Exhibit K

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 TO SUPPRESS EVIDENCE AND FOR PROTECTIVE ORDER

TABLE OF CONTENTS

INTRODUCTION

"[F]air play requires the players to play by the rules, especially those players who enforce the rules." *State v. Knapp*, 2005 WI 127, ¶ 81, 285 Wis. 2d 86, 700 N.W.2d 899. But sometimes the government takes "shortcuts." *Id.* In this case, the State took several. Two years ago, the Department of Agriculture, Trade and Consumer Protection (DATCP) ordered Mr. Joe Berrada and Berrada Properties Management (collectively "Berrada") to provide written, sworn answers to questions and to turn over documents. If Berrada did not promptly comply, DATCP warned, he would be guilty of a crime and could serve a year in jail. He was given no notice of this demand before it arrived. It did not come with a warrant. It did not give him a hearing date. It did not afford even an *opportunity* to seek precompliance review. None of these facts strike the State as problematic, however, because in its view DATCP can make such demands of a business anytime that it wants "just to assure" itself that the target is "not in violation" of its regulations. State's Brief at 24, *Berrada Properties Management Inc., et al. v. Romanski, et al.*, No. 20-cv-1872 (E.D. Wis. Feb. 2, 2021), ECF No. 11.

Berrada's "choice" was simple: either obey or face criminal penalties. So, of course, he complied, as any law-abiding Wisconsinite would. But the State's actions violated not only Wisconsin Statute § 93.18 but also the state and federal constitutions' bans on unreasonable searches, since the provision on which DATCP relied for its extraordinary demand unlawfully "penalizes [targets] for declining to turn over their records without affording them any opportunity for precompliance review." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 412 (2015). What is more, DATCP obtained Berrada's statements through coercion, making them inadmissible.

The "evidence" that the State's unconstitutional "Civil Investigative Demands" (CIDs) yielded and all fruit of those poisonous trees, including the discovery that the State now seeks, should be suppressed. That is because where, as here, the exclusionary rule applies, the State must

be forced to proceed as though it had never obtained the tainted evidence in the first place. This Court should therefore issue an order suppressing all evidence obtained via the CIDs, as well as any evidence derived therefrom, and blocking the State from discovering the same. The Constitution demands no less.

STATEMENT OF THE CASE

On May 19, 2020, DATCP served Defendants with two "Civil Investigative Demand[s]" (CIDs), one addressed to BPM and another to Mr. Berrada. Dkts. 56, 57. The letters ordered Defendants to provide "records, reports and answers under oath . . . to serve as evidence in the preliminary investigation of possible violations of Wis. Stat. § 100.20 . . . and Wis. Admin. Code chs. ATCP 134." *Id* (emphasis removed). Purportedly issued "[p]ursuant to Wis. Stat. §§ 93.15 and 100.18(11)(c)1," the CIDs stated that Defendants were "required on or before Friday, June 19, 2020, to provide to [DATCP] the [demanded] records, reports and answers." *Id.* "Failure to produce a record, answer or report as required by these demands," the CIDs added, would be "punishable by a fine of up to $5,000 or imprisonment up to one year or both, pursuant to Wis. Stat. § 93.21." *Id.* The CIDs, in other words, were self-executing—carrying force even without a judge's blessing. Presented with the letters, Defendants' choice was to comply or commit a crime.

Mr. Berrada and BPM received no prior notice of these demands. They were not served with a complaint or invited to a hearing before the CIDs issued. *See* Affidavit of Youssef "Joe" Berrada ("Berrada Aff."), ¶ 4. Nor did the CIDs give notice of any right to administrative or judicial review of the orders. *See* Dkts. 56, 57. The letters did not come with warrants. *See* Berrada Aff. ¶ 5. And the CIDs, according to DATCP, could be altered not by a court but only upon the "agreement [of] Investigator Valerie Schmidt," a DATCP employee. *See* Dkts. 56, 57.

DATCP demanded a plethora of information from both BPM and Mr. Berrada. From BPM, it sought information about "all rental properties" that it owned or managed or that it had agreed

to purchase, as well as information about all of BPM's directors, officers, and employees. Dkt. 56:5. The CID also sought "exemplar" copies of various documents, including all rental agreements drafted by BPM or transferred to BPM. *Id.* at 5–7. It demanded "full detail[s]" about numerous BPM practices and procedures, *id.* at 5–7, and asked for detailed information about potentially thousands of tenants, including 100 specific former tenants, *id.* at 6. Finally, the CID sought information relating to "renovation work done at the Custer Heights and Beaver Creek apartment complexes in March and April 2020." *Id.* at 7. From Mr. Berrada, DATCP sought information about all properties that he (or any legal entity that he owned or controlled) owned, purchased, or had agreed to purchase. Dkt. 57:5–6. The CID also sought information relating to Mr. Berrada's involvement in BPM. *Id.* at 6. Finally, the CID required the return of "exemplar copies of notices provided to tenants since January 1, 2019, regarding a change in ownership." *Id.*

Defendants understood that they had no choice but to respond to the demands. *See* Berrada Aff. ¶ 7. They could not challenge or appeal them but could only request that a particular DATCP employee voluntarily amend them. *See* Dkt. 56:7, 57:7[1]. And even if they tried to challenge the CIDs, it was extremely unlikely that any lawsuit would conclude or even afford relief by the time that they had to comply or commit a crime. So Defendants expended weeks' worth of their scarce administrative staff's time and resources to gather all that the agency had demanded. *See* Berrada Aff. ¶ 9. On June 19, Defendants provided both sworn written responses, Dkts. 58, 59, and thousands of pages of sensitive, confidential documents, *see* Dkt. 40:6, ¶ 35; Berrada Aff. ¶¶ 10–15. The State then demanded more information, and the Defendants, seeing no alternative that would avoid criminal sanctions, complied again. *See* Dkt. 61; Berrada Aff. ¶¶ 17–19.

[1] Defendants made a request, but the State refused narrow the demands. *See* Berrada Aff. ¶ 8.

Relying upon the materials that Defendants were forced to turn over, the State filed this civil enforcement action on November 15, 2022. Dkt. 3. The complaint purports to raise 14 claims: 12 claims of alleged violations of Chapter ATCP 134, one claim of alleged violations of Wisconsin Statute Section 100.18, and one claim of alleged violations of Wisconsin Statute Section 100.195. The same day that it filed, the State issued discovery requests to Defendants, including requests for admissions, interrogatories, and requests for production. Dkt. 136. All of the pending requests are derived from Defendants' responses to demands contained in the CIDs. *Compare* Dkt. 136:12 (requesting identification of "all legal entities created by Berrada for the purpose of buying rental Dwelling Units in Wisconsin" and information about all Dwelling Units such entities purchased), *with* Dkt. 57:5–6 (demanding that Mr. Berrada "[i]dentify each . . . legal entity that you own or control that owns rental properties in Wisconsin" and information about the properties such entities purchased); *compare* Dkt. 136:14 (requesting copies of notices and letters given to tenants regarding repair or renovation work, change in ownership, terminations of tenancy, or property removal from storage areas), *with* Dkt. 56:7 (demanding exemplar copies of notices given to tenants of repair or renovation work, change in ownership, terminations of tenancy, or any other mass notice); *see infra* Section III.B.

Long before the State filed the present action, Defendants sought a judicial determination that the State's investigation of the Defendants, including the CIDs, violated the constitution, including because the State failed to follow statutory procedures. *See* Complaint, *Berrada Properties Management Inc., et al. v. Romanski, et al.*, No. 2020-cv-00357 (Ozaukee Cnty. Cir. Ct. Nov. 11, 2020). As part of their requested relief, Defendants asked the court to quash the CIDs and to "[p]rohibit[ ] [the State] from using documents or information obtained through their unlawful search in any action against BPM or Mr. Berrada." *Id.* at 15; *see also* Dkt. 115:17–18

(Defendants' amended complaint seeking same relief). The State removed the case to federal court and sought dismissal. *See* Dkt. 117:3 (Decision and Order of the Eastern District of Wisconsin). While that motion was pending, the State initiated this enforcement action, which action "rel[ies] heavily on Berrada's and BPM's responses to the DATCP's CIDs." *Id.* After this Court ruled upon Defendants' motion to dismiss, Dkt. 80, Defendants moved to stay proceedings in this case pending resolution of the civil-rights case, Dkt. 85, explaining that "the issues presently before the District Court in the Civil Rights Action will have a direct impact on how the present case proceeds," including impacting "whether the present action can continue at all," Dkt. 86:4, 6. Defendants also noted that allowing discovery in this case while the constitutional issues were pending would "waste[ ] untold resources." *Id.* at 7. The State responded that Defendants could "raise their evidentiary challenges in *this* Court." Dkt. 90:1, 9.

Because of the parallel state-court proceeding, the Eastern District of Wisconsin remanded the civil-rights case to Ozaukee County. *See* Dkt. 117:10. Defendants then promptly moved both this Court and the Ozaukee County Circuit Court for an order consolidating this case and the civil-rights case. Dkt. 113. Defendants explained again that the outcome of the civil-rights case "will inevitably impact what evidence the State can use in its case against Berrada in the Civil Law Enforcement Action." Dkt. 114:8. Through consolidation, Defendants sought to serve judicial economy by avoiding parallel proceedings and the "cost [and] time" that would be expended "if the actions are not consolidated and the parties begin discovery and continue motion practice in parallel proceedings." *Id.* "Through consolidation," Defendants explained, "the Court can set a single schedule, hear evidentiary disputes, and decide factual and legal issues that will become the law of the case." *Id.*

One week later, this Court denied Defendants' motion for stay, *see* Motion Hearing Text, *State v. Berrada Properties Management, Inc. et al.*, No. 2021-cx-0011 (Milwaukee Cnty. Cir. Ct. July 7, 2022), but Defendants' motion for consolidation remained pending, *see* Dkt. 113:2. Before that motion could be heard, however, the State insisted upon receiving discovery from Defendants, refused to stipulate to a protective order, and moved to compel discovery. *See* Dkts. 134, 150. Defendants were thus forced to both move for a protective order and respond to the State's motion to compel, *see* Dkts. 134, 177, before the Court decided whether this case would be consolidated with the civil-rights action and "a single schedule" set for adjudicating the issues raised in the two cases. Dkt. 114:8.

