Exhibit J

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 18

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2021-CX-0011
Case Code 30109

BERRADA PROPERTIES MANAGEMENT, INC., and YOUSSEF BERRADA,

Defendants.

THE CINCINNATI INSURANCE CO.,

Intervenor,

v.

STATE OF WISCONSIN; BERRADA PROPERTIES MGMT., INC.; and YOUSSEF BERRADA,

Defendants in Intervention.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

INTRODUCTION

Twelve of the Complaint's thirteen counts, alleging violations of agency rules, fail as a matter of law. That is because the regulations that the State alleges Defendants violated either do not prohibit any conduct (and so cannot be "violated"); exceed the Department of Agriculture, Trade and Consumer Protection's (DATCP) statutory authority; or were promulgated under a statute that unconstitutionally delegates legislative authority to an agency. Defendants are therefore entitled to judgment on the pleadings on these counts.

Invoking two statutes that empower the State to prosecute "violations" of DATCP rules, the State seeks forfeitures for Defendants' alleged transgressions of Wisconsin Administrative

Code Section ATCP 134.08. This regulation, however, cannot be "violated." It merely provides that a contract is "void and unenforceable" if it includes certain provisions. While that is real relief to tenants (since it makes such contracts unenforceable in eviction proceedings), nothing in the statute prescribes or prohibits conduct giving rise to the "void and unenforceable" contracts.

In addition, and for the same reason, Section ATCP 134.08 exceeds DATCP's statutory authority. Wisconsin Statute Section 100.20(2), under which DATCP promulgated Chapter ATCP 134, provides only that DATCP may "prohibit[ ]" unfair methods of competition and "prescribe[ ]" fair methods. Since Section ATCP 134.08 neither prohibits nor prescribes any conduct, it exceeds DATCP's authority under this statute.

The other regulations on which the State relies—ATCP 134.06 and 134.09—likewise exceed DATCP's authority under the Supreme Court's binding interpretation of Section 100.20(2)'s limits. Under the Court's saving construction, Section 100.20(2) allows DATCP only to *eliminate* specific trade practices that it determines are unfair—it does not empower DATCP to pick one of innumerable "fair" practices and dictate industry-wide conformity to it. Yet that is precisely what Sections ATCP 134.06 and 134.09 purport to do. They therefore exceed DATCP's authority and are invalid.

Alternatively, notwithstanding Supreme Court precedent to the contrary, Section 100.20(2) unconstitutionally delegates legislative authority to DATCP in violation of separation-of-powers principles and is therefore invalid. The statute fails to satisfy even current doctrine, since it lacks a limited, ascertainable purpose, instead arrogating to DATCP the power to prescribe whatever it arbitrarily deems "fair" and prohibit whatever it arbitrarily deems "unfair." *A fortiori*, Section 100.20(2) also violates the Supreme Court's traditional, stricter non-delegation doctrine.

STATEMENT OF THE CASE

On November 15, 2021, the State filed this civil enforcement action against Defendants. Dkt. 3. The State's complaint raised 14 claims against Defendants. Claims One through Three allege violations of Wisconsin Administrative Code Section ATCP 134.08, Dkt. 3:37–42, which provides that "a rental agreement is void and unenforceable if it" contains certain provisions. Wis. Admin. Code § ATCP 134.08. Claims Four through Eight allege violations of Wisconsin Administrative Code Section ATCP 134.06, Dkt. 3:42–48, which prohibits and requires certain actions relating to security deposits. Wis. Admin. Code § ATCP 134.06. Claims Nine through Twelve allege violations of Wisconsin Administrative Code Section ATCP 134.09, Dkt. 3:48–53, which prohibits and requires certain actions related to entry of leased premises, charging fees, confiscating a tenant's personal property, and evictions. Wis. Admin. Code § ATCP 134.09. Claim Thirteen alleges a violation of Wisconsin Statute Section 100.18, Dkt. 3:53–54, which prohibits certain fraudulent representations. Wis. Stat. § 100.18. Claim Thirteen relates in particular to a "new building that Defendants had purchased" and a purported statement to the tenants there. Dkt. 3:53–54. Finally, Claim Fourteen alleged violations of Wisconsin Statute Section 100.195, Dkt. 3:54–56, which prohibits certain "[u]nfair billing for consumer goods or services." Wis. Stat. § 100.195.

On December 17, 2021, Defendants filed a partial motion to dismiss under Wis. Stat. § 802.06(2)(a)(6). Dkt. 38. Defendants argued that Mr. Berrada is immune from suit under Wis. Stat. § 93.17, that some of the State's claims are barred by the statute of limitations, and that several of the State's claims should otherwise be dismissed. *See* Dkt. 39. This Court granted Defendants' motion in part, dismissing Count 14 of the State's complaint on the ground that Wisconsin Statute Section 100.195 does not apply to landlords. Dkt. 80. This Court did not address Defendants' immunity or statute of limitations argument. Dkt. 80:3. Defendants then answered the Complaint,

denying the State's thirteen remaining claims and asserting several affirmative defenses. Dkt. 82. They later moved to amend the Answer to clarify already-asserted affirmative defenses. Dkt. 145. Defendants now bring the present motion for judgment on the pleadings.[1]

