person's exercise of the right to sell his or her property.

Under the fourth and final step of the analysis, the Court must apply strict scrutiny. A statutory classification that "addresses a fundamental right" is subject to strict scrutiny, meaning it is unconstitutional unless it is "tailored narrowly to facilitate a compelling state interest." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 637 (7th Cir. 2007). Notably, the DNR does not contend that the Spills Law satisfies strict scrutiny. That omission is sufficient reason to deny the DNR's motion to dismiss and grant summary judgment to the Ruffolos. Because the Ruffolos have at least *plausibly* argued that strict scrutiny applies here, this reason alone permits them to proceed with this claim.

B. Even if rational-basis scrutiny applies, the Ruffolos' equal protection facial claim is plausible.

If strict scrutiny does not apply here, then rational-basis scrutiny applies. "If no fundamental rights or suspect categories are at issue, '[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.'" *St. John's United Church of Christ*, 502 F.3d at 637–38 (alteration in original) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

As an initial matter, the Ruffolos (and other innocent landowners subject to liability under the Spills Law) are similarly situated with other groups that are *not* necessarily subject to Spills Law liability: tenants, owners of leased land, and innocent neighbors. Indeed, the DNR recognizes that tenants are not automatically liable under the Spills Law even if the property that they lease is contaminated with a hazardous substance. *See generally* Wis. Dep't of Nat. Res., "Lease Letters: Clarifying Environmental Liability When Leasing Property" (July 2012), https://widnr.widen.net/s/tkcgqrncbk/rr620. Also according to the DNR, *owners* of leased property are not liable for contamination that their tenants cause: "For the owner, complete documentation of the contamination that exists on the property will protect him/her from liability for discharges that are caused by the tenant." *Id.* at 3. As the DNR also recognizes, innocent neighbors—*i.e.*, persons whose property is contaminated by a substance that originated off-site—have liability protection under Wis. Stat. § 292.13. (Dkt. 3:13–14.) Even on its web site, the DNR asserts that "Wisconsin law considers a property owner to be liable for contamination, no matter when it occurred, and even when another person that caused the contamination is also liable, unless the owner falls under one of the four liability exemptions listed above." Wis. Dep't of Nat. Res., "Environmental Liability," https://dnr.wisconsin.gov/topic/Brownfields/Liability.html. According to that web site, the four exempted classes are local governments, impacted neighbors, lenders, and persons who successfully complete the Voluntary Party Liability Exemption program. *Id.*

Yet the DNR implies that the Spills Law on its face does not treat any groups differently than others, including property owners. (Dkt. 3:63.) The DNR, to begin with, misunderstands the nature of facial claims. Beyond that, in contending all are somehow equal under this law, the DNR misinterprets its own interpretation of the Spills Law.

The line between a facial challenge and an as-applied challenge can "sometimes prove amorphous." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) (internal quotation marks omitted) (quoting *Elgin v. Department of Treasury*, 567 U.S. 1, 15 (2012)). Certain claims can even have characteristics of each. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). But "[t]he label is not what matters." *Id*. Courts must key in on the relief that "would follow" from a plaintiff's claim. *Id*. If that relief would "reach beyond the particular circumstances" of the plaintiff, then he or she must satisfy "standards for a facial challenge." *Id*. (citing *United States v. Stevens,* 559 U.S. 460, 472–473 (2010)). Here, Claims Two and Three are facial challenges. With them, the Ruffolos seek not just to absolve themselves from Spills Law liability. They seek broader relief: declaratory judgment to absolve all innocent landowners from Spills Law liability.

The Spills Law's text plainly creates a classification by imposing remediation liability on persons who either cause contamination or possess or control a substance that is discharged. Wis. Stat. § 292.11(3). And, under the DNR's interpretation of this statute, owners of contaminated land are automatically liable for remediation because they possess the contaminants. (Dkt. 3:43–47.) If the Spills Law's text means what the DNR thinks it means—that landowners are automatically liable for contamination on their property—then the Spills Law facially treats landowners differently from other similarly situated groups. The DNR's contrary suggestion has merit only if the *Ruffolos'* interpretation of the Spills Law is correct, *i.e.*, only if the Spills Law does not impose liability based on ownership of contaminated land. If the DNR's interpretation of the Spills Law is correct, then the Ruffolos have stated a viable equal protection claim.

Under rational-basis scrutiny, the question is whether that differential treatment is rationally related to serving a legitimate government interest. There is no rational basis for this differential treatment—for two reasons.

First, liability based on ownership of land is not based on substantial distinctions between classes. There is no substantial distinction between a person who buys land that unknowingly was contaminated and a person whose land is contaminated by neighboring property. There is likewise no substantial distinction between an innocent buyer and an innocent tenant—or between an innocent buyer and an innocent lessor. All of these groups own or possess land that was contaminated by someone else. Yet, under the DNR's view, tenants and lessors are not liable for contamination that they did not cause. Each of these groups has a strong interest in remediating the contamination of land that they own and/or occupy, and such remediation benefits all these

groups. There is no rational basis for imposing remediation liability on innocent buyers (like the Ruffolos) while exempting innocent tenants, innocent landlords, and innocent neighbors from liability.