On August 24, this Court denied Defendants' motion to consolidate, *see* Dkt. 191, which eliminated the possibility that the claims pending before the Ozaukee County Circuit Court could be decided with the present case. Defendants therefore agreed to stay the Ozaukee County case, *see* Joint Motion and Stipulation for Stay of Proceedings, *Berrada Properties Management Inc., et al. v. Romanski, et al.*, No. 2020-cv-00357 (Ozaukee Cnty. Cir. Ct. Aug. 25, 2022), and now move this Court for relief similar to what they had sought in Ozaukee County: namely, an order suppressing all evidence forcibly collected by the CIDs, as well as all "fruit of the poisonous tree," and a protective order prohibiting the State from further seeking such evidence in discovery.[2]

STANDARD OF REVIEW

When the government obtains evidence through means that violate the constitution or a statute, courts exclude that evidence from any resulting proceedings, civil or criminal. *See Knapp*, 285 Wis. 2d 86, ¶¶ 22–25; *see also State v. Popenhagen,* 2008 WI 55, ¶¶ 54, 70–71, 309 Wis. 2d

[2] Although proceedings in this case were stayed by operation of statute upon the filing of Defendants' motion for judgment on the pleadings, *see* Wis. Stat. § 802.06(1)(b); Dkt. 180, Defendants bring this motion now in the interest of avoiding delay in this case, and recommend that it be decided only after the motion for judgment on the pleadings is decided.

601, 749 N.W.2d 611; *City of Milwaukee v. Cohen*, 57 Wis. 2d 38, 45–46, 203 N.W.2d 633 (1973). The rule applies not only to the evidence obtained directly through the illegal means but also to any evidence "which is the product of or which owes its discovery to the illegal government activity." *Knapp*, 285 Wis. 2d 86, ¶ 24.

This Court has authority to issue a protective order "for good cause shown, . . .to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Wis. Stat. § 804.01(3). These orders may stat "[t]hat the discovery not be had" and "[t]hat certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." *Id.*

ARGUMENT

I. THE CIDS ISSUED TO DEFENDANTS WERE UNLAWFUL

The May 2020 CIDs issued by DATCP to Defendants were unlawful for several reasons. As to the demands for sworn statements and reports, DATCP failed to follow the statutorily prescribed notice-and-hearing procedure for issuing "special orders," including those that demand sworn statements and reports, and therefore acted outside the scope of its authority. As to the demands for documents, the statute under which DATCP issued these demands, Section 93.15(2), is unconstitutional under both the federal and Wisconsin constitutions, both facially and as applied, for several independent reasons. First, Section 93.15(2) unlawfully allows the government to circumvent the warrant and probable-cause requirements for investigations of penal laws, because such investigations do not fall under the administrative-search exception to the warrant requirement. Second, even if the administrative-search exception applied, Section 93.15(2) is unconstitutional both facially and as applied because it fails to afford the subjects of searches an opportunity for precompliance review by a neutral decisionmaker. Finally, Section 93.15(2), as well as Section 93.21(4), are unconstitutional because they impose a penalty on the exercise of the

right to remain free from unreasonable, warrantless searches and seizures. And because the statute is unconstitutional, DATCP's document demands issued pursuant to that statute were unlawful.

A. DATCP Lacked Authority to Compel Sworn Statements Because the Agency Did not Provide the Notice and Hearing Required by Statute

An agency act that violates statutorily mandated procedures is unlawful. That is because "[a]dministrative agencies are creatures of the legislature" and therefore have only the authority that the statutes give them. *See Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47; Wis. Stat. § 227.57(8). Acts beyond their legislatively conferred powers are therefore *ultra vires*.

Wisconsin law unmistakably provides that, before issuing an investigatory demand for information—a "special order"—DATCP must provide the recipient with notice and a hearing. Section 93.15(1) states that DATCP "may, by general or special order, require persons engaged in business to file with the department . . . sworn or unsworn reports or sworn or unsworn answers in writing to specific questions, as to any matter which the department may investigate." Wis. Stat. § 93.15(1). To issue "general orders" under Section 93.15, DATCP must engage in rulemaking, pursuant to Chapter 227. *See* Wis. Stat. § 93.18(1) ("General orders . . . shall be adopted . . . as prescribed in ch. 227."); *id* § 227.01(13) (defining "rule" as a "general order of general application that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency").

To issue a "special order," DATCP must first issue notice and hold a hearing. "[I]n any matter relating to issuing . . . a special order relating to named persons," DATCP "shall serve upon the person complained against a complaint in the name of the department and a notice of public hearing thereon to be held not sooner than 10 days after such service." Wis. Stat. § 93.18(2). And

"[t]he person complained against shall be entitled to be heard in person, or by agent or attorney and shall be entitled to process to compel the attendance of witnesses." *Id.*[3]

The CIDs here were unquestionably issued under Section 93.15 and therefore are subject to Section 93.18. To begin, the CIDs demanded from Defendants "sworn . . . reports" and "sworn . . . answers in writing to specific questions." *See* Dkts. 56, 57. And the CIDs themselves explicitly state that, "*[p]ursuant to Wis. Stat. §[ ] 93.15* . . . you are hereby required . . . to provide . . . the following records, reports and answers under oath." *Id.* (emphasis added and removed). This is plainly not the language of a "general order" because it is not "of general application"—it is directed only to BPM and Mr. Berrada. *See id.* The CIDs instead purport to be "special order[s]" under Section 93.15. But "special orders" under that provision may issue *only after* notice and a hearing under Section 93.18. Since all agree that the Department neither sent any notice nor held a hearing before making their demands, *see* Berrada Aff. ¶ 5, the CIDs were issued in violation of the statutes and were therefore unlawful. *See* Wis. Stat. § 227.57(8).

The State's counterarguments fail. It has contended that it was not required to follow Section 93.18 because these CIDs were *also* authorized by either Section 100.18(11)(c) or Section 93.14. That is incorrect. Section 100.18(11)(c) allows DATCP to require statements, reports, or the production of documents *only* to "enforce[ ] this section," which prohibits certain "fraudulent representations." *Id.* § 100.18. The CIDs obviously did not seek information "relevant" to enforcement of Section 100.18. Nor did they pretend to: the CIDs themselves state only that they seek "evidence in the preliminary investigation of possible violations of Wis. Stat. § 100.20 Methods of competition and trade practices and Wis. Admin. Code chs. ATCP 134 Residential

[3] Whether "general" or "special," DATCP's orders have the force of law because noncompliance with such orders is punishable by criminal penalties. *See Cholvin v. Wis. Dep't of Health & Family Servs.*, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118; Wis. Stat. § 93.21(4); *see also infra* pp. 17–18.

rental practices." Dkts. 56, 57 (emphasis removed). Unsurprisingly, therefore, none of the demands relates to Section 100.18, which prohibits persons from, "with intent to induce the public in any manner to enter into any contract relating to the . . . lease of any real estate" to make a representation to the public relating to such lease "or the terms and conditions thereof" that contains "any assertion, representation or statement of fact which is untrue, deceptive or misleading." Wis. Stat. § 100.18(1). The statute also prohibits advertisements relating to the lease of real estate that are "part of a plan or scheme the purpose or effect of which is not to . . . lease the real estate . . . as advertised." Wis. Stat. § 100.18(9)(a). The CIDs sought information relating *not* to advertisements or other public representations about leases or their terms and conditions, but to specific properties, the terms of the individual leases themselves, or notifications about other matters. What is more, the CIDs state that *any* failure to comply is punishable by criminal sanctions under Section 93.21, but penalties under that statute are *not* available for failures to comply with requests issued under Section 100.18.

For similar reasons, the CIDs here were not subpoenas under Section 93.14. That statute allows the Department merely to hold *hearings* and to subpoena persons to testify *at those hearings*. Specifically, it says that DATCP may, "in relation to any matter within the department's power, conduct hearings, administer oaths, issue subpoenas and take testimony." Wis. Stat. § 93.14(1). It adds that anyone who "fail[s] *to attend* as a witness or refuse[s] *to testify* may be coerced . . . ," *id.* § 93.14(3), lest he or she "be fined not more than $5,000 or imprisoned for not more than one year." *Id.* § 93.21(4). Nothing in this section permits the Department to require *the filing* of sworn statements or reports or the provision of documents. It merely empowers a court to coerce a person "to attend as a witness" or "to testify"—full stop. Hence the CIDs here—which

compelled the provision of reports, statements, and documents on pain of criminal punishment for noncompliance—were not authorized by Section 93.14.