STANDARD OF REVIEW

"After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings." Wis. Stat. § 802.06(3). "A judgment on the pleadings is essentially a summary judgment decision without affidavits and other supporting documents." *Southport Commons, LLC v. Wisconsin Dep't of Transportation*, 2021 WI 52, ¶ 18, 397 Wis. 2d 362, 960 N.W.2d 17. Therefore, courts "apply the first two steps of summary judgment methodology to determine whether judgment on the pleadings is appropriate." *New Richmond News v. City of New Richmond*, 2016 WI App 43, ¶ 28, 370 Wis. 2d 75, 881 N.W.2d 339. The court first "examine[s] the complaint to determine whether it states a claim on which relief can be granted." *Id.* If it does, then the court will "determine whether the answer shows the existence of a material factual dispute." *Id.* If the complaint fails to state a claim, the inquiry ends, and the court will grant judgment on the pleadings on behalf of the defendant. *See id.* ¶ 36; *Com. Mortg. & Fin. Co. v. Clerk of Cir. Ct.*, 2004 WI App 204, ¶ 21, 276 Wis. 2d 846, 689 N.W.2d 74.[2]

[1] Whether Defendants' motion for judgment on the pleadings should be granted does not turn on whether Defendants are allowed to amend the Answer. Defendants' argument here is that, as a matter of law, the State's complaint fails to state a claim as to Counts One through Twelve. Defendants raised this defense in in their original answer, *see* Dkt. 82, and in their proposed amended answer, *see* Dkt. 147. And, regardless, Defendants may raise this argument "by a motion for judgment on the pleadings" at any time "[a]fter issue is joined between all parties but within time so as not to delay the trial." Wis. Stat. § 802.06(3), (8)(b); 4 Wis. Pl. & Pr. Forms § 22:33 (5th ed.). Here, all complaints have been answered, *see* Dkts. 82, 143, and so there is no question that issue is joined as to all parties. *See Snowberry v. Zellmer,* 22 Wis. 2d 356, 358, 126 N.W.2d 26 (1964) (joinder of issue occurred at filing of original answer regardless of amendment).

[2] A party may bring a motion for judgment on the pleadings even after bringing an earlier motion to dismiss for failure to state a claim. *See* 5C Fed. Prac. & Proc. Civ. § 1385 (3d ed.); *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 266 n.2 (S.D.N.Y. 2013), *aff'd*, 807 F.3d 541 (2d Cir. 2015), and *aff'd*, 622 F. App'x 67 (2d Cir. 2015); *Lipari v. U.S. Bancorp NA*, 345 F. App'x 315, 317 (10th Cir. 2009) (Gorsuch, J.); *see also Wilson v. Cont'l Ins. Companies,* 87 Wis. 2d 310, 316, 274 N.W.2d 679 (1979) ("federal decisions construing the procedural counterparts to the Wisconsin Rules of Civil Procedure are persuasive").

ARGUMENT

I. COUNTS ONE THROUGH THREE DO NOT STATE A CLAIM FOR "VIOLATIONS" OF SECTION ATCP 134.08 BECAUSE THAT SECTION DOES NOT PROHIBIT CONDUCT—IT MERELY DECLARES CERTAIN CONTRACT PROVISIONS "VOID AND UNENFORCEABLE"

Courts read regulations the same way that they read statutes. *See Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95. "[S]tatutory interpretation 'begins with the language of the statute,'" and, "[i]f the meaning of the statute is plain, [courts] ordinarily stop the inquiry." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. One rule of thumb in the plain-meaning analysis is that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." *Kimberly-Clark Corp. v. Pub. Serv. Comm'n of Wisconsin*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983). And, of course, courts "should not read into the statute language that the legislature did not put in." *Wisconsin Realtors Ass'n v. Pub. Serv. Comm'n of Wisconsin*, 2015 WI 63, ¶ 89 n.32, 363 Wis. 2d 430, 867 N.W.2d 364 (citation omitted). Similarly, "statutory history," which "encompasses the previously enacted and repealed versions of a statute" and involves "analyzing the changes the legislature has made over the course of several years," "is part of a plain meaning analysis." *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581. Finally, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997) (citation omitted).

State actors may enforce a statute or regulation against an individual as a "violation" of that law only if that statute or regulation prescribes or prohibits conduct. "[O]ne cannot violate the provisions of [a] statute" when the statutes "do not themselves prescribe or constrain any conduct

on the part of the citizen." *Bowles v. Willingham*, 321 U.S. 503, 530 (1944) (Roberts, J., dissenting). Thus, a complaint that alleges a "violation" of a statute that does not prohibit or prescribe conduct fails to state a claim. *See Young v. City of Visalia*, 687 F. Supp. 2d 1155, 1166 (E.D. Cal. 2010). For example, in *Young*, the plaintiff alleged that police officers violated California Penal Code Section 661 "when [they] failed to intercede to stop civil rights violations by other officers." *Id.* But Section 661 "merely state[d] that courts have the discretion to remove a public officer due to neglect or violation of public duty." The court explained that, "since the statute does not prohibit conduct, the Court is unaware of how the statute may be 'violated.'" *Id.* The Court therefore dismissed with prejudice "any cause of action" predicated upon this statute. *Id.*; *see also O'Fallon v. Protocol Recovery Serv., Inc.*, No. 2:15-CV-28-KS-MTP, 2015 WL 6394568, at *1 (S.D. Miss. Oct. 21, 2015) (Section 1692n of the FDCPA "merely provides that the FDCPA does not preempt state laws which provide 'greater protection'" and therefore "Defendant did not 'violate' § 1692n insofar as that statute does not require or forbid any actions").