Second, the classification is not germane to the purpose of the Spills Law. The Spills Law has a purpose of holding polluters accountable, given that it imposes cleanup liability on a person who possesses or controls a hazardous substance that is discharged or a person who causes a hazardous discharge. *See* Wis. Stat. § 292.11(3). Indeed, the Wisconsin Supreme Court recognized that, in enacting the Spills Law, "the legislature decided that *those responsible* should take affirmative action to remedy the problem." *Mauthe*, 123 Wis. 2d at 291 n.1 (emphasis added). Toward that end, this liability provision is aptly titled "Responsibility." Wis. Stat. § 292.11(3). Imposing liability on an innocent landowner is not germane to the Spills Law's purpose of imposing liability on a person *responsible* for creating pollution.

In short, there is no rational distinction between buyers of contaminated property and other innocent owners or innocent tenants of contaminated property. Innocent buyers are not responsible for creating contamination; they are not polluters. "Those who owned previously contaminated property where waste spread without their aid *cannot reasonably be characterized as 'polluters'*; excluding them from liability will not let those who cause the pollution off the hook." *United States v. CDMG Realty Co.*, 96 F.3d 706, 717 (3d Cir. 1996) (emphasis added). It is irrational for the government to deem a person legally responsible for cleanup costs if that person was not responsible for creating the contamination. The purpose of the Spills Law's differential treatment—ensuring that persons who are responsible for contamination bear the costs of cleaning it up—has no relevance to innocent landowners who are not responsible for creating contamination. Under rational-basis review, owner-based liability under the Spills Law violates the right to equal protection.

In sum, the Ruffolos' equal protection facial claim is very strong and thus easily satisfies the plausibility requirement at the motion-to-dismiss stage.

VI. The Ruffolos stated a plausible due process facial claim.

The Ruffolos' due process facial claim is plausible under strict or rational-basis scrutiny. While the analysis under the Due Process Clause is not identical to the analysis under the Equal Protection Clause, the two are much alike. *Goodpaster v. City of Indianapolis*, 736 F.3d 1060,

1071 (7th Cir. 2013). Accordingly, the Ruffolos' substantive due process facial claim is plausible for largely the same reasons their equal protection facial claim is plausible.

A. Innocent-landowner liability under Wis. Stat. § 292.11(3) is subject to and fails strict scrutiny.

Under a substantive due process analysis, governmental infringement of a fundamental right is unconstitutional "unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As explained above regarding the Ruffolos' equal protection facial claim, innocent-landowner liability under the Spills Law significantly interferes with the fundamental right to sell one's property and thus is subject to strict scrutiny. The DNR does not argue that innocent-landowner liability satisfies strict scrutiny. Because the Ruffolos have plausibly alleged that innocent-landowner liability is subject to strict scrutiny, they have stated a viable due process claim for this reason alone.

B. Even if rational-basis scrutiny applies, the Ruffolos' substantive due process facial claim is plausible.

"Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003).

Innocent-landowner liability under the Spills Law fails rational-basis scrutiny because such liability does not require any personal blameworthiness. Such liability has no rational basis because it is not based on the justifications behind strict and vicarious liability.

1. Due process forbids the State from imposing liability on innocent persons.

"Implicit within the concept of due process is that liability may be imposed on an individual only as a result of that person's own acts or omissions…." *Tyson v. New York City Hous. Auth.*, 369 F. Supp. 513, 518 (S.D.N.Y. 1974). "This notion of personal guilt is not limited to criminal actions." *Id.* at 519. The U.S. Supreme Court has applied this principle when striking down civil schemes as unconstitutional because they were not based on individual responsibility. *Id.* (summarizing cases). In one case, for example, the Supreme Court struck down a Louisiana statute that denied workers' compensation benefits to non-marital children, reasoning that "imposing disabilities on the illegitimate child is contrary to the *basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing*." *Weber v. Aetna Cas.*

& Sur. Co., 406 U.S. 164, 175 (1972) (emphasis added). In another illustrative case, the Supreme Court struck down a Texas statute that denied public education to children who were undocumented aliens, reasoning that such children were "innocent" and "not accountable" for their immigration status. *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982).