The State also argues that, even if the CIDs are special orders under 93.15, they are not subject to 93.18's notice and hearing requirements since they do not relate to a "matter" or a person "complained against." That is patently false. First, making an investigative demand of a named person by "special order," Wis. Stat. § 93.15(1), plainly involves "issuing . . . a special order relating to [a] named person[ ]," Wis. Stat. § 93.18(2). Indeed, the very captions of the CIDs state that they are issued "In the Matter of: Youssef 'Joe' Berrada, Berrada Properties Management, Inc. Respondent" and include a "Docket" number, *see* Dkts. 56, 57, which is something "assign[ed] to a case" or "matter." Docket Number, *Black's Law Dictionary* (11th ed. 2019); *id*. Matter (indicating that "matter" is sometimes synonymous with "case."). And the statute does not require that the named person have previously and separately been "complained against." Instead, if DATCP wishes to issue "a special order relating to named persons," DATCP must "serve upon the person complained against a complaint in the name of the department and a notice of public hearing." Wis. Stat. § 93.18(2). The "named person" thus becomes the "person complained against" by virtue of DATCP's serving its complaint. The plain text of the statute does not contemplate the need for a separate complaint to have first been filed under some other provision.[4]

B. The Statute Under Which DATCP Demanded Documents—Section 93.15(2)—is Unconstitutional both Facially and As Applied

Both the federal and state constitutions protect "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const.

[4] Nor can any of DATCP's administrative rules supplant the statutory requirements of Sections 93.15 and 93.18, since "[w]hen a conflict occurs between a statute and a rule, the statute prevails." *Debeck v. Wisconsin Dep't of Nat. Res.*, 172 Wis. 2d 382, 388, 493 N.W.2d 234, 237 (Ct. App. 1992); *see also* Wis. Stat. § 227.10(2) ("No agency may promulgate a rule that conflicts with state law.").

amend. IV; Wis. Const. Art. 1, § 11 (collectively the "Fourth Amendment").[5] This right belongs not only to natural persons but also to corporations, *see G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977), and applies in both civil and criminal contexts. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312–13 (1978). Hence it is well settled that administrative demands for documents, directed at individuals or entities, must satisfy the Fourth Amendment. *See McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1169 (2017) (subpoenas effect a "'constructive search'" and "implicate the privacy interests protected by the Fourth Amendment").

As explained below, Section 93.15(2) violates the Fourth Amendment in multiple respects. First, as applied to searches for evidence of violations of *penal* statutes—such as, here, Section 100.20—Section 93.15(2) unlawfully permits DATCP to circumvent the warrant and probable-cause requirements. Second, even where DATCP's searches do not implicate the typical Fourth Amendment rule but instead fall under the administrative-search exception to the warrant requirement, Section 93.15(2) is nonetheless straightforwardly unconstitutional "because it penalizes [targets] for declining to turn over their records without affording them any opportunity for precompliance review." *Patel*, 576 U.S. at 412. Finally, and for similar reasons, Section 93.15(2) is unconstitutional because it imposes a penalty for asserting one's constitutional right to be free from unreasonable, warrantless searches and seizures.

1. Section 93.15(2) is Unconstitutional as Applied to Investigations for Violations of Penal Laws, Including Section 100.20

Well-settled law establishes that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*,

[5] The Fourth Amendment is applicable to the States through the Fourteenth Amendment. *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967). Courts typically interpret the Wisconsin Constitution consistent with the Fourth Amendment. *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97.

556 U.S. 332, 338 (2009) (citation omitted). One of these exceptions is for administrative searches—that is, searches that "serve a 'special need' other than conducting criminal investigations." *Patel,* 576 U.S. at 420 (2015); *see also Camara v. Mun. Ct. of City & Cnty. of San Francisco,* 387 U.S. 523, 537 (1967) (an administrative search is one "no[t] aimed at the discovery of evidence of a crime").

An investigation of violations of a penal law does not fall under the administrative-search exception to the warrant requirement. *See Patel*, 576 U.S. at 420 (an administrative search is one that "serve[s] a 'special need' other than conducting criminal investigations"); *see also Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 619–20 (1989) (a "special need" is one "beyond the normal need for law enforcement"). While administrative and penal laws may serve the same ultimate purpose, the two "have different subsidiary purposes and prescribe different methods of addressing [a] problem." *New York v. Burger*, 482 U.S. 691, 712 (1987). "An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed." *Id.* at 712–13. A penal law, by contrast, involves "punishment of individuals for specific acts of behavior." *Id.* at 713. For example, the purpose of the laws in *Burger* was to address the "serious social problem [of] automobile theft." *Id.* Penal laws punished the act of stealing automobiles or possessing stolen property, while the administrative laws regulated the business of vehicle dismantlers, requiring them to obtain licenses and to comply with certain recordkeeping requirements, and allowing government inspections to ensure compliance with these requirements. *See id.* at 693–64, 713–14. Similarly, in *Camara*, 387 U.S. 523, the administrative subpoenas at issue were "[u]nlike the search pursuant to a criminal investigation" because the laws at issue—housing codes and building inspections—were "aimed at securing city-

wide compliance with minimum physical standards for private property," not to punish unlawful acts. *See id.* at 535–36.

Section 100.20, as well as DATCP's regulations thereunder, is a penal law. It prohibits unfair business practices and "punish[es] individuals for specific acts of behavior"—namely, engaging in a specific unfair business practice. The statute enumerates prohibited practices and empowers DATCP to delineate additional prohibited practices. Wis. Stat. § 100.20(1m), (1n), (1r), (1t), (1v), (2). The statute does *not* purport to regulate how certain businesses should be operated or to grant DATCP such authority.[6] *Compare* Wis. Stat. ch. 704 (regulating the residential-rental industry), *with* Wis. Stat. § 100.20. Rather, any "acts of behavior" deemed unfair business practices are penalized by both civil *and* criminal penalties. *See* Wis. Stat. § 100.26(3), (6). The statute is therefore a penal, not a mere "administrative," law.[7]

Hence investigations of violations of Section 100.20 (and DATCP's regulations thereunder) do not come within the administrative-search exception to the warrant requirement. The agency must instead meet the warrant and probable-cause requirements. *See Patel*, 576 U.S. at 419–20; *see also Ferguson v. City of Charleston*, 532 U.S. 67, 82–85 (2001) (statutory searches whose "immediate objective . . . was to generate evidence *for law enforcement purposes*," without adherence to the warrant and probable cause requirements, were unconstitutional).

Here, DATCP indisputably issued the CIDs to search for "evidence in the preliminary investigation of possible violations of Wis. Stat. § 100.20 . . . and Wis. Admin. Code chs. ATCP 134." *See* Dkts. 56, 57. But DATCP did not obtain a warrant or make a showing of probable cause

[6] Defendants' brief in support of their motion for partial judgment on the pleadings discusses the limited nature of DATCP's power under Section 100.20(2). *See* Dkt. 181.

[7] For the same reasons, Section 100.18 is a penal law. This statute likewise enumerates particular behaviors and penalizes them. *See* Wis. Stat. § 100.18. Thus, even if the CIDs here were authorized by Section 100.18 (they were not, *supra* Section I), Section 100.18(11)(c) would be unconstitutional as applied to these searches for the same reason.

to execute this search. *See* Berrada Aff. ¶ 5. DATCP instead simply cited Section 93.15(2) and unilaterally demanded that Defendants turn over their documents on pain of criminal punishment. *See* Dkts. 56, 57. This was unconstitutional because the government cannot investigate under a penal law without meeting the probable cause and warrant requirements. To the extent Section 93.15(2) authorizes DATCP to circumvent these requirements for searches related to a suspected violations of Section 100.20 or DATCP's regulations thereunder, it is therefore unconstitutional. So DATCP's demands for documents in the CIDs were unlawful.

2. Even for Administrative Searches, Section 93.15(2) Is Unconstitutional Because It Fails to Provide an Opportunity for Precompliance Review by a Neutral Decisionmaker

Although an administrative search is an exception to the warrant requirement, it still must meet certain minimum standards to pass constitutional muster. Specifically, "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *Patel*, 576 U.S. at 420. This review must occur "before [the subject] faces penalties for failing to comply." *Id.* at 421. Absent this requirement, the Supreme Court has explained, there is an "intolerable risk that searches . . . will exceed statutory limits, or be used as a pretext to harass" citizens. *Id.* Hence "the review scheme at a minimum must give the property owner a meaningful chance to contest an administrative-search request in front of a neutral party before the search occurs." *Benjamin as Tr. of Rebekah C. Benjamin Tr. v. Stemple*, 915 F.3d 1066, 1069 (6th Cir. 2019). A statute that requires compliance with an administrative search and imposes criminal penalties for noncompliance, without first providing an opportunity for precompliance review, is facially unconstitutional. *See Patel*, 576 U.S. at 421–22.[8]

[8] A statute is facially unconstitutional when it "is unconstitutional in all of its applications." *Patel*, 576 U.S. at 418 (citation omitted); *see also Serv. Emps. Int'l Union, Loc. 1 v. Vos,* 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35

The Supreme Court's decision in *City of Los Angeles v. Patel* controls. The law challenged there stated that hotel registries "shall be made available to any officer of the Los Angeles Police Department for inspection" upon request, and any failure to do so was "a misdemeanor punishable by up to six months in jail and a $1,000 fine." 576 U.S. at 413 (citing Los Angeles Municipal Code Section 41.49(3)(a)). While the Court did not "attempt[ ] to prescribe the exact form an opportunity for precompliance review must take," it observed that Section 41.49(3)(a) did not "afford[ ] hotel operators any opportunity whatsoever" for such review. *Id.* at 421. Implicit in the Court's holding was that the availability of Section 1983 or other similar review of governmental conduct (under which the suit arose) was not sufficient "review." *See Landon v. City of Flint*, No. CV 16-11061, 2017 WL 2806817, at *3 (E.D. Mich. Apr. 21, 2017), *report and recommendation adopted*, No. CV 16-11061, 2017 WL 2798414 (E.D. Mich. June 27, 2017). This lack of opportunity for review was a problem, the Court explained, because "business owners cannot reasonably be put to th[e] choice" of complying with an administrative search or "be[ing] arrested." *Patel*, 576 U.S. at 421. Because the statute provided just such a "choice" without also providing an opportunity for precompliance review, it was "facially invalid" under the Fourth Amendment. *Id.* at 421.

