

FILED  
11-14-2025  
Clerk of Circuit Court  
Cindy R. Hamre Incha  
2025CV000506

STATE OF WISCONSIN      CIRCUIT COURT      JEFFERSON COUNTY

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STEVEN BENASZESKI and  
MARY BENASZESKI,  
N11947 County Road L,  
Tomahawk, Wisconsin 54487,

Plaintiffs,

v.

WISCONSIN DEPARTMENT  
OF NATURAL RESOURCES,  
101 South Webster Street,  
Madison, Wisconsin 53707,

KAREN HYUN, *in her official capacity  
as secretary-designee of the Wisconsin  
Department of Natural Resources*,  
101 South Webster Street,  
Madison, Wisconsin 53707,

Case No. 2025-CV-\_\_\_\_\_  
Declaratory Judgment: 30701  
Injunctive Relief: 30704

and

JOSH KAUL, *in his official capacity  
as attorney general of Wisconsin*,  
17 West Main Street,  
Madison, Wisconsin 53703,

Defendants.

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**Summons**

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THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the

complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Jefferson County Courthouse, 311 South Center Avenue, Jefferson, Wisconsin 53549**, and to the WMC Litigation Center, Plaintiffs' attorneys, whose address is **2 Buttonwood Court, Madison, Wisconsin 53718**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 14th day of November 2025.

Respectfully submitted,

*Electronically signed by*  
Nathan J. Kane

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Defendants.

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**Complaint**

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Plaintiffs Steven Benaszski and Mary Benaszski, by their undersigned  
counsel, allege the following:

## Introduction

1. “It is a basic principle of law, as well as common sense, that one is typically liable only for his or her own acts, not the acts of others.” *Lewis v. Physicians Ins. Co. of Wisconsin*, 2001 WI 60, ¶ 11, 243 Wis. 2d 648, 627 N.W.2d 484.

2. Yet the government is ordering Steven and Mary Benaszkeski—who own a restaurant-turned-rental-property in Monico—to investigate and clean up alleged petroleum contamination they did not cause or even know about until recently.

3. The Benaszkeskis bought their lakeside property in 2001. (Exhibit O:1; Exhibit P:1.)

4. Then more than twenty years later, they received a letter—a letter from the Wisconsin Department of Natural Resources (DNR). (Exhibit A.)

5. In that letter, the DNR declared it was the Benaszkeskis’ responsibility to test for and remediate a petroleum spill allegedly in their soil—even though the alleged spill was caused by someone else *long before* the Benaszkeskis purchased their land. (Exhibit A:1.)

6. After hearing this news, the Benaszkeskis hired a contractor to test their well water for petroleum. (Exhibit G:2–8.)

7. Those tests came back negative. (Exhibit G:2–8; Exhibit E:1.)

8. Yet the DNR still demands more.

9. The DNR says the Benaszkeskis must test their soil too and, if any petroleum is detected, pay to clean it up. (Exhibit E:1.)

10. The Benaszekis are a retirement-age couple, and they wish, very simply, to sell their property. (Exhibit O:4; Exhibit P:4.)

11. But the testing and cleanup liability the DNR is imposing on them is thwarting their effort to sell their property and thus enjoy a much-deserved retirement. (Exhibit O:4; Exhibit P:3–4.)

12. Far from just shackling an innocent couple, the DNR's unceasing demands fly in the face of statutory text and Wisconsin constitutional law.

13. Wisconsin's Spills Law requires any "person who possesses or controls a hazardous substance which is discharged" to clean up the pollution. Wis. Stat. § 292.11(3).

14. The penalties for violating the Spills Law are steep: a person who violates Wis. Stat. ch. 292 "shall forfeit not less than \$10 nor more than \$5,000 for each violation. *Each day of continued violation is a separate offense.*" Wis. Stat. § 292.99(1) (emphasis added).

15. Cleanup liability under Wis. Stat. § 292.11(3) is separate from the penalties under Wis. Stat. § 292.99 for failing to clean up contamination. *See State v. Block Iron & Supply Co.*, 183 Wis. 2d 357, 366–69, 515 N.W.2d 332 (Ct. App. 1994) (predecessor statutes).

16. The Spills Law is Wisconsin's counterpart to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.

17. CERCLA provides liability protection for innocent landowners and innocent buyers.

18. “If a person merely controlled a site on which hazardous chemicals have spread without that person’s fault, that person is not a polluter and is not one upon whom CERCLA aims to impose liability.” *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358–59 (2d Cir. 1997).

19. In other words, people “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, 717–18 (3d Cir. 1996).

20. The DNR, however, is interpreting Wisconsin’s Spills Law to impose cleanup liability on anybody who owns contaminated property. According to the DNR:

- “When a discharge of a hazardous substance to the environment occurs, the person who ... owns the property where the discharge occurred is required to report it to the Wisconsin Department of Natural Resources (DNR), investigate how far the contamination spread and restore the environment.” (Exhibit I:1);
- “Property owners and persons that caused contamination are responsible for investigating the extent of the contamination and restoring the environment.” (Exhibit J:1); and
- “Property owners or the person who caused the discharge are responsible for reporting contamination.... The Spills Law applies

equally to a recent spill and to old contamination that has been discovered.” (Exhibit K:1.)

21. As a result of this misinterpretation and misapplication of the Spills Law, property owners in Wisconsin are “facing financial ruin by being mandated by the DNR to remediate contamination they knew nothing about.” (Exhibit L:3.)