Because Wisconsin Administrative Code Section ATCP 134.08 neither prescribes nor proscribes conduct, no conduct "violates" it. The regulation states, "Notwithstanding s. 704.02, Stats., a rental agreement is void and unenforceable if it does any of the following." Wis. Admin. Code § ATCP 134.08. The regulation then lists several kinds of provisions that will void a lease. *Id.* The regulation does not state that including these provisions in a lease is prohibited—the rule uses no terms to that effect. The rule does not say that a landlord "may not" or "shall not" include these provisions. The rule does not say that a landlord "is prohibited from" including these provisions. Instead, the rule states only that a contract is unenforceable if it contains any of the listed provisions. The voiding of a contract is a serious consequence, but it plainly is not the same thing as a prohibition on agreeing to the provision in the first place. For statutes that carry criminal

penalties, this is hardly interpretive hair-splitting—these distinctions are immensely consequential. *See infra* p. 9.

Context confirms this plain reading of the regulation. In several other provisions of Chapter ATCP 134, DATCP used language plainly prohibiting or prescribing conduct. For example, "[a] landlord shall deliver or mail to a tenant the full amount of any security deposit paid by the tenant, less any amounts that may be withheld under sub. (3), within 21 days after any of" certain specified events. Wis. Admin. Code § ATCP 134.06(2). And "[i]f any portion of a security deposit is withheld by a landlord, the landlord shall, within the time period and in the manner specified under sub. (2), deliver or mail to the tenant a written statement accounting for all amounts withheld." *Id.* § ATCP 134.06(4). Likewise, "[n]o landlord shall fail to complete [ ] promised cleaning, repairs or improvements on the date or within the time period represented under sub. (1), unless" certain factors are met. *Id.* § ATCP 134.07(3). And "[n]o landlord may rent or advertise for rent any premises which have been placarded and condemned for human habitation," "no landlord may . . . [e]nter a dwelling unit during tenancy except to inspect the premises, make repairs, or show the premises to prospective tenants or purchasers," subject to certain exceptions, "[n]o landlord shall enforce, or attempt to enforce, an automatic renewal or extension provision in any lease unless" certain factors are met, "[n]o landlord may exclude, forcibly evict or constructively evict a tenant from a dwelling unit, other than by an eviction procedure specified under ch. 799, Stats.," and so on *Id.* § ATCP 134.09. Clearly, DATCP knows how to and has written regulations that forbid or require certain conduct by landlords. That Section ATCP 134.08 is not written this way "is significant in showing that a different intention existed," *Kimberly-Clark Corp.*, 110 Wis. 2d at 463—namely, that ATCP 134.08 is not intended to prohibit or prescribe conduct.

Regulatory history also confirms that, under the plain meaning of Section ATCP 134.08, no conduct is prohibited. Before 2015, Section ATCP 134.08 read, "No rental agreement may" do any of a number of enumerated things. *See* Wis. Admin. Code § ATCP 134.08 (1999). In 2015, DATCP repealed and re-created Section ATCP 134.08, with the new regulation stating merely that "a rental agreement is void and unenforceable" if it does certain things. *See* Wis. Admin. Reg. 716B, CR 14-038 (effective Nov. 1, 2015). Although the previous language may have "prohibit[ed] as an unfair trade practice the inclusion of any clause" listed, *Baierl v. McTaggart*, 2001 WI 107, ¶¶ 4, 22, 245 Wis. 2d 632, 629 N.W.2d 277, this change in the regulatory language *removed* any prohibition on conduct. Instead, the rule provides simply that a contract will be void and unenforceable if it contains certain provisions. *See* Wis. Admin. Code § ATCP 134.08.[3] This means, for example, that a landlord cannot enforce the lease in eviction proceedings. *See, e.g.*, *Young v. Landstar Investments LLC*, 2016 WI App 16, 366 Wis. 2d 808, 2015 WL 7764990 (unpublished). If DATCP had intended to maintain a prohibition on conduct while also prescribing that any violation of that prohibition would render a contract void and unenforceable, it could have done so. *See, e.g.*, Wis. Stat. §§ 136.06 (prohibiting and prescribing conduct and then providing that "[e]very contract made in violation of this chapter is void and unenforceable as contrary to public policy"); 134.49 (similar); 194.53 (similar); 429.203 (similar); 429.205 (similar). That DATCP instead removed any prohibition on conduct further supports the plain-language reading of Section ATCP 134.08 as neither prohibiting nor prescribing any conduct, but merely providing a consequence for inclusion of certain lease provisions—namely, the unenforceability of the entire lease. *See Richards*, 309 Wis. 2d 541, ¶ 22.