Courts applying *Patel* have consistently held that a statute's imposition of criminal penalties upon a refusal to comply with an administrative search renders the law facially unconstitutional. *See Liberty Coins, LLC v. Goodman,* 880 F.3d 274, 281–82 (6th Cir. 2018). In *Liberty Coins*, for example, the Sixth Circuit declared unconstitutional a statute that "authorize[d] warrantless searches of the books, records, articles, and other items pertaining to the business of

("*SEIU*"). In the context of the Fourth Amendment, "the proper focus of the constitutional inquiry" under a facial challenge "is searches that the law actually authorizes, not those for which it is irrelevant." *Patel*, 576 U.S. at 418. In other words, situations in which "an exigency or warrant" or some other exception "justifies an officer's search" are irrelevant to the whether the statute is constitutional. *Id.* at 418–19. Instead, the court focuses on those searches which are justified only by reference to the statute. *See id.*; *see also Free Speech Coal., Inc. v. Att'y Gen. United States*, 825 F.3d 149, 168 (3d Cir. 2016) (citing *Patel*, 576 U.S. at 419).

precious metals dealers" and "provide[d] that dealers who oppose a search could be 'guilty of a misdemeanor of the first degree on a first offense," which "carries up to 180 days in jail." *Id.* Cases like *Liberty Coins* are numerous. *See Free Speech Coal.*, 825 F.3d at 155–56, 168–72 (holding facially unconstitutional statute that required business to make records "available for inspection" "at all reasonable times" and punished failure to do so as a criminal offense); *Halpern 2012, LLC v. City of Ctr. Line*, 404 F. Supp. 3d 1109, 1121 (E.D. Mich. 2019), *aff'd sub nom. Halpern 2012, LLC v. City of Ctr. Line, Michigan*, 806 F. App'x 390 (6th Cir. 2020) (similar).

It follows, under *Patel* and its progeny, that a business owner's apparent "acquiescence" to a search under threat of criminal sanction "could never be deemed 'voluntary consent.'" *Pund v. City of Bedford, Ohio*, 339 F. Supp. 3d 701, 712–13 (N.D. Ohio 2018) (discussing *Patel* and holding facially invalid ordinance that imposed criminal penalties for refusing an inspection, with no opportunity for precompliance review). After all, it has long been settled that a person's mere "acquiescence to a claim of lawful authority" is not consent. *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968); *accord State v. Reed*, 2018 WI 109, ¶ 58, 384 Wis. 2d 469, 920 N.W.2d 56. And "[w]here there is coercion there cannot be consent" to search. *Bumper*, 391 U.S. at 550; *see also New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (where person is told to acquiesce "or face the government's coercive sanctions," "there is no question whether physical or psychological pressures overrode the [person's] will").

Because Section 93.15(2) requires compliance with administrative searches and imposes criminal penalties for noncompliance, without providing any opportunity for precompliance review, it is unconstitutional, both facially and as applied here. The statute gives DATCP "access to . . . any document . . . in the possession or under the control of any person engaged in business," so long as the document is "relevant to any matter which [DATCP] may investigate." Wis. Stat.

§ 93.15(2). And, as in *Patel*, whenever the government chooses to exercise this breathtakingly broad power, the statute compels compliance: "No person shall refuse, neglect or fail to submit, for the purpose of inspection or copying, any document demanded under this section." *Id.* § 93.15(3). The law provides no opportunity for precompliance review, and failure to comply is a crime. "Any person who willfully violates [Section] 93.15(3) . . . shall, for each offense, be fined not more than $5,000 or imprisoned for not more than one year in the county jail or both." *Id.* § 93.21. Putting business owners to the "choice" of compliance or criminal sanctions, the statute is "facially invalid." *Patel*, 576 at 420–21.[9]

At the very least, Section 93.15(2) is unconstitutional as applied here.[10] As explained *supra* pp. 9–11, DATCP demanded the production of documents using only its authority under Section 93.15 and explained both that compliance with the demands was required, and that noncompliance could result in criminal penalties. Such a demand is tantamount to a "search" or "seizure" for purposes of the Fourth Amendment. *See McLane*, 137 S. Ct. at 1169.

Defendants have a reasonable expectation of privacy in the documents demanded by the CIDs. The CIDs sought countless non-public business documents, including rental agreements and other contracts between Defendants and third parties, notices and other documents provided directly to tenants, and internal business records like tenant ledgers and records of building maintenance and repair work. *See* Dkts. 56, 57. The Fourth Amendment covers such business records. *See Patel*, 576 U.S. at 420–21 (applying Fourth Amendment to business records); *see also*

[9] Nor could Section 93.15(2) ever satisfy the closely regulated business exception to the warrant requirement, including because the statute applies to *all* businesses, *see Marshall v. Barlow's Inc.*, 436 U.S. 307, 313–14 (1978), and provides no "certainty" or "regularity of its application," *Lundeen v. Wis. Dep't of Ag., Trade, and Consumer Protection*, 189 Wis. 2d 255, 262, 525 N.W.2d 758 (Ct. App. 1994), but applies at any time and to virtually any document.

[10] "As-applied challenges address a specific application of the statute against the challenging party." *SEIU*, 393 Wis. 2d 38, ¶ 37. Under an as-applied challenge, "the reviewing court considers the facts of the particular case in front of it to determine whether the challenging party has shown that the constitution was actually violated by the way the law was applied in that situation." *Id.*

Airbnb, Inc. v. City of New York, 373 F. Supp. 3d 467, 483 (S.D.N.Y. 2019) ("it is long settled that the Fourth Amendment's protection of 'papers' covers business records"). As explained by the Court of Appeals in *Patel*, Defendants have "a possessory and an ownership interest in [their] records," with a concomitant "right to exclude others from prying into the contents of [those] records," which give Defendants an "expectation of privacy" in those records. *Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013), *aff'd sub nom. City of Los Angeles, Calif. v. Patel*, 576 U.S. 409 (2015). And this expectation is "reasonable," since "businesses do not ordinarily disclose, and are not expected to disclose, the kind of commercially sensitive information contained in [these] records—e.g., customer lists, pricing practices, and occupancy rates." *Id.* at 1062. Here, Defendants do not ordinarily disclose lease terms to persons other than the tenant, do not ordinarily share tenant notices with anyone other than the tenant, do not ordinarily share contracts with anyone other than the parties to the contract, and do not ordinarily share internal business records like tenant ledgers and maintenance records with others. *See* Berrada Aff. ¶¶ 10–15. Indeed, these documents contain commercially sensitive information, including proprietary and financial information. *See id.* ¶¶ 14–15. Like the hotel operators in *Patel*, Defendants have a reasonable expectation of privacy in the demanded records. *See also Wacko's Too, Inc. v. City of Jacksonville*, 522 F. Supp. 3d 1132, 1154 (M.D. Fla. 2021) ("Businesses generally have an expectation of privacy in their business records.").

The "search" effected by the CIDs was unconstitutional because the CIDs failed to provide Defendants the opportunity for precompliance review. The CIDs simply demanded compliance and threatened criminal penalties under Chapter 93 if Defendants failed to respond. *See* Dkts. 56, 57. Thus, application of Section 93.15 here was unconstitutional. *See Patel*, 576 U.S. at 420–21.

The State has argued that the CIDs were constitutional because they were not "self-executing," meaning that DATCP could enforce the CIDs only through a court order—and that only then would Defendants have been subject to penalties for noncompliance. That is incorrect. As the CIDs themselves state, they were issued pursuant to Section 93.15, *see* Dkts. 56, 57; *see also supra* pp. 9–11, but that statute says nothing about a mechanism for enforcement through a court order. By comparison, Section 93.14 explicitly provides that DATCP may enforce its hearing subpoenas *through a court order* "as provided in s. 885.12." Wis. Stat. § 93.14(3). That Section 93.15 does not contain a similar enforcement provision indicates "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, in fact, the text later puts this beyond doubt, stating that "[n]o person shall refuse, neglect or fail to submit, for the purpose of inspection or copying, any document demanded under this section." Wis. Stat. § 93.15(3). Critically, it is that the document is "demanded"—a unilateral act by DATCP—which *alone* makes noncompliance criminal under the statute, making a person who "willfully" refuses subject to criminal penalties. Wis. Stat. § 93.21(4). The text does not contemplate an intervening court order.

That Section 93.21(4) imposes criminal penalties only for "willful[ ]" violations of Section 93.15 is of no moment. In this context, a "willful[ ]" violation of Section 93.15's prohibition on refusing access to documents simply means that the actor knows DATCP has demanded access under its statutory authority but nevertheless refuses such access. *See* Model Penal Code § 2.02 ("A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."). Indeed, there is no way for DATCP to enforce its right to access documents except through the imposition of criminal penalties for refusal, as Section 93.15 provides no mechanism

by which DATCP can seek a court order enforcing its demand for documents. *Compare* Wis. Stat. § 93.15, *with* Wis. Stat. § 93.14(3) (providing that DATCP can enforce its hearing subpoenas through the judicial process under Section 885.12). Because penalties under Section 93.21 are the method by which the government "require[s] compliance" with DATCP's directions, the term "willfully" simply means knowing and intentionally. *State v. Hanson*, 2012 WI 4, ¶ 22, 338 Wis. 2d 243, 808 N.W.2d 390.[11] A business owner's decision to refuse a demand to search under Section 93.15, and to instead assert his Fourth Amendment rights, would thus be "willful." And if there were any doubt about this, the owner gets no chance for review of his decision to refuse access until after criminal charges are brought against him and the criminal process begins. But this is not sufficient precompliance review. *See Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1243 (11th Cir. 2003). Thus, his choice to stand upon those rights subjects him to potential criminal penalties. Because a business owner cannot lawfully be put to such a choice, the statute is unconstitutional. *See Patel*, 576 U.S. at 420–21.