This constitutional limitation on vicarious liability without fault is longstanding. The Michigan Supreme Court, for example, struck down a statute that rendered a person liable for any harm caused by his or her automobile, even if the harm occurred when someone else was operating the vehicle without the owner's knowledge or consent. "[A]s a general proposition," the court held that "absolute liability, without fault on his part, cannot ordinarily be imposed upon a citizen." *Daugherty v. Thomas*, 174 Mich. 371, 387 (1913). The court thus declared the statute unconstitutional to the extent it made "a party absolutely liable for the negligent conduct on another, . . . no matter how careful or free from negligence he himself has been." *Id.* at 390. The effect of that statutory provision was "to take the property of defendant Thomas to pay for the wrongful and negligent act of another person not sustaining to him the relation of servant, agent, or employé." *Id.*

The Georgia Supreme Court held that a similar vehicle-liability statute "clearly violates the due process clause of both the Federal and State Constitutions, for the reason that it makes the owner of a motor vehicle liable" even if the vehicle was operated without the owner's knowledge or consent. *Frankel v. Cone*, 214 Ga. 733, 736 (1959), *abrogated on other grounds by Lott Inv.. Corp. v. Gerbing*, 242 Ga. 90 (1978). The statute made a vehicle owner "liable for the negligent conduct of another . . . irrespective of how careful or free from negligence the owner was." *Id.*

Likewise, the Illinois Supreme Court struck down a statute that made railroad companies liable for the burial costs of any passengers who died while riding their trains. The court reasoned that "[i]t is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. . . . [T]here is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected." *Ohio & Mississippi Railway Co. v. Lackey*, 78 Ill. 55, 57 (1875).

The government thus violates due process when it imposes liability on a person who had neither a blameworthy act or omission nor a blameworthy mental state. "Personal blameworthiness can take two forms: unlawful act and unlawful intent." *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999). Before liability may be imposed, "due process

at least requires individualized proof of intent *or* act." *Id.* at 1368. "For civil liability to be imputed, an ordinance must require proof that a defendant bears a 'responsible relation' to the unlawful conduct." *Wacko's Too, Inc. v. City of Jacksonville*, No. 3:20-CV-303, 2023 WL 2237864, at *15 (M.D. Fla. Feb. 27, 2023) (quoting *Lady J.*, 176 F.3d at 1367). "A defendant is in a 'responsible relation' if he has the power to prevent violations from occurring." *Lady J.*, 176 F.3d at 1367. Civil liability thus may be based on ownership if "an owner-defendant is only responsible for acts or omissions that he has the power to prevent." *See id.*

2. Wisconsin Stat. § 292.11(3) violates due process if it imposes liability on innocent persons.

Here, Wis. Stat. § 292.11(3) violates substantive due process if it attaches civil liability based on ownership of contaminated land, as the DNR argues it does. This form of civil liability violates due process because it does not require proof of an act, omission, or a mental state. *See, e.g.*, *Lady J.*, 176 F.3d at 1368 (holding "due process *at least* requires individualized proof of intent *or* act" before liability may be imposed). If liability under the Spills Law attaches based on a person's status as an owner of land, such liability is irrational and arbitrary.

Perhaps even more troubling, a person could be held liable under the DNR's broad view of *Mauthe* if she *inherited* contaminated property. Through the law of intestacy, the state could pass title of contaminated property to an heir and then impose cleanup liability on that person—even though that person made no choice to purchase the property.

Crucially, in rejecting substantive due process challenges to CERCLA liability, federal courts have emphasized that CERCLA imposes cleanup liability on persons who were *responsible* for creating contamination. *See, e.g.*, *Franklin Cnty.*, 240 F.3d at 552 (holding that "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites"); *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988) (holding that CERCLA rationally spreads "the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions"); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (holding that "[c]leaning up inactive and abandoned hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

In contrast to those cases, innocent-landowner liability under the Spills Law is *irrational* because it is imposed on persons who were *not* responsible for creating contamination.

3. Relatedly, innocent-owner liability violates due process because it lacks the justifications behind strict and vicarious liability.

Wisconsin Stat. § 292.11(3), as interpreted by the DNR, allows for strict vicarious liability. An offense that lacks a *mens rea* requirement is a "strict liability" offense. *State v. Beaudry*, 123 Wis. 2d 40, 48, 365 N.W.2d 593 (1985). "Thus under strict liability the accused has engaged in the act or omission; the requirement of mental fault, *mens rea*, is eliminated." *Id.* "Vicarious liability, in contrast to strict liability, dispenses with the requirement of the *actus reus* and imputes the criminal act of one person to another." *Id.* at 50.

Under the DNR's logic, Wis. Stat. § 292.11(3) requires neither a mental state nor an act or omission because this statute can impose liability based on ownership of contaminated land. Innocent-owner liability under this statute is thus both strict liability and vicarious liability.

The justifications for strict and vicarious liability do not apply to innocent-landowner liability under Wisconsin Stat. § 292.11(3). This statute is thus irrational and violates due process to the extent it imposes liability on innocent landowners.

"In most instances, strict or vicarious liability has its source in a policy decision that the person held liable is in a position to spread the costs of injury over a large portion of the public." *Bd. of Ed. of Piscataway Twp. v. Caffiero*, 431 A.2d 799, 804 (N.J. 1981). "Imposition of vicarious liability without fault is normally justified by the policy decision that the person held liable is in a position to shift the costs of an injury to the public at large through the purchase of liability insurance." *Bryan v. Kitamura*, 529 F. Supp. 394, 400 (D. Haw. 1982).