[3] As Defendants explained in their brief in support of their partial motion to dismiss, Dkt. 39:15–17, the State's claims here are subject to a three-year statute of limitations. Thus, any cause of action accruing under the pre-2015 version of Section ATCP 134.08 expired long before the State brought this suit in November 2021.

Indeed, given DATCP's choice in regulatory language, reading Section ATCP 134.08 as prohibiting landlords from including certain provisions in rental agreements requires reading language into the regulation that is not there—namely, that "no rental agreement may" include the listed provisions. But courts "should not read into the [regulation] language that the [agency] did not put in." *Wisconsin Realtors Ass'n*, 363 Wis. 2d 430, ¶89, n.32.

Worse, reading the rule the State's way would make it unconstitutional. Violations of Chapter ATCP 134 may, in some circumstances, be punishable by criminal sanctions. *See* Wis. Stat. § 100.26(3). But criminal laws must "give ordinary people fair notice of the conduct it punishes," and a failure to provide such notice violates the constitutional requirement of due process. *See Johnson v. United States*, 576 U.S. 591, 595 (2015). Without stating that landlords are prohibited from including certain provisions in rental agreement, the regulation fails to give "ordinary people fair notice" of what, if anything, is prohibited. *See Hall*, 207 Wis. 2d at 89.[4]

In all, Section ATCP 134.08 does not prohibit or prescribe any conduct, and thus DATCP cannot charge a landlord with a "violation" of this provision under the unfair trade practices law. *See Young*, 687 F. Supp. 2d at 1166. Nor can it invoke the statutes that empower the State only to bring actions for "violations" of Section ATCP 134.08. *See* Wis. Stat. §§ 100.20(6), 100.26(6). Instead, the consequence of including a listed provision in a lease agreement is that the entire lease, not just the included provision, is unenforceable. *See* Wis. Admin. Code § ATCP 134.08; *see also* Wis. Stat. § 704.44.[5]

[4] That the title of Section ATCP 134.08 is "Prohibited rental agreement provisions – rental agreement that contains certain provisions void" is of no moment. A statute's (or regulation's) heading cannot alter the plain meaning of the substantive text. *See Aiello v. Vill. of Pleasant Prairie*, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996) ("text must control over title"); *see also State v. Lopez,* 2019 WI 101, ¶ 28, 389 Wis. 2d 156, 936 N.W.2d 125 (lead op.) ("a statute's title may not be used to contradict its text or to create ambiguity where its meaning is plain"); *id.* ¶ 41 (R.G. Bradley, concurring).

[5] There is likewise no prohibition on a landlord's requesting a tenant's voluntary performance under a lease containing any of the listed provisions. *See* Wis. Admin. Code § ATCP 134.08. However, if the landlord attempted to compel

II. THE COMPLAINT DOES NOT STATE A CLAIM FOR VIOLATIONS OF SECTIONS ATCP 134.06, ATCP 134.08, AND ATCP 134.09, BECAUSE THOSE SECTIONS EXCEED DATCP'S STATUTORY AUTHORITY

An agency acts in excess of its authority when it exercises a power not granted by statute. "Administrative agencies are creatures of the legislature" and therefore have only the authority granted by statute. *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47. Courts "narrowly construe imprecise delegations of power to administrative agencies." *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900. An agency rule that exceeds its statutory authority is invalid. *See id.* ¶¶ 43–59; *see also* Wis. Stat. § 227.40(4)(a).

A. Sections ATCP 134.06 and ATCP 134.09 Exceed DATCP's Authority Under the Wisconsin Supreme Court's Saving Construction of Wisconsin Statute Section 100.20

The Wisconsin Supreme Court has adopted a limiting construction of statutes that give the executive rulemaking authority to proscribe unfair or prescribe fair business practices, including Wisconsin Statute Section 100.20(2). Under such statutes, the executive branch may exercise *only* the "power to eliminate unfair methods of unfair competition in business and unfair trade practices in business." *Petition of State ex rel. Attorney General*, 220 Wis. 25, 264 N.W. 633, 639–40 (1936); *see also State v. Lambert*, 68 Wis. 2d 523, 528–29, 229 N.W.2d 622 (1975) (applying *Attorney General* to Section 100.20(2)). By contrast, the agency cannot, and may not, "choose one among [many parallel] fair trade practices and fair methods of competition and require conformity to that practice or method and so denounce all others as unfair." *Attorney General*, 264 N.W. at 640. Such a choice involves an "exercise[ ] [of] pure legislative discretion," which is "the kind of legislative power that may not be delegated." *Id.* Indeed, the Legislature's creation of such "a roving commission to inquire into evils and upon discovery to correct them" would violate the non-

involuntary performance or to otherwise enforce the lease in court, he would be unable to do so. *See Baierl*, 245 Wis. 2d 632, ¶ 2.

delegation principles set forth in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), relied upon in *Attorney General*, 264 N.W. at 640.[6]