22. This wrongful interpretation has created “difficulties that so-called innocent buyers across Wisconsin face when someone else contaminates their property.” (Exhibit M:5.)

23. Under the Spills Law as interpreted by the DNR, “people may have to pay for contamination they didn’t cause.” (Exhibit M:16.)

24. Such liability is problematic because “innocent buyer situations are not unique.” (Exhibit M:5.)

25. Under the DNR’s remediation regime, “property owners are sometimes even forced to clean up previous contamination.” (Exhibit M:5.)

26. That means people can “buy a property without knowing about previous contamination, or contamination can spread from one source to other properties.” (Exhibit M:16.)

27. The DNR has been administering Wis. Stat. § 292.11(3) based on a mistaken view that the Spills Law imposes cleanup liability on innocent landowners.

28. Accordingly, this Court should declare that the DNR incorrectly determined that the Benaszekis are liable under Wis. Stat. § 292.11(3) for the alleged underground petroleum contamination at their property. That determination

was based on the Benaszekis' mere ownership of allegedly contaminated land, which is insufficient to establish investigation-and-remediation liability under Wis. Stat. § 292.11(3).

29. In particular, Wis. Stat. § 292.11(3) does not require the Benaszekis to investigate or remediate any underground petroleum at their property because the Benaszekis did not cause any discharge, do not possess or control any underground petroleum, and, even if they do possess any underground petroleum, no petroleum is currently discharging or has discharged at the Benaszekis' property since they became owners of the property.

30. Alternatively, if Wis. Stat. § 292.11(3) imposes liability based on ownership of contaminated land, that liability on its face violates the Wisconsin Constitution's Due Process Clause and Equal Protection Clause.

31. Accordingly, that liability is unconstitutional as applied to the Benaszekis because they did not contribute whatsoever to any petroleum contamination at their property.

### **Parties**

32. The Benaszekis reside at N11947 County Road L in the City of Tomahawk, Lincoln County, Wisconsin, and own the property located at 1800 US Highway 8 East, Town of Monico, Oneida County, Wisconsin.

33. Defendant DNR is an agency of the State of Wisconsin. The DNR's principal place of business is at 101 South Webster Street in the City of Madison,



Dane County, Wisconsin. The DNR is responsible for administering Wis. Stat. § 292.11, which is the subject of this complaint.

34. Defendant Karen Hyun is the secretary-designee of the DNR. Her principal place of business is at 101 South Webster Street in the City of Madison, Dane County, Wisconsin.

35. Pursuant to Wis. Stat. § 15.05, all of the DNR's administrative powers and duties are vested in Secretary-Designee Hyun.

36. Defendant Josh Kaul is the attorney general of Wisconsin. His principal place of business is at 17 West Main Street in the City of Madison, Dane County, Wisconsin.

37. Under Wis. Stat. § 299.95, Attorney General Kaul is responsible for enforcing Wis. Stat. § 292.11, which is the subject of this complaint.

38. The DNR secretary-designee has unlawfully applied the Spills Law to innocent landowners, including the Benaszekis, and will continue doing so unless enjoined by this Court. Such administration exceeds the DNR secretary-designee's jurisdiction and constitutional authority.

39. 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.

40. Unless enjoined by this Court, the attorney general may unlawfully enforce the Spills Law against the Benaszekis.

### **Jurisdiction and Venue**

41. This Court has jurisdiction over this action under Wis. Stat. § 806.04.

42. This Court has jurisdiction over the subject matter of this dispute under article VII, section 8 of the Wisconsin Constitution and Wis. Stat. § 753.03, which provide for subject-matter jurisdiction over all civil matters within this state.

43. Defendants, as state officers and a state agency, are subject to this Court's jurisdiction. *See Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976).

44. Plaintiffs Steven and Mary Benaszkeski designate Jefferson County as the venue for this action, making venue in this Court proper under Wis. Stat. § 801.50(3)(a).

45. The Benaszkeskis have standing to bring this lawsuit and assert the claims in this complaint because the Benaszkeskis' potential liability under Wis. Stat. § 292.11(3) adversely affects their pecuniary interests.

46. In addition, the Benaszkeskis have standing to bring this lawsuit and assert the claims in this complaint because the issues raised in this complaint are significant issues of public policy.

47. In addition, the Benaszkeskis have standing to bring this lawsuit and assert the claims in this complaint because the Benaszkeskis pay taxes to the State of Wisconsin, and the DNR's administration and enforcement of the statute challenged in this complaint has resulted in and will result in unlawful expenditures of state taxpayer funds. As explained below, the DNR's administration and enforcement of

Wis. Stat. § 292.11(3) based on ownership of contaminated land is unlawful. The DNR has spent and will continue spending taxpayer money unlawfully administering and enforcing this statutory provision against innocent landowners.

### **Background**

#### *The Benaszekis*

48. In the summer of 2001, Steven Benaszekis, a schoolteacher, and Mary Benaszekis, a nurse, bought a property on the southern shore of Venus Lake in Monico, Wisconsin—address: 1800 US Highway 8 East. (Exhibit O:1, 4; Exhibit P:1, 3.)

49. During their first years of ownership, the Benaszekis (all the while working day jobs) ran a small bar and grill on the property. They called it the Venus Lake Inn. (Exhibit O:1; Exhibit P:1.)