That economic rationale for vicarious liability does not apply to innocent-owner liability under Wis. Stat. § 292.11(3). In the DNR's view, this statute imposes liability based on ownership of contaminated land. It would thus apply to a homeowner whose land is contaminated by a third party. Obviously, homeowners are unable to pass the costs of pollution cleanup onto customers. Many businesses are not able to do so, either. *See, e.g.*, *State v. Mauthe*, 142 Wis. 2d 620, 627, 419 N.W.2d 279 (Ct. App. 1987) (*Mauthe II*) (noting that "the social cost of repairing pollution damage is beyond the means of many companies"), *overruled on other grounds by Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

Also, homeowners and businesses are generally unable to pass the costs of pollution cleanup onto their liability insurance carriers. "Standard commercial general liability (CGL) contracts include an exclusion commonly known as the 'pollution exclusion.'" *Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 302, 305 (7th Cir. 1998) (internal quotation marks omitted); *see*

also Preisler v. Gen. Cas. Ins. Co., 2014 WI 135, ¶ 4, 360 Wis. 2d 129, 857 N.W.2d 136 (2014). Pollution exclusions are common in homeowner insurance policies, too. *See, e.g.*, *Hirschhorn v. Auto-Owners Ins. Co.*, 2012 WI 20, ¶ 21, 338 Wis. 2d 761, 809 N.W.2d 529. Indeed, an insurance policy did not cover the pollution cleanup in *Mauthe*. *See Mauthe II*, 142 Wis. 2d at 626–27.

Since *Mauthe* was decided, pollution exclusions have become broader so as to exclude coverage for pollution, regardless of whether the pollution was intentional, accidental, gradual, or sudden. *See, e.g.*, *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 718–19 (7th Cir. 2012); *Guenther v. City of Onalaska*, 223 Wis. 2d 206, 211 n.2, 588 N.W.2d 375 (Ct. App. 1998); *Beahm v. Pautsch*, 180 Wis. 2d 574, 582–83, 510 N.W.2d 702 (Ct. App. 1993). CGL policies underwent a significant industry-wide revision in 1986, rendering the standard pollution exclusion nearly absolute. *Beahm*, 180 Wis. 2d at 582–83. Because "the financial consequences [of pollution-cleanup mandates] can be horrific," insurers "limited their risk by excluding coverage of pollution harms in the broadest possible terms" after CERCLA and other environmental laws were adopted. *Scottsdale Indem. Co.*, 673 F.3d at 718. The purpose of the modern pollution exclusion is to "limit the catastrophic damages that resulted from environmental accidents, such as oil spills." *Guenther*, 223 Wis. 2d at 215.

Consistent with that purpose, Wisconsin courts have held that pollution exclusion clauses barred coverage for contamination-remediation costs. *See, e.g.*, *Prod. Stamping Corp. v. Maryland Cas. Co.*, 199 Wis. 2d 322, 330–31, 544 N.W.2d 584 (Ct. App. 1996) (holding an absolute pollution exclusion denied coverage for cleanup costs for soil and groundwater contamination).

In short, because homeowners and businesses generally cannot pass along contamination-remediation costs to the general public, the economic rationale for vicarious liability does not apply to Wis. Stat. § 292.11(3).

The economic rationale for *strict* liability does not justify innocent-landowner liability under the Spills Law, either. *Marathon Pipe Line* is instructive here. In that case, the federal government imposed liability on the Marathon Pipe Line Company because one of its pipelines ruptured, resulting in oil discharging into a river. The company argued that this liability violated due process because a third party had caused the pipeline to rupture by striking it with a bulldozer. The court rejected that argument. The court reasoned that "[s]trict liability, though performing a residual deterrent function, is based on the economic premise that certain enterprises ought to bear

the social costs of their activities." *United States v. Marathon Pipe Line Co.*, 589 F.2d 1305, 1308–09 (7th Cir. 1978).

Two judges—a majority of the three-judge panel—wrote concurring opinions to criticize the strict liability imposed on the pipeline company. Judge Wood argued that there was "no justification for the basic unfairness" involved in this liability, reasoning that the pipeline "company is concededly not guilty of the slightest fault. It in no way caused the accident, except it was in business." *Id.* at 1310 (Wood, J., concurring). "Just being in the business of supplying critical energy or other needs for our society scarcely justifies this type of penalty being imposed by someone in a government agency. I fail to see how it will deter or remedy anything." *Id.* Such faultless liability was "generally considered to be contrary to the accepted principles of law and equity." *Id.*

Judge Bauer "join[ed] in Judge Wood's concurring remarks" and argued that "[t]o punish a business engaged in enterprises essential to our national well-being for an unfortunate accident when the business is faultless, seems to be a self-defeating exercise of power." *Id.* (Bauer, J., concurring).