There is no possible argument that, either facially or as applied, recipients of demands under Section 93.15(2) have an opportunity for precompliance review. That the subjects of searches under Section 93.15(2) could possibly seek emergency relief from a court if DATCP provides them enough lead time does not save the statute. First, this opportunity for review is not provided by the administrative-search statute—it derives from entirely separate statutes and the whims of government officials to provide sufficient notice. But *Patel* requires that *the statutory*

[11] More, the statutes recognize that Section 93.15 compels compliance. Section 93.17 prohibits natural persons from invoking their privilege against compelled self-incrimination in response to a demand under Section 93.15, but simultaneously provides immunity to natural persons "for or on account of" providing statements or producing documents "in response to a demand made under [Section] 93.15." This immunity is a recognition by the Legislature that the statute compels compliance (through the threat of criminal penalties), since such immunity is required for Section 93.17 to avoid running afoul of the Fifth Amendment privilege against compelled self-incrimination. *See Lefkowitz v. Turley*, 414 U.S. 70, 81 (1973); *see also infra* Section III.C. Such compulsion could be achieved only if the potential for criminal sanctions for "willful[ ]" refusal was a real threat.

scheme authorizing the search provide the opportunity for review. *See* 576 U.S. at 420–21. The Court explained that the ordinance at issue was problematic because *it* failed to afford precompliance review. *See id.* at 421. The Court did not mention or consider other potential avenues for review, such as a claim under Section 1983, the provision under which the challenge to the ordinance was brought. *See generally id.* at 420–21; *see also Patel v. City of Los Angeles*, 738 F.3d at 1061(explaining that case was brought under 42 U.S.C. § 1983).

Second, Section 93.15 does not provide a timetable for compliance and thus does not provide a party time to seek review through any mechanism. The statute simply says that DATCP "may have access to" documents and that "[n]o person shall refuse, neglect or fail to submit . . . any document demanded." Wis. Stat. § 93.15(2), (3). Whether a person has time to seek review thus depends entirely upon the whims of the government official making the demand. If the official chooses to give the recipient advance notice, the recipient might have time to go to court. But there is no requirement that the official do so. An opportunity for precompliance review cannot be predicated entirely upon the whims of the government officials conducting the search. Indeed, *Patel* implicitly rejects any such notion, since the police in that case could have chosen to give hotels advance notice of their searches. Such hypothetical grace on the part of government officials did not save the statute. *See Patel*, 576 U.S. at 420–21. And, critically, in Wisconsin, review of an agency action does *not* stay the enforcement of the underlying agency action. *See* Wis. Stat. §§ 227.52, 227.54, 806.04.[12] So, even if there were time for such review to be initiated, it would

[12] Nor is review available under Section 227.52, which provides for review only of "final" agency decisions that "determine[ ] 'the substantial rights of the parties involved' and conclude[ ] the agency proceeding," *Friends of the Black River Forest v. Wisconsin Dep't of Nat. Res.*, 2021 WI App 54, ¶ 9, -- Wis. 2d --, 964 N.W.2d 342 (citation omitted), and are "made after a statutorily prescribed hearing and fact finding," *State ex rel. Thomas v. State*, 55 Wis. 2d 343, 348, 198 N.W.2d 675 (1972). Similarly, a person may obtain a hearing under Section 227.42 only if there is a "dispute of material fact," Wis. Stat. § 227.42(1)(d), but whether an agency complied with a statute or with the Fourth Amendment is a question of law, not of fact. *See Haase-Hardie v. Wisconsin Dep't of Nat. Res.*, 2014 WI App 103, ¶ 15, 357 Wis. 2d 442, 855 N.W.2d 443; *see also State v. Eskridge*, 2002 WI App 158, ¶ 9, 256 Wis. 2d 314, 647 N.W.2d 434 ("whether a search is reasonable under the Fourth Amendment is a question of law").

very unlikely occur "*before* [the subject] faces penalties for failing to comply." *Patel*, 576 U.S. at 421 (emphasis added).[13]

Finally, and in any event, a subject's ability to run to court in an attempt to get an emergency stay of a search demand is not an "opportunity for precompliance review" as contemplated by *Patel*. Indeed, an argument that "filing a [ ] lawsuit to challenge the constitutionality of an administrative search" is "the type of precompliance review contemplated by [the *Patel*] Court" is "absurd on its face." *Landon*, 2017 WL 2806817, at *3; *see also supra* p. 16. That is because, if the argument were correct, *Patel* would have no operation—a target could almost always seek a Hail-Mary Emergency TRO in the name of the Constitution.

Nor does the pre-issuance administrative review required by Section 93.18—which DATCP did not provide here anyway—save the statute. In the first place, this review does not even apply to Section 93.15(2), the statute that DATCP relied on here and that empowers DATCP to search virtually "any document" in the possession or control of "any person engaged in business." That is because Section 93.15(2) does not require DATCP to act by "special order," and therefore does not trigger the hearing requirements of Section 93.18, which apply only to "issuing, revoking or amending a special order." Wis. Stat. § 93.18(2).[14] And the provisions of Section 93.18 provide "how a [special order] may issue, not a procedure for precomplaince review." *ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d 700, 727 (E.D. Tex. 2020). More to it, the review required under *Patel* is "precompliance review before a *neutral* decisionmaker," 576 U.S. at 420,

[13] For the same reasons, the process afforded to all criminal defendants is plainly not the kind of review required by *Patel*, since it is not "*pre*"-compliance at all. In any event, such review would be limited to the issues of whether there was a demand under Section 93.15 and whether the defendant willfully failed to comply—it would *not* go to the validity of the underlying demand. *See Whitman*, 336 F.3d at 1243.

[14] Nor can the statute be given a saving construction that does not conflict with the plain text and require the court impermissibly to "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; *see also 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").

and the agency issuing the demand and conducting the search is not neutral. *Cf. See v. City of Seattle*, 387 U.S. 541, 544–45 (1967). Since the review provided under Section 93.18 is undertaken by agency itself, it is not neutral and thus not sufficient to satisfy *Patel*, even if it applied.[15]

Finally, the State has argued that Defendants cannot challenge the CIDs because Defendants "voluntarily" responded to them. As the State appears to acknowledge, consent must be voluntary to justify a search. *Reed*, 2018 WI 109, ¶ 8. But consent to search under threat of criminal punishment is not voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *see also Pund*, 339 F. Supp. 3d at 712–13 (collecting cases). And, of course, a person who claims to have been coerced into submitting to a search is certainly free to later challenge the constitutionality of that search. *See, e.g.*, *State v. Brar*, 2017 WI 73, ¶ 40, 376 Wis. 2d 685, 898 N.W.2d 499; *United States v. Duran*, 957 F.2d 499, 502 (7th Cir. 1992). Here, Defendants' responses to the CIDs were hardly voluntary: Defendants were coerced by the direct threat of criminal punishment to respond to the CIDs. *See Bumper*, 391 U.S. at 550; *Portash*, 440 U.S. at 459; *see also* Dkts. 56, 57; Berrada Aff. ¶ 7. As such, the State's search cannot be justified by consent, nor are Defendants precluded from challenging the search.

3. For Similar Reasons, Sections 93.15(2) and 93.21(4) Are Unconstitutional both Facially and As Applied Because They Impose a Penalty upon Those Who Exercise their Constitutional Right to Refuse a Warrantless, Unreasonable Search

Sections 93.15(2) and 93.21(4) are facially unconstitutional because they impose criminal penalties upon a person for exercising their constitutional rights. The State cannot punish persons

[15] For the same reasons, review under Chapter ATCP 1, whether formal or informal, is not sufficient. Not only is this review non-neutral, but it is neither provided by the statute nor does it stay enforcement of criminal penalties, *see* Wis. Admin. Code ATCP §§ 1.03(3)(f) (formal and informal review); 1.06(1) (formal review), which independently renders it inadequate. More, as to formal review, it is entirely with the DATCP Secretary's discretion whether to afford any review at all, further rendering Chapter ATCP 1 inadequate to constitute precompliance review under *Patel*. *See* Wis. Admin. Code § ATCP 1.06(3). And the Secretary may grant such a hearing only when the requirements of Section 227.42 or some other law are met, *see id.*, and Section 227.42 is not triggered for a pure question of law, including whether an agency has complied with a statute or with the Fourth Amendment, *see supra* n.11.

for exercising their constitutional rights, including the right to be free from unreasonable searches and seizures. *State v. Forrett*, 2022 WI 37, ¶ 6, 401 Wis. 2d 678, 974 N.W.2d 422. Thus, a law that punishes by criminal sanction a person's exercise of their "right to refuse a warrantless, unreasonable search" is facially unconstitutional. *Id.* ¶¶ 6, 14. A warrantless search is "'per se unreasonable,' unless some exception to the Fourth Amendment's warrant requirement applies." *Id.* ¶ 6. And no exception to the warrant requirement applies here, because searches under Section 93.15(2) do not satisfy the requirements to constitute a constitutionally permissible administrative search. *See supra* pp. 12–24. Thus, Sections 93.15(2) and 93.21(4) are facially unconstitutional.[16]