50. As time wore on, however, they sought relief from the unslowing toll of restaurateuring. (Exhibit O:2; Exhibit P:2.)

51. Toward that end, they shut down their bar and grill, and they began to rent out the property as a triplex. (Exhibit O:2; Exhibit P:2.)

52. The Benaszekis have managed the property as a rental ever since. (Exhibit O:2; Exhibit P:2.)

53. Yet as time has worn further on, and as the Benaszekis have grown a bit older still, the couple has resolved to sell their property. (Exhibit O:3; Exhibit P:3.)

54. But a problem's arisen: They cannot sell their property. (Exhibit O:4; Exhibit P:3.)

55. And that is because of a history they were only recently told anything about.

*The Previous Owners*

56. The Benaszekis were not the first to own the property at 1800 US Highway 8 East.

57. Before the Benaszekis, a couple named Mike and Patti Modrow owned the land. (Exhibit A:7.) Before the Modrows, it belonged to a bank. (Exhibit H:58.)

58. Some time before the bank acquired the property, a gas station stood on the lot. (Exhibit A:10.)

59. To supply gasoline to the station's pumps, two storage tanks, "4 feet wide by 6 feet long" and able to hold more than 500 gallons of fuel, were buried a few feet below ground and just shy of the roadside. (Exhibit H:63.)

60. Eventually, the gas station closed.

61. The tanks, however, were not at that time exhumed.

*The DOT's Discovery*

62. In the summer of 1993, the Wisconsin Department of Transportation (DOT) began scopework for a project to modify US Highway 8 East. The plan was to mill the road, elevate its grade, and add a curb and gutter along some of its lengths. (Exhibit H:58.)

63. But during a "routine site visit," the DOT "discovered an encroachment" at number 1800. (Exhibit H:106.)

64. Only a few steps from the highway's edge at the time—and smack between the boundaries of a DOT easement abutting the road—lay the underground storage tanks, now sand-filled and long disused. (Exhibit H:63–64.)

65. The DOT determined that, to begin roadwork, the tanks must be excavated, so it hired a contractor to do the excavation. (Exhibit H:58.)

66. Using a bright yellow backhoe, the contractor dug up the tanks.



(Exhibit H:71.)

67. Inside them sat a stew of sand, soil, and water, which exuded an odor of petroleum.



(Exhibit H:63, 67.)

68. Where the tanks once lay, the contractor collected soil samples. (Exhibit H:63.)

69. “Field-screening results [of that soil] revealed elevated levels of [volatile organic compounds, or VOCs].” (Exhibit H:63.)

70. Then a “test pit” was drilled, allowing samples to be drawn nine feet beneath the surface of the tanks’ long-lain bed. (Exhibit H:63.)

71. There, too, “[f]ield-screening analysis ... revealed the presence of VOCs.” (Exhibit H:63.)

72. Finally, “[a]s a precautionary measure,” the property’s well water was tested. (Exhibit H:106.)

73. Like the soil, the water was unclean; samples “showed three VOCs in exceedance of the [DNR] groundwater quality enforcement standards.” (Exhibit H:68.)

74. After the tanks were removed from the property and on-site testing complete, the contractor backfilled the hole, but it did not “excavate impacted soils.” (Exhibit E:1.)

75. A few months later, in November 1993, the DNR sent a letter to the Modrows—then owners of 1800 US Highway 8 East. (Exhibit A:7–9.)

76. In that letter, the DNR declared that “petroleum products” were discharged from the long-buried tanks into the property’s soil. (Exhibit A:7.)

77. The DNR therefore concluded the Modrows, as “legal owner[s] of the property,” “must take the actions necessary to restore the environment and minimize the harmful effects from the discharge to the air, lands or waters of the State.” (Exhibit A:7.)

78. Over a year passed, and in 1995 the DNR sent a notice of noncompliance to Mr. Modrow. This letter, like the one dated November 1993, declared that Mr. Modrow, as “legal owner of the property,” was automatically liable for the discharge that had occurred there. (Exhibit A:10–11.)

79. Then five years passed. This time, in the year 2000, the DNR sent a letter addressed to Mrs. Modrow, a so-called “Project Status Update Request.” (Exhibit A:12.)

80. According to this letter, the DNR’s “files indicate[d] that [the DNR had] not received any written correspondence or reporting for the case” since 1995. (Exhibit A:12.)

### *The Innocent Purchase*

81. Whatever efforts the Modrows took to remediate the soil (if they took any at all), they disclosed nothing of them when selling the property.

82. So when Steven and Mary Benaszkeski obtained title to the property, they were completely unaware of the long-gone tanks, the long-past discharge, or the long-running correspondence between the DNR and the Modrows. (Exhibit O:2; Exhibit P:2.)

83. Only two decades later were they finally informed of all this history. (Exhibit O:2; Exhibit P:2.)

### *The Blameless Liability*

84. Around November 2, 2022, the DNR sent a responsible-party letter to the Benaszkeskis for the first time. (Exhibit A:1–6.)

85. This letter, much like those sent to the Modrows more than twenty years before, declared the Benaszkeskis “responsible for the discharge of a hazardous substance” because they “are the current owners of the property” at 1800 US Highway 8 East. (Exhibit A:1.)