Here, unlike in *Marathon Pipe Line*, innocent-landowner liability under Wis. Stat. § 292.11(3) is not based on any activity by the liable landowner. Instead, in the DNR's view, the Spills Law imposes liability on any person who owns contaminated land. The liability in *Marathon Pipe Line* was not based on property ownership but rather was based on the pipeline company's *conduct* of transporting a hazardous substance through a pipeline. Essentially, that company assumed the risk that its pipeline might leak when it undertook the *action* of transporting oil. Innocent-landowner liability under the Spills Law exceeds what a majority of the court in *Marathon Pipe Line* was barely willing to tolerate. Instead, innocent-landowner liability under the Spills Law is analogous to the faultless liability schemes that were struck down in *Daugherty*, *Frankel*, and *Lackey*.

4. The DNR's arguments are meritless.

The DNR argues that the Ruffolos cannot proceed with their substantive due process claim unless they establish either an independent constitutional violation or the inadequacy of available post-deprivation remedies. (Dkt. 3:65.) Those requirements are not good law, and even if they are, the Ruffolos satisfy them.

First, those additional requirements are not good law. "If there [is] a conflict between this circuit's precedent and Supreme Court precedent, [this Court is] to follow the Supreme Court." *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 361 n. 5 (7th Cir. 1997) (first alteration in original) (citation omitted). The Seventh Circuit's additional requirements for bringing a substantive due process claim conflict with U.S. Supreme Court precedent. Regarding the first requirement, a substantive due process claim may proceed only if an "explicit textual source of constitutional protection," such as the Fourth Amendment right against unreasonable seizures, does *not* apply. *Lewis*, 523 U.S. at 842. If a more-explicit constitutional provision applies, then a substantive due process analysis is *not* applicable. *See id.* As for the second requirement, the existence of state remedies is *not* relevant to a substantive due process claim. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Seventh Circuit's additional requirements conflict with *Zinermon* and *Lewis*.

Those requirements stem from *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). *See Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 958 (7th Cir. 1988). But *Parratt* and *Hudson* involved *procedural* due process claims, so they do "not necessarily apply in the substantive due process context." *Schaper v. City of Huntsville*, 813 F.2d 709, 717 (5th Cir. 1987). Indeed, the Seventh Circuit has recognized that *Zinermon* limited *Hudson* and *Parratt*. *Armstrong v. Daily*, 786 F.3d 529, 539–45 (7th Cir. 2015). "[T]he *Parratt* doctrine responded to a practical problem in a *narrow subset of procedural due process cases*, where a plaintiff contends that the state must provide notice and a hearing before carrying out a deprivation of liberty or property, but where a pre-deprivation hearing simply is not practical." *Id.* at 544–45 (emphasis added). Because the independent-constitutional-violation and inadequate-state-remedy requirements conflict with Supreme Court precedent, this Court should not apply them here.

Second, even if those alternative requirements apply here, the Ruffolos satisfy each of them. As explained above, innocent-landowner liability under the Spills Law violates the Equal Protection Clause. The Ruffolos thus satisfy the independent-constitutional-violation requirement if it applies here. In addition, remedies under state law are inadequate. When the Ruffolos raised this lawsuit in state court, the DNR removed this case to federal court. (Dkt. 1.) Litigating in state court has thus been inadequate for the Ruffolos. More importantly, state law is an inadequate remedy for the Ruffolos. Under the Spills Law, a person can establish an exemption from liability under Wis. Stat. § 292.11(3) under certain circumstances if contamination originated *on someone*

else's property. *See* Wis. Stat. § 292.13. But the Spills Law does *not* provide a comparable exemption for a person whose property was, unbeknownst to them, contaminated by a prior owner. Even the DNR recognizes that section 292.13 provides liability protection for "off-site discharges." (Dkt. 3:13.) Here, the evidence indicates that the cause of the petroleum contamination at the Ruffolos' commercial property was a filling station that previously owned the property. (*See, e.g.*, Dkt. 1-1:753.) Because the Ruffolos cannot avail themselves of the liability protection under section 292.13, they satisfy the inadequate-state-remedy requirement, too. Their substantive due process claim is viable.

Yet the DNR suggests, without developing its argument, that the Ruffolos have an adequate state-law remedy because after the DNR makes a "final determination about their property, the Spills Law and state administrative review procedures provide adequate recourse to address any alleged violation of the law." (Dkt. 3:67.) That argument does not pass the straight-face test. The DNR is suggesting that the Ruffolos must spend a large amount of money remediating their property, and then *if* the DNR someday makes a "final determination" (whatever that means), the Ruffolos may seek a recourse at that point. To state this argument is to reject it. Spending a fortune on remediation costs, in the hopes that the DNR someday renders a decision reviewable under Wis. Stat. Ch. 227, is not an adequate remedy. More troublingly, the doctrine of sovereign immunity would bar the Ruffolos from seeking monetary damages from the state to reimburse their unlawfully imposed remediation costs. *See Brown*, 230 Wis. 2d at 381–82. Any administrative or judicial review would be futile because it would not make the Ruffolos financially whole.