II. THE STATE'S USE AGAINST DEFENDANTS OF THEIR COMPELLED STATEMENTS WOULD VIOLATE THE STATE AND FEDERAL CONSTITUTIONS

The federal and Wisconsin constitutions prohibit the State from using against a defendant his statements obtained through government coercion or compulsion. *See Jackson v. Denno*, 378 U.S. 368, 385–86 (1964); *State v. Ward*, 2009 WI 60, ¶ 18 n.3, 318 Wis. 2d 301, 767 N.W.2d 236; *see also Bustos-Torres v. I.N.S.*, 898 F.2d 1053, 1057 (5th Cir. 1990) (rule can apply in a civil case).[17] "It is the State's burden to prove the voluntariness of a [statement] by a preponderance of the evidence." *In re Jerrell C.J.*, 2005 WI 105, ¶ 17, 283 Wis. 2d 145, 699 N.W.2d 110 (citation omitted). A statement is voluntary if it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *Ward*, 318 Wis. 2d 301, ¶ 18 (citation omitted). Where "the witness is told to talk or face the government's coercive sanctions," such as a conviction for contempt, this "is the essence of coerced testimony." *Portash*, 440 U.S. at 459. "In such cases there is *no question*

[16] For the same reasons, the statutes are unconstitutional as applied to the searches here.
[17] This prohibition stems from two independent sources, both state and federal: the privilege against compelled self-incrimination and due process. *See Ward*, 318 Wis. 2d 301, ¶ 18. Either is sufficient to invoke the bar. *See id.*

whether physical or psychological pressures overrode the defendant's will." *Id.* (emphasis added); *see also Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir. 1960) (citation omitted) ("A statement obtained . . . through official threats of prosecution is not voluntarily given.").

Here, Defendants' responses to the CIDs were involuntary. DATCP coerced the Defendants' CID responses through threat of criminal prosecution. *See* Dkt. 56, 57; *see also supra* pp. 3, 24. Indeed, the statutes go so far as to prevent Defendants from invoking the privilege against compelled self-incrimination and refusing to answer. *See* Wis. Stat. § 93.17(1). Defendants reasonably felt that they had no choice but to respond. *See* Berrada Aff. ¶ 7. This "is the essence of coerced testimony." *Portash*, 440 U.S. at 459. As such, it cannot be used against Defendants here. *See Denno*, 378 U.S. at 385–86.

III. THIS COURT SHOULD SUPPRESS ALL EVIDENCE OBTAINED DIRECTLY THROUGH THE CIDS, AND ALL EVIDENCE DERIVED THEREFROM, AND SHOULD ISSUE A PROTECTIVE ORDER BLOCKING THE STATE FROM SEEKING DISCOVERY OF THE SAME

Given that the State violated Defendants' constitutional right to be free from unreasonable searches and seizures, violated Section 93.18's requirements, and obtained Defendants' statements through coercion, rendering them involuntary, the exclusionary rule applies to all evidence obtained via the CIDs, as well as all evidence derived therefrom. This Court should therefore issue a protective order prohibiting the State from seeking through discovery the same evidence it obtained via the CIDs and any evidence derived therefrom. That is because, where the exclusionary rule applies, the State must act as though it had never obtained the unlawfully acquired evidence in the first place. Requiring Defendants to produce discovery derived from this evidence would thus be an undue burden. Indeed, courts will quash subpoenas that are derived from constitutional violations. This some logic applies to discovery. At the very least, under Section 93.17, Mr.

Berrada's statements and evidence provided in response to the CIDs should be suppressed, and Defendants protected from discovery seeking to reobtain, or that are derived from, these responses.

A. The Court Should Suppress All Evidence Obtained in Violation of the Constitution or State Statutes, and All Evidence Derived Therefrom

When the government obtains evidence in violation of the constitution, courts exclude the evidence unlawfully obtained and all evidence derived therefrom. *See Knapp*, 2005 WI 127, ¶¶ 22–25. This "exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *State v. Scott*, 2019 WI App 22, ¶ 18, 387 Wis. 2d 595, 928 N.W.2d 629 (citation omitted).[18] The rule applies not only in criminal proceedings but in civil forfeiture proceedings as well, where the purpose of the suit "is to penalize for the commission of an offense against the law." *Id.* ¶¶ 23–24, 27 (citation omitted); *see also Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986) ("[T]he exclusionary rule should be applied for purposes of assessing penalties against an employer . . . for OSHA violations."). Exclusion in such civil cases is warranted because it serves the purpose of the exclusionary rule: deterring unlawful government conduct. *See Tirado v. C.I.R.*, 689 F.2d 307, 311–12 & n.5 (2d Cir. 1982) (exclusionary rule applies "in [a] variety of civil proceedings") (collecting cases). And "[i]t would be anomalous indeed . . . to hold that in [a] criminal proceeding the illegally seized evidence is excludable, while in [a civil] proceeding, requiring the determination that the [same] law has been violated, the same evidence would be admissible." *Scott*, 387 Wis. 2d 595, ¶ 24 (citation omitted); Wis. Stat. § 100.26(3), (6) (providing both civil and criminal penalties). The exclusionary rule thus applies in this case, since application serves the rule's purpose, where government agents conducted the searches at issue for the express

[18] The exclusionary rule also applies to violations the Wisconsin Constitution. *See State v. Scull*, 2015 WI 22, ¶ 21, 361 Wis. 2d 288, 862 N.W.2d 562.

purpose of obtaining evidence to use against Defendants in this proceeding, *see Scott*, 387 Wis. 2d 595, ¶ 24.; *see also* Dkts. 56, 57 (explaining the purpose of the CIDs), which proceeding seeks to punish Defendants for purported violations of law, *see Scott*, 387 Wis. 2d 595, ¶¶ 23–24, 27; *see* Dkt. 3.[19]

Similarly, courts will suppress evidence obtained in violation of statutes, as well as any evidence derived from the unlawfully obtained evidence. *See Popenhagen*, 2008 WI 55, ¶ 68. For example, in *Popenhagen*, the district attorney's office issued three civil subpoenas for bank records pursuant to Wis. Stat. § 805.07. *Id.* ¶¶ 7–8. But the office "should have followed . . . Wis. Stat. § 968.135," governing subpoenas in criminal investigations. *Id.* ¶ 10. Because the office failed to follow proper procedures, the recipient had no opportunity to move to quash the subpoena as provided by Section 968.135. *See id.* ¶ 82. Instead, the recipient sought to suppress the evidence obtained via the subpoena, but Section 968.135 did not list suppression as a remedy for its violation. *See id.* ¶ 34. The Supreme Court nevertheless held that the statute encompassed a remedy of suppression for evidence obtained in violation of its provisions, because failure to suppress such evidence would "render[ ] meaningless" the procedural "safeguards established by" the statute. *Id.* ¶ 71. The Court explained that the Legislature was not required to expressly provide for suppression, and that instead such legislative intent could be found from the context and objectives of the statute. *Id.* ¶¶ 68–71; *see also State v. Renard*, 123 Wis. 2d 458, 461–62, 367 N.W.2d 237 (Ct. App. 1985) (holding that suppression of blood-draw evidence was "an appropriate sanction for failure to comply with [Wis. Stat.] sec. 343.305(5)").

Evidence is derived from a constitutional (or statutory) violation when it "is the product of or [when it] owes its discovery to illegal government activity." *Knapp*, 285 Wis. 2d 86, ¶ 24. In

[19] Indeed, the State itself has characterized this case as a "law enforcement action" and "prosecution." *See* Dkt. 170:4, 6–7; *see also* Dkt. 3 (titled "Civil Law Enforcement Complaint").

other words, "[t]he exclusionary rule can apply to both evidence discovered during an unlawful search or seizure and evidence discovered only because of what the police learned from the unlawful activity, also referred to as 'fruit of the poisonous tree.'" *State v. Van Linn*, 2022 WI 16, ¶ 11, 401 Wis. 2d 1, 971 N.W.2d 478 (citation omitted). While it is the defendant's burden to show some link between the illegal search and the subsequent evidence or discovery, *see Jones v. Brown*, 756 F.3d 1000, 1011 (7th Cir. 2014), "[a] defendant seeking to have evidence suppressed as the fruit of an illegal search need only establish a 'factual nexus between the illegality and the challenged evidence'" to prevail. *Gardner v. United States*, 680 F.3d 1006, 1011 (7th Cir. 2012).

Here, exclusion is clearly warranted. First, the State violated the Defendants' Fourth Amendment rights, *supra* Section I, and thus the exclusionary rule applies. *Scull*, 2015 WI 22, ¶ 20. More, the CIDs compelled involuntary statements from Defendants, *supra* Section II, and so those statements, as well as the evidence derived therefrom, must be suppressed. *See Knapp*, 285 Wis. 2d 86, ¶¶ 25–26. Finally, exclusion is warranted for the State's violation of Section 93.18's procedural requirements. Like the district attorney's office in *Popenhagen*, DATCP failed to follow the proper procedure for issuing its demand. *See supra* Section I. Determining whether the procedural statute violated provides for a remedy of suppression requires looking to the statute's purpose and to closely related statutes. *See Popenhagen*, 309 Wis. 2d 601, ¶¶ 35, 53–54. Although Section 93.18 contains no provisions for review of DATCP's decision to issue a special order, Section 227.52 provides for review of an agency's decision after a contested-case hearing. *See* Wis. Stat. § 227.52. Upon such review, the court can "reverse" or "set aside" the agency's decision, and the court can "provide whatever relief is appropriate." Wis. Stat. § 225.57. Thus, had DATCP held a hearing and issued a special order under Section 93.18, Defendants likely could have sought relief such as a "revers[al]" of the order and "whatever [other] relief [was] appropriate." This other

relief could include suppression. *See Popenhagen*, 309 Wis. 2d 601, ¶¶ 53–54. And allowing such relief is clearly "germane to the[ ] objectives" of Section 93.18, which provides procedural "safeguards" to those subject to DATCP's orders. *Id.* ¶¶ 54, 71.