In practice, an administrative agency's "complete, comprehensive and detailed regulation of" an industry "in the interest of the general welfare" goes too far. *State v. Neveau*, 237 Wis. 85, 294 N.W. 796, 807 (1940). In particular, the code in *Neveau* did not "declare certain specific practices to be unfair and order persons furnishing barber services to cease and desist therefrom" but instead issued "a general law having all the characteristics of an act of the legislature itself." *Id.* at 808. The code "d[id] everything . . . the legislature itself could do in regulating the industry in the interest of the general welfare. *Id.* at 807. On denial of a motion for reconsideration, the Court explained further, "A reading of the trade practice standards for the barber trade makes it perfectly obvious that what is being done is to regulate by affirmative action the whole barber business." *State v. Neveau*, 237 Wis. 85, 296 N.W. 622, 622 (1941). "In form and substance the so-called standards are a regulation of the business and not a mere elimination of unfair trade practices and unfair methods of competition." *Id.* Thus, the code was "invalid as an unwarranted exercise of the legislative power which cannot be delegated." *Neveau*, 294 N.W. at 808.

Here, like the code in *Neveau*, the provisions of Chapter ATCP 134 provide a "complete, comprehensive and detailed regulation" of an entire industry "in the interest of the general welfare" and are therefore "invalid as an unwarranted exercise of the legislative power which cannot be delegated." *Neveau*, 294 N.W. at 806–08. The regulations "do[ ] everything . . . the legislature could do in regulating the industry in the interest of the general welfare." *Id. at* 807. Indeed, the

[6] Defendants disagree that statutes like Section 100.20 or the one at issue in *Attorney General* can be saved via a limiting construction. The elimination of "unfair" trade practices involves just as much discretion as the prescribing of "fair" trade practices, and thus such statutes are simply unconstitutional. *See infra* Section III. Nevertheless, current law applies a limiting construction to unfair-trade-practices statutes, and so Defendants apply that construction here. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (only the Supreme Court can modify or overrule its prior precedent).

Legislature has enacted some of these very provisions in its statutes regulating landlord and tenant relations. *See* 2011 Wis. Act 143.

In its exercise of the legislative power here, DATCP acted as a "roving commission to inquire into evils and upon discovery correct them"—using an authority that cannot be delegated by the Legislature in an unfair-trade-practices statute. *Attorney General*, 264 N.W. at 640. In 1977, after several unsuccessful attempts to pass a legislative overhaul of landlord-tenant law, the Legislature directed DATCP to "conduct a landlord-tenant study." *See* 1977 Wis. Act 418, § 923(3); *see also* Landlord-Tenant Report of the Department of Agriculture, Trade and Consumer Protection to the Joint Committee on Finance, Wisconsin Legislature (Dec. 1, 1978), at i–ii, 17 ("Landlord-Tenant Report") (attached as Exhibit 1). This "roving commission" then "inquire[d] into the evils" of the residential rental industry. *See generally* Landlord-Tenant Report. And when the Legislature could not act through the constitutional, democratic process, DATCP acted in the Legislature's stead "upon discovery [of the evils, to] correct them," claiming authority to do so as part of its power to declare fair and unfair business practices under Section 100.20(2). *See* Landlord-Tenant Report at 10; Wis. Admin. Reg. 290B (1980); *see also* Landlord-Tenant Report Appendix A, Landlord-Tenant Law, Report of the Department of Justice on Selected Issues Affecting Residential Leases (November 30, 1978), at 65 ("With the grant of authority to regulate unfair trade practices, the Department of Agriculture becomes a 'mini-legislature.'") ("DOJ Landlord-Tenant Report").

Ultimately, DATCP "cho[se] among" innumerable possible "fair trade practices and fair methods of competition and require[d] conformity" to the chosen practices. *Neveau*, 294 N.W. at 805 (quoting *Attorney General*, 264 N.W. at 640). For example, in determining the time periods set forth in the security-deposit regulations, DATCP's roving commission found "uncertainty [ ]

over the length of time which should be allowed" for returning a security deposit. Landlord-Tenant Report at 58. "The City of Madison" set a 14-day period, "[t]enants strongly favored a short time period," but some "landlord representatives suggested that a longer period was necessary" and "endorsed Assembly Bill 697, Substitute Amendment 3, passed by the Assembly on March 7, 1978, which allowed landlords 30 days to return the security deposit." *Id.* DATCP could have chosen the 14-day time period that the City of Madison, in its legislative discretion, had chosen. DATCP could have chosen the 30-day time period that the Assembly, in the exercise of its legislative discretion, had chosen. DATCP could have chosen some other time period. Or DATCP could have chosen not to regulate any of this conduct at all. *See* Wis. Stat. § 100.20(2) (DATCP "may" declare fair or unfair trade practices). In the end, DATCP, in the "exercise[ ] of pure legislative discretion," chose 21 days, *see* Wis. Admin. Reg. 290B (1980); Wis. Admin. Code ATCP 134.06(2), and in so doing "denounce[d] all other[time frames] as unfair." *Attorney General*, 264 N.W. at 640. This was an "exercise of the kind of legislative power that may not be delegated." *Id.*