86. The letter then listed a long series of duties thus imposed on the Benaszekis. (Exhibit A:3–4.)

87. According to the DNR, the Benaszekis are required to, at the very least:

- Under Wis. Admin. Code §§ NR 716.07 and 716.09, complete a “site investigation scoping” and “submit a work plan ... for completing a site investigation”;
- Under Wis. Admin. Code § NR 716.11, start a site investigation “within the timeframe provided under law”;
- Under Wis. Admin. Code § NR 716.14, “report sampling results to the DNR, owners, occupants, and various other parties”;
- Under Wis. Admin. Code § NR 716.15, “submit a Site Investigation Report (SIR) to the DNR,” identifying any “soil contamination”;
- Under Wis. Admin. Code § NR 722, submit a remedial actions options report, “includ[ing] an evaluation of green and sustainable remediation criteria”;
- Under Wis. Admin. Code § NR 724, submit “Remedial and Interim Action Design, Implementation, Operation, Maintenance and Monitoring Reports”;
- Under Wis. Admin. Code § NR 725, identify any continuing obligations incumbent upon them after case closure; and
- Under Wis. Admin. Code § NR 700.11, “submit semi-annual site progress reports to the DNR until case closure is granted.”

(Exhibit A:3–4.)

88. Attached to this letter were copies of the DNR’s letters to the Modrows from 1993, 1995, and 2000. (Exhibit A:5–12.)

89. In February 2023, the DNR sent the Benaszekis a letter titled “Request for Status Update” (Exhibit B), and in January 2024, a “Notice of Noncompliance” (Exhibit C).

90. In the Notice of Noncompliance, the DNR stated that “[f]ailure to take the actions required by Wis. Stat. ch. 292 to address this contamination will cause the DNR to take appropriate enforcement action.” (Exhibit C:2.)

91. Furthermore, the DNR explained that if the Benaszekis did not “move forward with the response actions necessary,” it intended “to file a deed affidavit” under Wis. Admin. Code § NR 728.11(2) to attach a notice of contamination to the Benaszekis’ property. (Exhibit C:2.)

92. Such a notice, the DNR wrote, would alert “the public, and any prospective purchaser, of the existing contamination and the environmental liability associated with the Property.” (Exhibit C:2.)

93. In April 2024, the DNR filed a “Notice of Intent to File Notice of Contamination Affidavit per Wis. Admin. Code § NR 728.11.” (Exhibit D.)

94. And in June 2024—just when the Benaszekis decided they should sell their property in order to retire—that affidavit was recorded, perfecting a Wis. Admin. Code § NR 728.11(2) “notice of contamination” against the Benaszekis’ property. (Exhibit N:2.)

*The Water Wells*

95. In separate correspondence to the Benaszekis, dated June 28, 2023, the DNR stated that it had “recently located” results from tests it conducted in 1996 and 2001 on the property’s water well. (Exhibit F:1.)

96. Those samples, collected to determine whether any petroleum had continued to contaminate the well, revealed “[n]o hazardous substances” above any allowable limits, but “there were detects of various VOCs.” (Exhibit F:1.)

97. Because the Benaszekis had installed a new well in 2011, the DNR “recommended” they test that well for VOCs too. (Exhibit F:1.)

98. So in early 2025, the Benaszekis hired Northern Lake Service, Inc. to test their well for petroleum contamination. (Exhibit G.)

99. That test evinced unsullied water. “[N]o volatile organic compounds” were found, and the water “passe[d] all levels of safety for drinking.” (Exhibit E:1, 2.)

*The Present*

100. Although the Benaszekis have tested their well for VOCs, they have not tested their soil. (Exhibit O:3; Exhibit P:3.)

101. As a result, it is unknown whether the soil still contains petroleum contamination.

102. Nonetheless, a notice of contamination still marks their land. (Exhibit N:1.)

103. In addition, the DNR’s Remediation and Redevelopment Database lists the Benaszekis’ property as contaminated. (Exhibit N.) The Benaszekis still wish

to sell their property, but the cleanup liability the DNR has imposed on them as current owners makes selling a nearly impossible task. (Exhibit O:4; Exhibit P:3.)

104. As a result, the Benaszekis still own the property and manage it as a rental. (Exhibit O:2; Exhibit P:2.)

105. “[F]acing financial ruin by being mandated by the DNR to remediate contamination they knew nothing about,”<sup>1</sup> the Benaszekis cannot comfortably retire. (Exhibit O:4; Exhibit P:4.)

### **Causes of Action**

#### **Count 1: Declaratory and Injunctive Relief**

*Wisconsin Stat. § 292.11(3) does not impose liability on the Benaszekis for the alleged petroleum contamination at their property*

106. The Benaszekis re-allege and incorporate the preceding allegations of this complaint.

107. Wisconsin Stat. § 292.11(3) provides: “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.”

108. Interpreting the predecessor to Wis. Stat. § 292.11(3),<sup>2</sup> the supreme court held that remediation liability may be imposed under either a possession-or-control theory or a causation theory. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d

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<sup>1</sup> (Exhibit L:3.)

<sup>2</sup> In 1995, the Wisconsin Legislature renumbered Wis. Stat. § 144.76(3) to be Wis. Stat. § 292.11(3). 1995 Wis. Act 227, § 704.

130, 161–62, 580 N.W.2d 203 (1998); *see also State v. Mauthe*, 123 Wis. 2d 288, 300, 366 N.W.2d 871 (1985) (“[L]iability 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.”).

109. The DNR has not accused the Benaszekis of causing the alleged petroleum contamination at their property.

110. And the Benaszekis *did not* cause that alleged petroleum contamination; it predated their ownership by years.

111. The DNR’s view that the Benaszekis are responsible parties under Wis. Stat. § 292.11(3) for the alleged petroleum contamination is based solely on a possession-or-control theory.