Thus, the exclusionary rule applies to all evidence the State obtained through the CIDs and all evidence derived therefrom. Thus, this Court should suppress all of the Defendants' CID responses. More, this Court should suppress all evidence derived from those responses—*i.e.*, any evidence that the State obtained by using information contained in Defendants' CID responses.

The State cannot prove that an exception to the exclusionary rule applies for any of this evidence. *See State v. Jackson,* 2016 WI 56, ¶ 72, 369 Wis. 2d 673, 882 N.W.2d 422; *State v. Hess*, 2010 WI 82, ¶ 51, 327 Wis. 2d 524, 785 N.W.2d 568 (state's burden to prove an exception). First, the State cannot rely on the "good faith" exception to the exclusionary rule because the relevant constitutional rules were clearly established at the time DATCP issued the CIDs here. A government actor cannot "be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable [actor] should have known that the statute was unconstitutional." *Illinois v. Krull*, 480 U.S. 340, 355 (1987). And "the same standard of objective reasonableness . . . applie[s] in the context of a suppression hearing [and] qualified immunity," *Groh v. Ramirez*, 540 U.S. 551, 564 n.8 (2004) (citation omitted), meaning that if "clearly established" law demonstrates that a statute is unconstitutional, the government cannot rely in good faith on that statute, *see Krull*, 480 U.S. at 355. Here, clearly established law declared that a statute cannot permit an administrative search without providing the subject an opportunity for precompliance review. *See Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019). Thus, the State could not rely in good faith on Section 93.15(2). *See Krull*, 480 U.S. at 355. Nor would DATCP have "inevitably" obtained these statements, documents, or information without Section 93.15. *See*

Jackson, 369 Wis. 2d 673, ¶ 47. As explained *supra* Section I, the CIDs' demands here were not authorized by other statutes and thus DATCP could not have used those statutes to recreate them.

Finally, the State cannot show that it had or has an independent source for the evidence, including the discovery sought here. If the State's decision to issue discovery, such as a subpoena, is "prompted by what it learned from" an "unlawful" search, then the discovery must be suppressed or quashed. *See Van Linn*, 401 Wis. 2d 1, ¶ 12. More, the unlawfully obtained evidence cannot "affect[ ]" the court's decision to compel the discovery. *See id.* The State "bear[s] the burden of 'convincing [the] trial court that no information gained from the illegal [search] affected either law enforcement officers' decision to seek [discovery] or the [court's] decision to grant it." *State v. Carroll*, 2010 WI 8, ¶ 45, 322 Wis. 2d 299, 778 N.W.2d 1 (citation omitted). Here, the State's decision both to initiate this case and to issue discovery requests were prompted by the evidence it obtained unlawfully through the CIDs. *See infra* pp. 33–40. And the State's claims in its complaint against Defendants here derive from the unlawful CIDs, and thus this Court's determination that discovery is appropriate will necessarily be affected by the unlawfully obtained evidence. *See infra* pp. 40–42; *see also* Wis. Stat. § 804.01(2). Thus, the State cannot show that an exception to the exclusionary rule applies, and the evidence must be excluded.

B. This Court Should Issue a Protective Order Prohibiting the State From Seeking Discovery That Repeats the CIDs' Demands or That Is Derived From the Defendants' CID Responses, Since That Discovery Could Not Be Used by the State Under the Exclusionary Rule

This Court can issue a protective order to protect a party from oppression, or from an undue burden or expense. *See* Wis. Stat. § 804.01(3). Such an order is particularly appropriate where the government seeks through discovery evidence that it has obtained in violation of a party's constitutional or statutory rights or evidence derived from that violation. First, the government is not permitted, under the exclusionary rule, either to use the tainted evidence in the case against the

party or to use the tainted evidence to discover additional evidence or information. It would be nonsensical to require a party to turn over documents or provide answers that the State must treat as though it never obtained. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *see also State v. Kerr*, 2018 WI 87, ¶ 81, 383 Wis. 2d 306, 913 N.W.2d 787 (R.G. Bradley, J., dissenting) (explaining that the exclusionary rule "partially restores the *status quo ante*"). Indeed, in *Silverthorne*, the Supreme Court held that the government could not, through the subpoena process, reobtain the evidence that it had earlier obtained unlawfully or obtain new evidence derived from that unlawfully obtained evidence. 251 U.S. at 391–92. More, a court may issue a protective order to prohibit discovery when such discovery would violate a constitutional right, such as the right to privacy. *See Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D. Cal. 1995). In the same vein, when a discovery request repeats or derives from an earlier violation of a party's constitutional or statutory right, requiring the party to respond to such a discovery request would expand the scope of the harm done by the violation. A party should thus be protected from discovery—whether that discovery takes the form of a subpoena or a civil discovery request—when that discovery seeks to reobtain evidence that the government previously obtained unlawfully, or when that discovery request is derived from the unlawfully obtained evidence. *See Silverthorne*, 251 U.S. at 391–92.

Here, the State's discovery requests—and, indeed, its entire case—either seek to reobtain evidence unlawfully obtained or seek to obtain information that follows up on and thus derives from the unlawfully obtained CID responses. There is thus a "factual nexus" between the discovery requests and the unlawful government activity. *Gardner*, 680 F.3d at 1011 (citation omitted). The nexus between the State's discovery requests and the CIDs are clear:

Interrogatory 2 asks: "Identify all damages Defendants experience when a tenant pays their rent in full on the 11th calendar day of a month." Dkt. 152:11. The CIDs demanded exemplar copies of all rental agreements drafted by, transferred to, or used by Defendants as well as individual copies of rental agreements for 100 named tenants. Dkt. 56:5–6; 57:5. Defendants provided such agreements. *See* Dkt. 58:2–3; 59:2. The State then used these Agreements to support its claims against Defendants, including its claims that Defendants charge a "late fee if rent is not paid by the tenth day of the month." Dkt. 3:11–12. The State's interrogatory about these late fees thus clearly derives from the documents Defendants provided in response to the unlawful CIDs.

Interrogatory 3 asks: "Since January 1, 2015, identify all legal entities created by Berrada for the purpose of buying rental Dwelling Units in Wisconsin." Dkt. 152:11. The CID sent to Mr. Berrada demanded: "Identify each Limited Liability Company, corporation, S-Corporation, partnership, limited liability partnership, or any other legal entity that you own or control that owns rental properties in Wisconsin." Dkt. 57:5. Mr. Berrada provided such a list. *See* Dkt. 59:1–2. The State's interrogatory seeks the same information that the State coerced Mr. Berrada into involuntarily providing, and seeks to derive further information from that response by asking what entities were created "for the purpose of buying rental Dwelling Units in Wisconsin." Dkt. 152:11.

Interrogatory 4 asks: "Since January 1, 2015, identify all rental Dwelling Units a Berrada solely owned legal entity purchased in Wisconsin." Dkt. 152:11. The CID sent to Mr. Berrada demanded: "Identify all rental properties in Wisconsin that a legal entity you have control over purchased since 2015." Dkt. 57:6. Mr. Berrada provided such a list. *See* Dkt. 59:2. This interrogatory thus seeks information the State coerced Mr. Berrada into involuntarily providing.

Interrogatory 5 asks: "For all properties identified in response to Interrogatory number 4, identify all properties in which Defendants began a renovation project within 6 months of the date

of sale." Dkt. 152:11. This follows up on information obtained involuntarily from Mr. Berrada since, as explained above, Interrogatory 4 mirrors the CID. More the CID sent to BPM demanded information related to renovation work done at two particular properties. Dkt. 56:7. BPM provided this information. *See* Dkt. 58:7; Berrada Aff. ¶¶ 17–18. The State now seeks to expand upon this information through Interrogatory 5.

Interrogatory 6 asks: "For all properties identified in response to Interrogatory number 4, identify all properties you received copies of existing rental agreements or rent rolls for and, if you did not receive rental agreements or rent rolls, the reason why you did not receive them." Dkt. 152:12. Again, this interrogatory follows up on information obtained involuntarily from Mr. Berrada since, as explained above, Interrogatory 4 mirrors the CID. More the CID sent to BPM demanded "exemplar cop[ies] of all rental agreements that were transferred to you or to the owner of a rental property you managed since January 1, 2015." Dkt. 56:5. BPM provided documents in response. Dkt. 58:2. Interrogatory 6 seeks to expand upon this information by obtaining a list of all properties with transferred agreements and reasons why agreements were not transferred.

Interrogatory 7 asks: "For all properties identified in response to Interrogatory number 5, identify all properties that had storage units removed or modified as part of the renovation project." Dkt. 152:12. As explained above, Interrogatory 5 follows up on information involuntarily obtained through the CIDs. Thus, Interrogatory 7, which asks for more information relating to Interrogatory 5, also follows up on information involuntarily obtained through the CIDs.