DATCP similarly exercised pure legislative discretion in promulgating the code sections at issue here, exceeding the "limited in scope" saving construction of Section 100.20(2) adopted in *Lambert*. 68 Wis. 2d at 528–29. As to Section ATCP 134.06(3), DATCP chose among infinite "fair" standard withholdings from security deposits. *See* Wis. Admin. Code § 134.06(3). DATCP could have chosen to allow only withholdings for tenant waste and damages, or only for unpaid rent, or DATCP could have allowed additional withholdings, such as the cost of cleaning the premises after the tenant vacates or removing any leftover belongings. DATCP did not "declare certain specific practices," such as withholding a security deposit without a valid reason, "to be unfair and order [landlords] to cease and desist therefrom" but instead issued "a general law having

all the characteristics of an act of the legislature itself." *Neveau*, 294 N.W. at 808. This was unlawful. *Id.*[7]

As to Section ATCP 134.06(4), DATCP chose to copy the practices of the City of Madison's legislative body, *see* Landlord-Tenant Report 58, proposed legislation passed by the Assembly, DOJ Landlord-Tenant Report at 36, and portions of the Uniform Residential Landlord-Tenant Act (URLTA), *see* Landlord-Tenant Report Appendix B, Uniform Residential Landlord-Tenant Act § 2.101, relating to itemized lists of deductions from security deposits. Adopting this uniform practice in the interest of the industry generally was clearly a legislative act "regulating the industry in the interest of the general welfare." *Neveau*, 294 N.W. at 807.

As to Section ATCP 134.09(2), the Wisconsin statutes already required that a tenant be entitled to "exclusive possession of the premises" and that the landlord may enter only "upon advance notice and at reasonable times" for certain purposes, except in certain emergency situations. Wis. Stat. § 704.05(2) (1977). DATCP then decided to define for the Legislature what "advance notice" means—"at least 12 hours"—choosing again from among countless possibilities. *See* Wis. Admin. Reg. 290B (1980); Wis. Admin. Code ATCP 134.09(2). But the Legislature did not grant DATCP this authority. *See Neveau*, 294 N.W. at 807. Indeed, the statutes *prohibit* DATCP from "chang[ing] any right or duty arising under" Chapter 704. Wis. Stat. § 704.95. By changing the duty imposed by the Legislature from "advance notice" to "at least 12 hours," DATCP violated the prohibition. More, DATCP again set forth the precise form in which a landlord must provide non-standard rental provisions by choosing from an infinite number of

[7] Similarly, in prescribing the precise form in which a landlord must provide non-standard rental provisions, DATCP again chose from an infinite number of possible mechanisms by which a tenant could be informed of security-deposit withholdings. DATCP requires that the nonstandard provisions be in a separate document, *id.*, but DATCP could just have easily allowed the provision to be included in the lease document itself. DATCP prescribes the precise language that the document must use, *id.*, but could have chosen any language. These choices were the "exercise[ ] of pure legislative discretion" and thus unlawful and invalid. *Attorney General*, 264 N.W. at 640.

possible mechanisms by which a tenant could be informed of the landlord's right to enter at other times. This was all an "exercise[ ] [of] pure legislative discretion" and invalid. *Attorney General*, 264 N.W. at 640.

In Section ATCP 134.09(7), DATCP in practical effect created a private legal remedy for forcible or constructive eviction that the Legislature had not seen fit to do itself, although it had already provided for the required eviction process. *See* Wis. Stat. ch. 799. In Section ATCP 134.09(4), DATCP again provided a precise method for landlords to inform tenants of terms relating to the seizure of a tenant's personal property using non-standard rental provisions, and again chose from an infinite number of possible mechanisms by which the parties could agree to such provisions. And in Section ATCP 134.09(8), DATCP chose from an infinite number of possibilities of how to handle the issue of late fees, including by prescribing that landlords use first use prepaid rent to cover the late fee, despite the parties' allocation of that money to rent payment. These were all unlawful exercises of legislative discretion. *See Attorney General*, 264 N.W. at 640.

Neither the Legislature's statement in Section 704.95 that certain conduct "may" constitute unfair methods of competition or trade practices, nor the Legislature's prohibition on DATCP's "chang[ing] any right or duty arising under" Chapter 704, saves these provisions of Chapter ATCP 134. *See* Wis. Stat. § 704.95. Under Section 704.95, DATCP still has unfettered authority to determine whether and what will be an "unfair" method of competition or trade practice. And while DATCP may not "change[ ]" any right or duty arising under Chapter 704, DATCP is free to add (or not) any of untold number of regulations to those prescribed by statute. *See State v. Lasecki*, 2020 WI App 36, ¶¶ 30–31, 392 Wis. 2d 807, 946 N.W.2d 137. There are thus no guidelines and DATCP is still free "to choose one among [myriad] trade practices . . . and require conformity"

therewith, which is precisely what it has done. *Neveau*, 294 N.W. at 805 (quoting *Attorney General*, 264 N.W. at 639).