112. However, the Benaszekis are not liable under a possession-or-control theory of liability for two reasons.

113. First, the Benaszekis do not possess or control any petroleum on their property.

114. Second, even if they possess or control any petroleum, no petroleum is currently discharging, nor has any discharged since the Benaszekis bought the property.

115. To the first reason, Wis. Stat. § 292.11(3) does not require the Benaszekis to remediate the alleged petroleum contamination under a possession-

or-control theory of liability because the Benaszekis do not possess or control any petroleum.

116. The DNR concludes the Benaszekis are liable under this theory solely because the Benaszekis own the allegedly contaminated land.

117. The 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.<sup>3</sup>

118. In *Brantner*, the supreme court reaffirmed that a person does not possess an item simply by owning the premises where the item is located. *Brantner*, 2020 WI 21, ¶¶ 12–16.

119. 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 Brantner*, 2020 WI 21, ¶ 16.

120. Under *Brantner*, the Benaszekis’ ownership of property does not establish the possession or control of the alleged underground petroleum under Wis. Stat. § 292.11(3). The Benaszekis do not have actual physical control—i.e., direct bodily power—over the alleged underground petroleum. And notwithstanding any

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<sup>3</sup> To the extent *Mauthe* suggests that ownership of contaminated land establishes possession or control of an underground hazardous substance for purposes of the predecessor to Wis. Stat. § 292.11(3), *Mauthe* is no longer good law on that point because its definition of possession conflicts with more recent supreme court precedent, *Brantner*. “When the decisions of our supreme court appear to be inconsistent, we follow its most recent pronouncement.” *Lemke v. Lemke*, 2012 WI App 96, ¶ 23, 343 Wis. 2d 748, 820 N.W.2d 470. And if *Mauthe* is still controlling authority on the meaning of “possession,” the supreme court should overrule that interpretation.

DNR-mandated cleanup, the Benaszekis do not intend to control any underground petroleum. (Exhibit O:3; Exhibit P:3.)

121. The Benaszekis therefore do not possess the alleged underground petroleum contamination on their property.

122. Moving to the second reason that the Benaszekis are not liable for remediation under a possession-or-control theory, for remediation liability to attach to a person under this theory, a hazardous discharge must occur *while* the person has possession or control of the substance.

123. The alleged petroleum on the Benaszekis' property is not currently discharging.

124. Nor, according to the information submitted to the DNR, has the alleged petroleum ever been discharging during the Benaszekis' ownership of the property.

125. So for these reasons, too, the Benaszekis are not liable for remediation under a possession-or-control theory.

126. The Spills Law's plain language and *Mauthe* compel the conclusion that, to be held liable under a possession-or-control theory, a discharge must have occurred during the allegedly responsible party's possession or control of the substance.<sup>4</sup>

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<sup>4</sup> Other Wisconsin case law is not to the contrary. Some case law uses language that, if taken out of context, might suggest that ownership of contaminated land triggers cleanup liability under the Spills Law. See *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 172 n.24, 580 N.W.2d 203 (1998) ("*Mauthe* illustrates that a property owner is liable under the law merely by owning the property upon which hazardous wastes are located, regardless of the owner's connection to, or knowledge of, the wastes." (citing *State v. Mauthe*, 123 Wis. 2d 288, 301, 366 N.W.2d 871 (1985))); *Foss v. Madison Twentieth Century Theaters, Inc.*, 203 Wis. 2d 210, 221, 551 N.W.2d 862 (Ct. App. 1996) ("The duty to clean up soil contaminated by a hazardous substance attaches to ownership of the land." (citing *Mauthe*, 123 Wis. 2d at 300)); *Nischke v. Farmers & Merchants Bank & Tr.*, 187 Wis. 2d 96, 119, 522 N.W.2d 542 (Ct.

127. 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). This “use of the present tense” in Wis. Stat. § 292.11(3) means that the remediation requirement “applies to current discharges.” *See Mauthe*, 123 Wis. 2d at 297.

128. The Spills Law imposes liability “upon a person who possesses or controls the hazardous substance *being discharged*.” *Mauthe*, 123 Wis. 2d 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).

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App. 1994) (“Under [Wis. Stat.] § 144.76, Nischke has a duty as a landowner in possession of discharged hazardous substances to take remedial measures to restore the environment.” (citing *Mauthe*, 123 Wis.2d at 300–02)).

But the courts in *Chrysler*, *Foss*, and *Nischke* did not explain *when* a discharge must occur under a possession-or-control theory of liability. Those cases cited *Mauthe*, and *Mauthe* did not hold that ownership of contaminated land automatically establishes cleanup liability regardless of when the discharge occurred. In *Mauthe*, the court held that Mauthe was liable based on two elements: (1) a requisite discharge was occurring, and (2) Mauthe possessed the discharging substance. *Mauthe*, 123 Wis. 2d at 295–302. The *Mauthe* court made clear that “[u]nder the *facts of this case* ... the responsibility is on the owner.” *Id.* at 302 (emphasis added). In *Chrysler*, *Foss*, and *Nischke*, the courts did not eliminate, modify, or clarify the discharge element as interpreted and applied in *Mauthe*. Nevertheless, our supreme court should withdraw language in those three cases to the extent they might seem to equate ownership with liability.