The DNR string cites federal cases that have upheld the "retroactive" nature of CERCLA liability. (Dkt. 3:66.) But the Ruffolos are *not* challenging Spills Law liability because it is retroactive, *i.e.*, because it imposes liability for contamination that occurred before the Spills Law took effect. Instead, they are arguing that the Spills Law unconstitutionally imposes liability on innocent owners, specifically, innocent buyers. The DNR has not cited any federal case law addressing the constitutionality of innocent-buyer liability under CERCLA—because CERCLA provides liability protection for innocent buyers. As the DNR recognizes, "the federal 'Bona Fide Prospective Purchaser' provision, which offers a defense against [CERCLA] liability, does not have an equivalent provision in Wisconsin law." Wis. Dep't of Nat. Res., "Environmental Liability," https://dnr.wisconsin.gov/topic/Brownfields/Liability.html. Because the Ruffolos are

challenging innocent-owner liability (not retroactive liability), the cases that the DNR cites did *not* involve "the same type of argument as the Ruffolos'." (*See* Dkt. 3:69 n.12.)

Moreover, the DNR's citation to *Monsanto* undermines, rather than helps, the DNR's argument. In *Monsanto*, the Fourth Circuit held that the defendant did not meet the requirement for CERCLA's innocent-owner liability protection. *Monsanto Co.*, 858 F.2d at 168–69. It also held that CERCLA liability satisfied due process because "CERCLA operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions." *Id.* at 174. Similarly, in *Franklin County*, the Sixth Circuit held that the plaintiff did not meet the requirements for CERCLA's innocent-owner protection—and it held that CERCLA liability satisfied due process because "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites." *Franklin Cnty.*, 240 F.3d at 547–48, 552. By contrast, Wisconsin's Spills Law is unconstitutional to the extent that it imposes liability on persons who were not responsible for creating contamination. CERCLA's innocent-owner defense ensures that liability is limited to persons who played a role in creating contamination, and this limitation is why CERCLA liability satisfies due process. Because the Spills Law lacks an equivalent limitation on liability, its innocent-owner liability violates due process.

When the DNR eventually applies the rational-basis test, it argues that the Ruffolos' due process claim "fails as long as there is any conceivable, legitimate basis for the Spills Law." (Dkt. 3:68.) The DNR is framing the Ruffolos' challenge far too broadly. The Ruffolos are not challenging the constitutionality of "the Spills Law" in its entirety. They are instead arguing that the Spills Law is unconstitutional to the extent it imposes liability on innocent landowners. Tellingly, the DNR does not even try to argue that the Spills Law is rational to this extent. This implied concession is correct: there is no rational basis for the government to force innocent landowners to pay to clean up contamination that someone else caused.

The DNR claims that "the Ruffolos do not allege a property right that is being infringed." (Dkt. 3:67.) As explained above regarding the Ruffolos' equal protection claim, they are alleging that Spills Law liability directly and substantially interferes with a person's right to sell his or her property. And more generally, for due process purposes, "[t]he law is clear that individuals have a property interest in their own money." *Barnes v. Brown Cnty.*, No. 11-CV-00968, 2013 WL 1314015, at *4 (E.D. Wis. Mar. 30, 2013). Liability under Wis. Stat. § 292.11(3) obligates a person

to spend her money on remediation costs. This civil-liability schemes deprives a person of her property interest in her own money.

The DNR tries to distinguish *Weber* by arguing it did not involve an environmental law. (Dkt. 3:69.) But the *Weber* Court recognized the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175. That basic concept is not unique to any single area of the law.

The DNR also tries to distinguish *Lady J.* by arguing that it involved a criminal penalty. (Dkt. 3:69.) But *Lady J.* applies to civil liability, too. Under *Lady J.*, "[f]or *civil* liability to be imputed, an ordinance must require proof that a defendant bears a 'responsible relation' to the unlawful conduct." *Wacko's Too*, No. 3:20-CV-303, 2023 WL 2237864, at *15 (emphasis added) (quoting *Lady J.*, 176 F.3d at 1367). "A defendant is in a 'responsible relation' if he has the power to prevent violations from occurring." *Lady J.*, 176 F.3d at 1367. By contrast, "due process prohibits the state from *imprisoning* a person without proof of some form of personal blameworthiness *more* than a 'responsible relation.'" *Id.* (emphases added).

The Spills Law fails the *Lady J.* test to the extent it imposes liability on innocent landowners. When a person buys land that, unbeknownst to him, was contaminated by a previous owner, the buyer does not have the power to prevent the prior contamination from occurring. Under the DNR's logic, the Spills Law imposes liability on a person simply because he owns contaminated land, even if the contamination did not result from any act, omission, or blameworthy mental state by that person. Because "due process *at least* requires individualized proof of intent *or* act," *Lady J.*, 176 F.3d at 1368, innocent-landowner liability under the Spills Law violates due process because it requires neither of those things.

In sum, if this Court reaches the merits of the Ruffolos' facial due process claim, the Court should deny the DNR's motion to dismiss and grant summary judgment to the Ruffolos.