In all, these regulations were an "exercise[ ] [of] pure legislative discretion" by DATCP. *Neveau*, 294 N.W. at 808 (quoting *Attorney General*, 264 N.W. at 640). These sections of Chapter ATCP 134 are thus an unlawful attempt to "exercise [ ] legislative power which cannot be delegated," and are therefore invalid. *Id.*; *see also* Wis. Stat. § 227.40(4)(a). And because the regulations are invalid, the State's allegations fail to state a claim under these regulations. *See State v. Crute*, 2015 WI App 15, ¶¶ 2, 51, 360 Wis. 2d 429, 860 N.W.2d 284. Defendants are therefore entitled to judgment on the pleadings as to Counts Four through Twelve of the State's Complaint.

B. At the Very Least, Section ATCP 134.08 Exceeds DATCP's Authority Under Section 100.20(2) Because It Does Not "Forbid[ ]" or "Prescribe[ ]" Practices, So Counts One, Two, and Three Fail for This Reason as Well

Section 100.20(2) empowers DATCP only to "forbid[ ] methods of competition in business or trade practices in business which are determined by the department to be unfair" or "prescrib[e] methods of competition in business or trade practices in business which are determined by the department to be fair." Wis. Stat. § 100.20(2). As explained *supra* Section I, Section ATCP 134.08 neither "forbid[s]" nor "prescrib[es]" any conduct. This rule thus exceeds DATCP's authority under Section 100.20(2) and is invalid. *See Palm*, 391 Wis. 2d 497, ¶ 58. Defendants are therefore entitled to judgment on the pleadings as to Counts One through Three for this reason as well.

III. DESPITE WISCONSIN SUPREME COURT PRECEDENT, SECTION 100.20(2) VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS AND THUS CHAPTER ATCP 134 IS INVALID[8]

Alternatively, although the Supreme Court in *Lambert* upheld Section 100.20(2) against a non-delegation challenge, that case was wrongly decided and should be overruled by the Supreme

[8] Defendants recognize that only the Wisconsin Supreme Court has authority to overrule its prior decisions, including *Lambert*. *See Cook*, 208 Wis. 2d at 189. Defendants nevertheless raise these arguments here to preserve them.

Court. *Lambert* relied entirely on *Attorney General*, but the saving construction applied in that case is not only weak; it does not even fit Section 100.20(2), given material differences between the statutes at issue in the two cases. An independent review of Section 100.20(2) shows that it is an unlawful delegation of legislative authority, both under modern non-delegation doctrine and under a more robust, historically based doctrine.

A. Under Current Doctrine, Section 100.20(2) Is an Unlawful Delegation of Legislative Authority

Under modern non-delegation doctrine, the Legislature may allocate its lawmaking authority to a subordinate agency only if "the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure that the board or agency acts within that legislative purpose." *Watchmaking Examining Bd. v. Husar*, 49 Wis. 2d 526, 536–37, 182 N.W.2d 257 (1971). In other words, the Legislature must "la[y] down the fundamentals of the law," leaving the agency simply to "fill up the details." *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928). The "fundamentals of the law" are "the who, what, when, where, why, and how." *Becker v. Dane Cnty.*, 2022 WI 63, ¶ 36, -- Wis. 2d --, 977 N.W. 2d 390 (lead op.). More, "[t]he power to determine whether or not there shall be a law . . . is a power which is vested by our Constitution in the Legislature, and may not be delegated." *Whitman*, 220 N.W. at 941. Thus, in *Gibson Auto v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935), the Court struck down a statute which delegated the authority to determine whether there will be a law. *Id.* at 421–23.

Section 100.20(2) fails to pass muster under modern non-delegation doctrine. It says only that "[m]ethods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited." Wis. Stat. § 100.20(1). It then gives DATCP the power to "issue general orders" both "forbidding methods of competition in business or trade practices in business which are determined by the

department to be unfair" and "prescribing methods of competition in business or trade practices in business which are determined by the department to be fair." Wis. Stat. § 100.20(2). This is woefully insufficient to "'la[y] down the fundamentals of the law'—the who, what, when, where, why, and how." *Becker*, 2022 WI 63, ¶ 36 (lead op.) (citing *Whitman*, 196 Wis. at 505–06). The statute does not say to whom these methods shall be fair, how fairness should be measured, what separates a "fair" practice from an "unfair" practice, how one is to determine whether something is fair or unfair, why the Legislature seeks to promote fairness and eliminate unfairness, where it wishes to do so, or answer any of an infinite number of questions regarding what the Legislature intended. There is thus no ascertainable purpose to direct the agency in its exercise of this delegated lawmaking authority. *See Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 646, 155 N.W.2d 633 (1968) (holding unlawful delegation of legislative authority statute that gave courts authority to determine whether annexation was in the public interest); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (invaliding delegation of legislative authority to President to prohibit transportation of certain petroleum products, without any legislatively provided guidance or criteria). More, the statute grants to DATCP the authority to determine whether there shall be a law at all. *See Matter of Commitment of S.L.L.*, 2019 WI 66, ¶ 36, 387 Wis. 2d 333, 929 N.W.2d 140 ("may" is permissive). While the Legislature has itself designated some practices as unfair, *see* Wis. Stat. § 100.20(1m), (1n), (1r), (1t), (1v), it has left entirely to DATCP to determine whether any additional practices shall be added to the list, which violates the non-delegation doctrine. *See Whitman*, 220 N.W. at 941; *Gibson Auto*, 259 N.W. at 423.