In *Chrysler*, “Chrysler concede[d] that a hazardous substance ‘discharge’ occurred” during the relevant timeframe. *Chrysler*, 219 Wis. 2d at 166. The court recognized that the *Mauthe* court had found liability based on ownership only *after* concluding that a requisite discharge was occurring. *Id.* at 160–61.

In *Foss*, the parties did not dispute that Foss was a responsible party under the Spills Law, that a leak from an underground tank occurred after Foss bought the land, and that Foss knew about the underground tank when he bought the land.

In *Nischke*, Nischke installed an underground gasoline tank after buying land, and she used the tank for apparently a decade or more. The tank began leaking apparently around 20 years after it was installed, long after she bought the land. She did not dispute that she was a responsible party under the Spills Law.



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).

129. In *Mauthe*, the supreme court also 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.

130. Unlike in *Mauthe*, no information submitted to the DNR here shows that the alleged petroleum at the Benaszekis’ property is migrating onto neighboring property. In addition, the underground storage tanks were removed almost a decade before the Benaszekis bought the property.

131. As a result, under *Mauthe*, no petroleum has been discharged during the Benaszekis’ ownership of their property.

132. Because no underground petroleum has discharged while the Benaszekis have owned their property, Wis. Stat. § 292.11(3) does not require the Benaszekis to remediate the alleged petroleum contamination under a possession-or-control theory of liability.

133. In sum, Wis. Stat. § 292.11(3) does not require the Benaszekis to remediate the alleged petroleum contamination at their property. They are not liable under a possession-or-control theory for two reasons—(1) the Benaszekis do not possess or control the alleged petroleum under *Brantner*, and (2) petroleum is not presently discharging and has not discharged while the Benaszekis have owned the land.

134. Pursuant to Wis. Stat. § 806.04, this Court should issue a declaratory judgment stating that the Benaszekis are not liable under Wis. Stat. § 292.11(3) for remediating the alleged underground petroleum at their property.

135. To aid that declaratory judgment, this Court should enjoin the Defendants from enforcing, applying, or administering Wis. Stat. § 292.11(3) against the Benaszekis based on their ownership of property that allegedly contains underground petroleum contamination.

### **Count 2: Declaratory and Injunctive Relief**

*Liability under Wis. Stat. § 292.11(3) based on ownership of contaminated land violates the Wisconsin Constitution's guarantee of due process of law*

136. The Benaszekis re-allege and incorporate the preceding allegations of this complaint.

137. Article I, Section 1 of the Wisconsin Constitution guarantees substantive due process all the same as the federal Constitution. *State v. McManus*, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989) (“This court has held the due process and equal protection clauses of the Wisconsin Constitution are the substantial equivalents of their respective clauses in the federal constitution.”); *see also Blake v. Jossart*, 2016 WI 57, ¶ 28, 370 Wis. 2d 1, 884 N.W.2d 484 (“As a general principle, this court treats [the Due Process and Equal Protection provisions] of the United States and Wisconsin Constitutions as consistent with each other in their due process and equal protection guarantees.”); *Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678 (“Article I, Section 1

has been interpreted as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution.”).<sup>5</sup>

138. “Substantive due process is equated with the concept of fundamental fairness.” *State v. Scott*, 230 Wis. 2d 643, 652, 602 N.W.2d 296 (Ct. App. 1999).

139. “The right to substantive due process addresses ‘the content of what government may do to people under the guise of the law.’” *Dane Cnty. DHS v. Ponn P.*, 2005 WI 32, ¶ 19, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted). “The right of substantive due process protects against a state act that is arbitrary, wrong or oppressive, regardless of whether the procedures applied to implement the action were fair.” *Id.*

140. Wisconsin Stat. § 292.11(3) violates the substantive due process protection in Article I, Section 1 of the Wisconsin Constitution to the extent this statutory provision imposes liability based on ownership of contaminated property.

141. A litigant may bring “a categorical facial challenge” alleging that only “a portion of” a statute is unconstitutional. *Winnebago Cnty. v. C.S.*, 2020 WI 33, ¶ 14 n.6, 391 Wis. 2d 35, 940 N.W.2d 875. Also known as a “hybrid” challenge, this type of lawsuit alleges that a statute is facially unconstitutional when applied in one or more categories of cases. *Kaul v. Wisconsin State Legislature*, 2025 WI 23, ¶ 15, 416 Wis. 2d 322, 21 N.W.3d 513.

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<sup>5</sup> Count 2 is based entirely on the Wisconsin Constitution, not also on the United States Constitution.

142. “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).

143. “It is a basic principle of law, as well as common sense, that one is typically liable only for his or her own acts, not the acts of others.” *Lewis*, 2001 WI 60, ¶ 11; *see also* Oliver Wendell Holmes, Jr., *Agency*, 5 Harv. L. Rev. 1, 14 (1891) (“I assume that common-sense is opposed to making one man pay for another man’s wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility.”).

144. “Simply put, the law functions best when it fixes liability on those causing harm.” *Nw. Insulation v. Lab. & Indus. Rev. Comm’n*, 147 Wis. 2d 72, 82, 432 N.W.2d 620 (Ct. App. 1988).

145. “This notion of personal guilt is not limited to criminal actions.” *Tyson*, 369 F. Supp. 513 at 519. So 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).

146. “For civil liability to be imputed, [a law] must require proof that a defendant bears a ‘responsible relation’ to the unlawful conduct.” *Wacko’s Too, Inc. v. City of Jacksonville*, 658 F. Supp. 3d 1086, 1111 (M.D. Fla. 2023) (citing *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999)), *aff’d*, 134 F.4th 1178 (11th Cir. 2025).