VII. The Ruffolos stated a plausible as-applied constitutional challenge.

As the DNR recognizes, the Ruffolos' as-applied constitutional claims are premised on their argument that innocent-landowner liability is facially unconstitutional. (Dkt. 3:70.) Because their facial constitutional claims are plausible, their as-applied claims are plausible, too. The Ruffolos allege that the Spills Law is facially unconstitutional to the extent that it imposes liability based on ownership of contaminated land. Notably, the DNR does not dispute that it believes the Ruffolos are liable for underground petroleum at their commercial property because they own that

property. Because innocent-owner liability is facially unconstitutional, it is unconstitutional as applied to the Ruffolos here. Because they have raised viable as-applied due process and equal protection claims, this Court should not dismiss them. The Court instead should grant summary judgment to the Ruffolos on this claim if it reaches it.

VIII. The Ruffolos plausibly alleged that the Spills Law does not require them to remediate trichloroethene vapors inside their commercial building—but the Court should remand this claim to state court without addressing its merits.

A. The Court should remand this claim to state court.

For five independent reasons, this Court should remand the Ruffolos' vapor-intrusion claim (Claim Five of their first amended complaint) to the Jefferson County Circuit Court. First, the Court should remand this entire case because the notice of removal was untimely. (Dkt. 5:2–8.) Second, the Court should remand this claim because it is a novel and complex issue of state law. (Dkt. 5:9–10.) Third, the Court should remand this claim because it has no related federal claim. (Dkt. 5:11.) Fourth, the Court should remand this claim (along with the rest of this case) because the DNR argues that this entire case is unripe under Article III of the U.S. Constitution. *See supra* § I. Fifth and finally, the Court should remand this case because the DNR has asserted sovereign immunity under the U.S. Constitution. *See supra* § II.A.

The DNR argues that this claim should "be dismissed" because it is unripe. (Dkt. 3:72.) Because a federal court lacks jurisdiction to hear an unripe claim, such a claim must be remanded to state court in a removal action (and the state court may then consider whether the claim is ripe under state law). *Smith*, 23 F.3d at 1142; *see generally supra* § I.

B. If the Court reaches the merits of this claim, it should grant summary judgment to the Ruffolos or at least decline to dismiss this claim.

The claims discussed above relate to the underground petroleum at the Ruffolos' commercial property. The Ruffolos also raised a claim that the DNR is unlawfully requiring them to mitigate trichloroethene vapors inside their commercial building. (Dkt. 1-1:873–74.) If the Court reaches the merits of this claim, it should grant summary judgment to the Ruffolos on this claim, too—or at least allow this claim to proceed.

The presence of trichloroethene vapors inside the Ruffolos' commercial building does not create remediation liability under Wis. Stat. § 292.11(3). This statutory provision does not require remediation of air vapor within a building.

Instead, this statute requires a responsible party to "take the actions necessary to restore *the environment* to the extent practicable and *minimize the harmful effects* from the discharge *to the air, lands or waters* of this state." Wis. Stat. § 292.11(3) (emphases added). The interior of a building is not "the environment," and a harmful effect to a building interior is not a harmful effect "to the air, lands or waters of this state." Instead, "'[e]nvironment' means any plant, animal, natural resource, surface water (including underlying sediments and wetlands), groundwater, drinking water supply, land surface and subsurface strata, and *ambient air* within the state of Wisconsin or under the jurisdiction of the state of Wisconsin." Wis. Admin. Code § NR 700.03(18) (emphasis added). Wisconsin Stat. § 292.11(3) thus does not require remediation to interiors of buildings—at least buildings where a hazardous substance originated.

Federal courts have made a similar observation about CERCLA. *See, e.g.*, *3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 (9th Cir. 1990) (collecting cases holding that "the 'environment' referred to in [CERCLA] 'includes the atmosphere, external to the building,' but not the air within a building"). "It is lexically possible to treat the 'environment' as everything pertaining to the planet Earth," but "[a] reading of this sort trivializes statutory language." *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1436–37 (7th Cir. 1988). "The interior of a place of employment is not 'the environment' for purposes of CERCLA . . . ." *Id.* at 1439. Nor is it for purposes of the Spills Law. Those federal cases are consistent with Wisconsin law, which defines the environment as including "ambient air," but does not mention air within a building. *See* Wis. Admin. Code § NR 700.03(18).

A contrary conclusion would permit the DNR to impose Spills Law liability on any homeowner whose basement has radon seeping in from the ground, given that radon mitigation is similar to trichloroethene mitigation. (*See* Dkt. 1-1:549.) Wisconsin Stat. § 292.11(3) does not authorize the DNR to impose liability and penalties on persons for the air quality inside their homes and businesses. Instead, "the levels of toxic substances permitted at work" is "the subject of the Occupational Safety and Health Act." *Covalt*, 860 F.2d at 1437. By requiring the Ruffolos to mitigate air vapors inside their commercial building, the DNR is stretching the Spills Law beyond its text.