B. Section 100.20(2) Also Fails Under Traditional Non-Delegation Principles

Because Section 100.20 fails to set forth *any* standard for the exercise of delegated lawmaking authority—and thus fails to satisfy even modern doctrine—the statute necessarily fails to satisfy any more rigorous scrutiny of legislative delegation. Historically, legislative power could

not be delegated, and thus agencies were not permitted to have "discretion as to what [the law] shall be." *See City of Milwaukee v. Sewerage Comm'n of City of Milwaukee*, 268 Wis. 342, 352, 67 N.W.2d 624 (1954) (citing *State ex rel. Adams v. Burdge*, 95 Wis. 390, 70 N.W. 347 (1897), and *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832 (1911)).

Under such an understanding, Section 100.20(2) is unconstitutional. The statute clearly gives DATCP discretion to determine what the law shall be. Indeed, the statute gives DATCP discretion to determine whether there shall be any law at all, which is itself unconstitutional. *See Whitman*, 220 N.W. at 941. And, if DATCP decides that it will make a law, it has discretion entirely to determine what that law shall be. The Department's law can regulate any trade, any business, in any way, with only the limitation that the regulation must relate somehow to "fairness," whatever that may mean. This is clearly an unlawful delegation of the legislative authority. *See Schechter Poultry*, 295 U.S. 495 (holding statute allowing President to promulgate "codes of fair competition" an unlawful delegation of legislative power).

C. The Supreme Court's Decision in *Lambert* Upholding Section 100.20(2) Was Wrongly Decided and Should Be Overruled

The Supreme Court's decision in *Lambert*, which upheld Section 100.20(2) against a non-delegation challenge, was wrongly decided. 68 Wis. 2d 523. *Lambert* relied entirely upon *Attorney General*, which, the Court explained, addressed a statute with "identical language" to that of 100.20. *Lambert*, 68 Wis. 2d at 538–29. First, *Attorney General*'s saving construction is wrong on its face. In any event, *Attorney General* did not involve language entirely "identical" to Section 100.20. In that case, the statute stated that "it shall be [the governor's] duty to investigate, ascertain, declare and prescribe reasonable codes or standards of fair competition and trade practices." *Attorney General*, 264 N.W. at 638–39. But Section 100.20(2) does not require DATCP to make any rules, and thus would have violated the non-delegation doctrine in place at the time *Attorney*

General was decided. *See Whitman*, 220 N.W. at 941; *Gibson Auto*, 259 N.W. at 423. More, the statute in *Attorney General* did not *also* vest the executive branch with the authority to prohibit unfair trade practices, as Section 100.20(2) does. This distinction is important, since it renders the Court's saving construction in *Attorney General* nonsensical when applied to Section 100.20(2). In *Attorney General*, the Court explained, "[t]he power to prescribe a code or standard of fair competition is the power to eliminate unfair methods of competition in business and unfair trade practices in business." 264 N.W. at 640. But Section 100.20 already gives DATCP the authority to "forbid[ ] methods of competition in business or trade practices which are . . . unfair." Wis. Stat. § 100.20(2). Thus, reading DATCP's authority to "prescrib[e] methods of competition . . . which are . . . fair" as simply "to eliminate unfair methods of competition" would render language in Section 100.20(2) surplusage. *See Kalal.*, 271 Wis. 2d 633, ¶ 46; *Town of Beloit v. City of Beloit*, 37 Wis. 2d 637, 643, 155 N.W.2d 633 (1968) ("the court cannot give a construction which is unreasonable or overlook language in order to sustain legislation").

Instead, by enacting Section 100.20(2), the Legislature made the Department "a roving commission to inquire into evils and upon discovery correct them." *Attorney General*, 264 N.W. at 640 (citation omitted). Indeed, in promulgating Chapter ATCP 134, that is precisely what the Department did—it inquired into the "evils" of the residential rental industry and, "upon discovery correct[ed] them" through lawmaking in the Legislature's stead. *See supra* Section II. This violates the constitutional separation of powers. *See Schechter Poultry*, 295 U.S. at 541–42; *see also id.* at 551 (Cardozo, J., concurring).

CONCLUSION

This Court should grant Defendants judgment on the pleadings as to Counts One through Twelve of the Complaint.

August 23, 2022

Respectfully Submitted,

Electronically signed by Ryan J. Walsh

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2022, I electronically filed the foregoing with the Wisconsin circuit court eFiling system. I certify that all participants in this case are registered for eNotice and that service will be accomplished by the eFiling system.

I further certify that on the same date, in compliance with the requirements of Wis. Stat. § 227.40(5) and Wis. Stat. § 806.04(11), I caused true and correct copies of the foregoing to be delivered to the below recipients via certified mail and electronically via email, addressed as follows:

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