147. “A defendant is in a ‘responsible relation’ if he has the power to prevent violations from occurring.” *Wacko’s Too, Inc.*, 658 F. Supp. 3d at 1111 (quoting *Lady J. Lingerie, Inc.*, 176 F.3d at 1367).

148. Civil liability may be based on ownership if “an owner-defendant is only responsible for acts or omissions that he has the power to prevent.” *See Lady J. Lingerie, Inc.*, 176 F.3d at 1367.

149. Persons “who owned previously contaminated property where waste spread without their aid cannot reasonably be characterized as ‘polluters.’” *CDMG Realty Co.*, 96 F.3d at 717.

150. Wisconsin Stat. § 292.11(3) violates due process to the extent it attaches liability based on ownership of contaminated land.

151. Innocent-owner liability violates due process because it does not require proof of an act, omission, or mental state—in other words, proof of any responsibility for creating any contamination.

152. The DNR is imposing innocent-landowner liability on the Benaszekis.

153. The Benaszekis did not cause the alleged petroleum contamination on their property, nor did they have the power to prevent it from occurring.

154. The alleged petroleum contamination of that property occurred at least several years before the Benaszekis bought the property.

155. The Benaszekis did not know about that alleged contamination when they purchased the property.

156. As a result, the DNR is attempting to impose cleanup liability on the Benaszekis without even alleging a guilty act, omission, or mental state of theirs.

157. In sum, Wis. Stat. § 292.11(3) facially violates Article I, Section 1 of the Wisconsin Constitution to the extent it imposes liability on a person because he or she owns contaminated property.

158. This Court should issue a declaratory judgment to that effect, pursuant to Wis. Stat. § 806.04.

159. To aid that declaratory judgment, this Court should enjoin the Defendants from enforcing, applying, or administering Wis. Stat. § 292.11(3) based on ownership of contaminated property.

### **Count 3: Declaratory and Injunctive Relief**

*Liability under Wis. Stat. § 292.11(3) based on ownership of contaminated property violates the Wisconsin Constitution's guarantee of equal protection of the law*

160. The Benaszekis re-allege and incorporate the preceding allegations of this complaint.

161. Article I, Section 1 of Wisconsin's Constitution states, "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." Wis. Const. art. I, § 1.<sup>6</sup>

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<sup>6</sup> Count 3 is based entirely on the Wisconsin Constitution, not also on the United States Constitution.

162. Wisconsin courts interpret the Wisconsin Constitution's Equal Protection Clause to be at a minimum "consistent with" the federal Equal Protection Clause. *Blake*, 2016 WI 57, ¶ 28; *see also Mayo*, 2018 WI 78, ¶ 35.

163. That said, Wisconsin courts also "have a long history of interpreting our constitution to provide greater protections for the individual liberties of Wisconsinites than those mandated by the federal Constitution." *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 52, 411 Wis. 2d 389, 5 N.W.3d 238 (Dallet, J., concurring).

164. Indeed, "Article I, Section 1 protects more than the enumerated rights of 'life, liberty, or property.'" *Id.* ¶ 55. "Wisconsinites have 'inherent rights,' a phrase that was written 'to be broad enough to cover every principle of natural right, of abstract justice.'" *Id.* (quoting *Black v. State*, 113 Wis. 205, 226, 89 N.W. 522 (1902) (Marshall, J., concurring)).

165. Therefore, courts have "recognized greater protections for individual liberties in our [state] constitution...." *Id.* ¶ 53.

166. Wisconsin Stat. § 292.11(3) violates the Equal Protection Clause in Article I, Section 1 of the Wisconsin Constitution to the extent this statutory provision imposes liability based on ownership of contaminated property.

167. "[I]f a statute affects a 'fundamental right' or creates a classification based on a 'suspect' criterion, [courts] review the statute with 'strict scrutiny.'" *State v. Martin*, 191 Wis. 2d 646, 651, 530 N.W.2d 420 (Ct. App. 1995) (citation omitted).

168. “Otherwise, the appropriate analysis is the ‘rational basis test’ which determines whether the legislative classification rationally furthers a purpose identified by the legislature.” *Id.* at 651–52 (citation omitted).

169. The Spills Law, to the extent it imposes liability on innocent landowners, significantly affects the fundamental rights to property ownership and liberty.

170. “A fundamental right is ‘deeply rooted in this Nation’s history and tradition.’” *Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 15 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)); *see also Matter of Adoption of M.M.C.*, 2024 WI 18, ¶ 15 (Dallet, J., concurring) (arguing the Wisconsin Constitution protects a set of rights that includes and goes beyond those protected by the federal Constitution).

171. “The 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), *aff’d*, 440 U.S. 689; *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”); 1 *William Blackstone, Commentaries on the Laws of England* 78, 125 (1765) (stating that the common law did not “authorize the least violation” of property rights).

172. The right to own property is not a singular right, however. It conveys a whole “bundle” of rights. The right to sell one’s property is included in that bundle. *State ex rel. Wisconsin Edison Corp. v. Robertson*, 99 Wis. 2d 561, 569 n.11, 299 N.W.2d 626 (Ct. App. 1980); *see also Loretto v. Teleprompter Manhattan CATV Corp.*,



458 U.S. 419, 435 (1982). Selling 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).

173. Innocent-landowner liability under Wis. Stat. § 292.11(3) is subject to strict scrutiny because such liability interferes with the fundamental right to sell one’s property.