In addition, if the DNR's view of the law were correct, then a person would be required to report every spill of a hazardous substance within his home. "A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the [DNR]

immediately of any discharge not exempted under sub. (9).” Wis. Stat. § 292.11(2). Subsection (9) exempts from the reporting requirement law enforcement officers, members of a fire department, local governments, and persons with certain permits. So under the DNR’s logic, if a person spills a hazardous solvent while working in his garage and then cleans it up immediately, the person would still be required to report the spill to the DNR because (in the DNR’s apparent view) the Spills Law applies to discharges that occur within buildings. That view is troubling: a person who violates Wis. Stat. ch. 292 may be required to forfeit $5,000 for each day of violation. Wis. Stat. § 292.99(1). Under the DNR’s logic, then, a person could have to forfeit $5,000 for each day that he fails to report to the DNR that he spilled a solvent (or other hazardous substance) in his home or garage. This view is absurd and has no basis in the language of Wis. Stat. § 292.11(3).

The DNR seems to argue that a discharge of a hazardous solvent into the ground is a discharge within the scope of the Spills Law. (Dkt. 3:76–77.) That argument is a red herring because Claim Five does not challenge the validity of an obligation to remediate a discharge *into soil*. Claim Five instead alleges that the Spills Law does not impose an obligation to remediate vapor *within a building*.

The DNR suggests that its own regulations require mitigation of vapor intrusion. (Dkt. 3:74–75.) But those regulations simply require an investigation into the possibility of vapor intrusion and require vapor mitigation in order to receive case closure. The Ruffolos are not challenging either of those requirements or any of those regulations. If a person were denied case closure under those regulations for failing to adequately mitigate vapor intrusion, then that person could challenge the validity of those regulations. But that is not what this case is about.

The DNR argues that “even if the inside of their building were not ‘the environment’ and ‘vapor entering a building is not a “discharge to the air,”’ the Spills Law still requires [the Ruffolos] to ‘minimize the harmful effects from the discharge,’ Wis. Stat. § 292.11(3), which includes harmful effects to customers and other members of the public within their commercial building.” (Dkt. 3:77.) The Ruffolos challenge that view of the statute. That view is wrong because the statute requires a responsible party to “minimize the harmful effects from the discharge *to the air, lands or waters of this state*.” Wis. Stat. § 292.11(3) (emphasis added). The DNR overlooks this italicized language, which modifies the phrase “minimize the harmful effects.” A harmful effect to a building interior is not a harmful effect to the air, lands, or waters of this state.

The DNR argues that the court in *Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 770–71 (7th Cir. 2021), "held that the costs of vapor intrusion remediation may be a be recoverable cost under CERCLA." (Dkt. 3:79.) But that does not appear to be what the court held there. The parties did not seem to have disputed whether vapor intrusion was a recoverable cost, let alone whether CERCLA required remediation of vapor within a building.

In sum, Wis. Stat. § 292.11(3) does not require the Ruffolos to remediate the trichloroethene vapors within their commercial building. Because this claim is at least plausible, this Court should allow the Ruffolos to pursue this claim further if this Court does not grant summary judgment to the Ruffolos at this point.

IX. Wisconsin's attorney general is a proper party here.

The DNR argues that Wisconsin Attorney General Josh Kaul is not a proper defendant in this case. (Dkt. 3:79– 81.) That argument fails.

An attorney general is a proper defendant in a case challenging a statute that the attorney general has the specific authority to enforce. *See, e.g.*, *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1152–53 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014). The attorney general is thus a proper defendant in this declaratory judgment case because he is charged with enforcing the statute at issue. As the Ruffolos asserted in their first amended complaint: "Under Wis. Stat. § 299.95, Attorney General Kaul is responsible for enforcing Wis. Stat. § 292.11, which is the subject of this first amended complaint." (Dkt. 1-1:855.) The Ruffolos also alleged, "The attorney general has unlawfully enforced the Spills Law against innocent landowners and will continue doing so unless enjoined by this Court. Such enforcement exceeds the attorney general's jurisdiction and constitutional authority." (Dkt. 1-1:855.) "Unless enjoined by this Court, the attorney general may unlawfully enforce the Spills Law against the Ruffolos." (Dkt. 1-1:855.)

Yet the DNR argues that the attorney general is not a proper defendant because any enforcement of the Spills Law would happen later, and prosecutors are immune for being sued for exercising prosecutorial discretion. (Dkt. 3:80.) But this lawsuit is not challenging an act of prosecutorial discretion, so the DNR's point is a red herring. As for timing, a prosecuting entity is not an improper party "simply because its involvement in the enforcement process comes later." *Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020, 1029 (W.D. Wis. 2022).

This Court thus should not dismiss the attorney general from this case.

CONCLUSION

This Court should remand this case to state court or otherwise deny the motion to dismiss and grant summary judgment to the Ruffolos.

Dated this 25th day of October 2023.

Respectfully submitted,

Electronically signed by
s/ Scott E. Rosenow

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