174. Indeed, the investigation-and-remediation liability that the DNR is imposing on the Benaszekis as the current owners of allegedly contaminated property has made it difficult for them to sell the property. (Exhibit O:4; Exhibit P:3.)

175. Accordingly, innocent-owner liability under Wis. Stat. § 292.11(3) is subject to strict scrutiny under the Wisconsin Constitution’s Equal Protection Clause.

176. “To survive strict scrutiny, the State has the burden to show that the ‘[statute] is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” *State v. Baron*, 2009 WI 58, ¶ 45, 318 Wis. 2d 60, 769 N.W.2d 34 (quotation marks omitted).

177. Innocent-landowner liability is unconstitutional because the state cannot satisfy its burden to overcome strict scrutiny.

178. Even if rational-basis scrutiny applies to innocent-landowner liability, it fails under that test too.

179. When rational basis scrutiny is applied to a statutory classification, that classification must meet five criteria: (1) “All classification must be based upon substantial distinctions which make one class really different from another”; (2) “The classification adopted must be germane to the purpose of the law”; (3) “The classification must not be based upon existing circumstances only. It must not be so constituted as to preclude addition to the numbers included within a class”; (4) “To whatever class a law may apply, it must apply equally to each member thereof”; (5) “That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.” *Dane Cnty. v. McManus*, 55 Wis. 2d 413, 423, 198 N.W.2d 667 (1972) (citations omitted); *see also Mayo*, 2018 WI 78, ¶ 42.

180. Innocent-landowner liability under the Spills Law fails that five-factor test.

181. The Spills Law does not automatically attach cleanup liability to innocent *lessees* of contaminated property. Indeed, “persons who lease contaminated property may not,” in the DNR’s words, “be liable for contamination if they did not cause or exacerbate the contamination.” (Exhibit I:1.)

182. Innocent owners and innocent lessees are similarly situated.

183. It is therefore irrational to automatically impose cleanup liability on innocent owners but not innocent lessees.

184. In sum, if Wis. Stat. § 292.11(3) imposes liability on a person because he or she owns contaminated property, such liability facially violates Article I, Section 1 of Wisconsin's Constitution.

185. This Court should issue a declaratory judgment to that effect, pursuant to Wis. Stat. § 806.04.

186. To aid that declaratory judgment, this Court should enjoin the Defendants from enforcing, applying, or administering Wis. Stat. § 292.11(3) based on ownership of contaminated property.

#### **Count 4: Declaratory and Injunctive Relief**

*Wisconsin Stat. § 292.11(3) is unconstitutional as applied to the Benaszekis if it imposes liability on them for the alleged petroleum contamination at their property*

187. The Benaszekis re-allege and incorporate the preceding allegations of this complaint.

188. The DNR's view that the Benaszekis are responsible parties under Wis. Stat. § 292.11(3) for the alleged petroleum contamination is based solely on the fact that the Benaszekis own the allegedly contaminated land.

189. As explained above in Counts 2 and 3, if Wis. Stat. § 292.11(3) imposes liability based on ownership of contaminated land, such liability on its face violates the Wisconsin Constitution's rights to due process of law and equal protection of the law.<sup>7</sup>

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<sup>7</sup> Count 4 is based entirely on the Wisconsin Constitution, not also on the United States Constitution.

190. When a portion of a statute is facially unconstitutional, that portion cannot constitutionally be enforced under any circumstances. *See C.S.*, 2020 WI 33, ¶ 14 n.6.

191. Because Wis. Stat. § 292.11(3) is facially unconstitutional to the extent it imposes liability based on ownership of contaminated land, that portion of the statute is unconstitutional as applied to the Benaszekis regarding the alleged petroleum contamination at their property.

192. This Court should issue a declaratory judgment to that effect, pursuant to Wis. Stat. § 806.04.

193. To aid that declaratory judgment, this Court should enjoin the Defendants from enforcing, applying, or administering Wis. Stat. § 292.11(3) against the Benaszekis based on their ownership of allegedly contaminated property.

### **Request for Relief**

The Plaintiffs request the following relief:

1. A declaration that the Plaintiffs are not liable under Wis. Stat. § 292.11(3) for investigating or remediating the alleged underground petroleum at their property;
2. Alternatively, or additionally, a declaration that Wis. Stat. § 292.11(3) violates the Due Process Clause in Article I, Section 1 of the Wisconsin Constitution to the extent this statutory provision imposes liability based on ownership of contaminated property;

3. Alternatively, or additionally, a declaration that Wis. Stat. § 292.11(3) violates the Equal Protection Clause in Article I, Section 1 of the Wisconsin Constitution to the extent this statutory provision imposes liability based on ownership of contaminated property;

4. A declaration that Wis. Stat. § 292.11(3) is unconstitutional as applied to the Plaintiffs regarding the alleged underground petroleum at their property;

5. A permanent injunction prohibiting the Defendants from administering, applying, or enforcing Wis. Stat. § 292.11(3) against the Plaintiffs regarding the alleged underground petroleum at their property;

6. A permanent injunction prohibiting the Defendants from administering, applying, or enforcing Wis. Stat. § 292.11(3) against any person based on that person's ownership of contaminated property;

7. Costs and attorney fees, or both, as allowed by law.

Dated this 14th day of November 2025.

Respectfully submitted,

*Electronically signed by*  
Nathan J. Kane

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