Request for Production 1 demands: "All rental agreements, including attachments and addendums, Defendants entered with tenants since January 1, 2015." Dkt. 152:12. But the State, through the CIDs, already sought and obtained both exemplar copies of all Defendants' rental agreements and individual copies of the agreements with 100 named tenants. *See* Dkt. 56:5–6;

57:2; 58:2–3; 59:2. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 2 demands: "Since January 1, 2015, all Security Deposit Return Letters Defendants sent tenants." Dkt. 152:12. But the State, through the CIDs, already sought and obtained copies of such letters sent to 100 named tenants and "all tenants who vacated a dwelling unit in a rental property owned or managed by [BPM] during any part of the 2019 or 2020 calendar years." *See* Dkt. 56:6; 58:3–4; Berrada Aff. ¶ 17. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 3 demands: "Since January 1, 2015, tenant Ledgers for all tenants who resided in dwelling unit operated by BPM and/or a business entity wholly owned and controlled by Berrada. (*See* Civil Law Enforcement Complaint Exhibit 2 for an example of the type of Ledger this request is seeking.)" Dkt. 152:12. But the state, through the CIDs, already sought and obtained these ledgers for 100 named tenants. *See* Dkt. 56:6; 58:3. Indeed, the Complaint's "Exhibit 2" to which the State refers in this discovery request is a copy of a tenant ledger provided by BPM in response to the CID. *See* Dkt. 14; Berrada Aff. ¶ 21. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs. More, BPM involuntarily responded to questions regarding these tenant ledgers. *See* Dkt. 56:6; 58:3–4. As with the documents unlawfully obtained, the State's request here is thus clearly following up on the Defendants' involuntary response to the CIDs.

Request for Production 4 demands: "All Transferred Rental Agreements for Acquired Dwelling Units purchased on or after January 1, 2015." Dkt. 152:12. But the State already sought and obtained, through the unlawful CIDs, exemplar copies of all such agreements. *See* Dkt. 56:5; 58:2. This request is thus clearly a follow up on documents obtained through the unlawful CIDs.

Request for Production 5 demands: "For Acquired Dwelling Units, all documents BPM maintained to record the terms of Transferred Rental Agreements, including but not limited to, amount of rent, security deposit, late fees, whether the rental agreement was month-to-month or a longer fixed term, appliances furnished with apartment, authorized late rent fees, and nonstandard rental provisions." Dkt. 152:12–13. Again, the State already sought and obtained exemplar copies of all transferred rental agreements through the unlawful CIDs. *See* Dkt. 56:5; 58:2. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs, seeking additional information regarding how BPM maintains records of these transferred agreements. More, the State already obtained an involuntary response by BPM regarding its practices for handling transferred rental agreements and ensuring compliance with the terms of those agreements. *See* Dkt. 56:5–6; 58:2–3. The State's request for production thus seeks to follow up on this involuntary response and obtain records relating to these practices.

Request for Production 6 demands: "Since January 1, 2015, all notices given to tenants at Acquired Dwelling Units within 6 months of the date of acquisition informing the tenant of the dwelling that the landlord would be entering to perform a repair, renovation, or replacement for the dwelling unit." Dkt. 152:13. But the State already sought and obtained, through the unlawful CIDs, "exemplar copies of all notices [BPM] provided to tenants during the 2019 and 2020 calendar years regarding . . . [e]ntry or access for repairs or renovations," as well as "[a]ny other notice provided en masse." *See* Dkt. 56:7; 58:7. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 7 demands: "Since January 1, 2015, all change in ownership/management letters sent to tenants living in Acquired Dwelling Units. (See e.g., Civil Law Enforcement Complaint Ex. 3.)." Dkt. 152:13. But the State already obtained exemplar copies

of such letters through the unlawful CIDs. *See* Dkt. 56:7; 57:6; 58:7; 59:3; 61:1–2. Indeed, the Complaint's "Ex. 3" to which the State refers in this discovery request is a combination of documents provided by Defendants in response to the CIDs. *See* Dkt. 4; Berrada Aff. ¶ 22. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 8 demands: "Since January 1, 2015, all 28-day, 30-day, and/or 60-day Notice to Vacate, or 28-30-60-day Notices Terminating Tenancy, given to tenants living in Acquired Dwelling Units within 6-months of the date of acquisition." Dkt. 152:13. But the State already obtained, through the unlawful CIDs, exemplar copies of notices to vacate or terminating tenancy, as well as individual copies of such notices "[f]or all tenants who vacated a dwelling unit in a rental property owned or managed by [BPM] during any part of the 2019 or 2020 calendar years," as well as for 100 named tenants. *See* Dkt. 56:6–7; 58:3–4, 7; Berrada Aff. ¶ 17. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 9 demands: "Since January 1, 2015, all notices given to tenants of Acquired Dwelling Units telling the tenant to remove property from storage areas in their building. (*See e.g.*, Civil Law Enforcement Complaint Ex. 8)('All personal property must be removed from the basement and storage areas . . . or it will be discarded. We are clearing it out!')." Dkt. 152:13. But the State already obtained, through the unlawful CIDs, exemplar copies of all notices provided to tenants en masse in 2019 and 2020. *See* Dkt. 56:7; 58:7. Indeed, the Complaint's "Ex. 8" is a copy of documents provided by BPM in response to the CIDs. *See* Dkt. 7; Berrada Aff. ¶ 24. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 10 demands: Since January 1, 2015, all records of property seized and/or disposed of from then-current tenants that was contained in individual tenant storage units within a building of an Acquired Dwelling Unit. (See e.g., Civil Law Enforcement Complaint Ex.

8)('All personal property must be removed from the basement and storage areas . . . or it will be discarded. We are clearing it out!'); (See also e.g., Civil Law Enforcement Complaint Ex. 3 at p.4.)('We do not allow storage lockers in our buildings so you have until 9/30/2017 to remove all your belongings from storage lockers. Anything left after the two weeks period will be disposed of.')." Dkt. 152:13–14. But the State, through the unlawful CIDs, already obtained exemplar copies of notices provided tenants en masse in 2019 and 2020. *See* Dkt. 56:7; 58:7. Indeed, the Complaint's "Ex. 8" is a copy of documents provided by BPM in response to the CIDs. *See* Dkt. 7; Berrada Aff. ¶ 24. Similarly, the Complaint's "Ex. 3" to which the State refers is a combination of documents provided by Defendants in response to the CIDs. *See* Dkt. 4; Berrada Aff. ¶ 22. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 11 demands: "Since January 1, 2015, all records of maintenance requests from tenants that resulted in removal of an appliance from a dwelling unit." Dkt. 152:14. The State obtained, through the unlawful CIDs, notices relating to "[e]ntry or access for repairs or renovations" sent to tenants in 2019 and 2020. *See* Dkt. 56:7; 58:7. Defendants also obtained copies of leases through the CIDs, which leases discussed appliances and their removal. *See* Dkt. 3:9, 41; 56:6–7; 57:5; 58:2–3; 59:2. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs, which discussed appliances and repair work.

Request for Production 12 demands: "Since January 1, 2015, all emails received and sent by the email address info@berradaproperties.com pertaining to security deposit deductions, evictions, court fees, late rent fees, appliance repairs, bed bug or roach infestations, Notices to Vacate, property in storage areas, Transferred Rental Agreements, and Renovation Projects." Dkt. 152:14. The topics of the emails demanded all relate to the leases, security deposit letters, tenant ledgers, and other documents provided in response to Defendants' unlawful CID requests. As

explained above, security deposit deductions, late rent fees, appliance repairs, Notices to Vacate, property in storage areas, Transferred Rental Agreements, and Renovation Projects were all topics covered by the documents the State obtained in response to the CIDs. Similarly, court fees and bed bug or roach infestations are also covered by the documents that the State obtained through the CIDs, including the leases and tenant ledgers. *See* Dkt. 3:6–9 (quoting and citing Exhibit 1, which is a collection of documents obtained via the CIDs); Dkt. 13; Berrada Aff. ¶ 17. This request is thus clearly a follow up on the documents obtained in response to the unlawful CIDs.

Request for Production 13 demands: "Since January 1, 2015, all emails received and sent by the email address jb@berradaproperties.com pertaining to security deposit deductions, evictions, court fees, late rent fees, appliance repairs, bed bug or roach infestations, Notices to Vacate, property in storage areas, Transferred Rental Agreements, and Renovation Projects." Dkt. 152:14. For the same reasons that Request for Production 12 is fruit of the poisonous tree, so too is Request for Production 13.

Request for Production 14 demands: "Since January 1, 2015, all contracts signed by Joe Berrada pertaining to rental property management services and Renovation Projects. This request includes, but is not limited to, property management service contracts between BPM and properties owned by legal entities that Berrada owns or controls; contracts between BPM and other entities in which BPM subcontracts its property management service responsibilities; contracts between BPM and other landlords in which Berrada has no ownership interest; and contracts with construction companies or tradespersons for Renovation Projects." Dkt. 152:14–15. The State already obtained, through the unlawful CIDs, all rental property management services contracts between Mr. Berrada or an entity he controls. *See* Dkt. 57:5; 59:1–2. And the State obtained, through the unlawful CIDs, information regarding renovation projects undertaken at particular

properties. *See* Dkt. 56:7; 58:7; Berrada Aff. ¶ 18. This request thus clearly follows up on these CID responses relating to Defendants' contracts and renovation projects.

Request for Production 15 demands: "All civil and criminal judgments against BPM and Berrada." Dkt. 152:15. The State obtained volumes of civil court filings in response to the unlawful CIDs, relating to BPM's evictions. *See* Dkt. 56:6; 58:3. This request follows up on that request, seeking additional documents relating to Defendants' involvement in the court system.

* * *

More fundamentally, the State's case here is almost entirely derived from the CID responses. Many of the Exhibits to the State's complaint, including those relating to certain tenants discussed in the complaint, are the Defendants' responses to the CIDs. *See* Berrada Aff. ¶¶ 20–26. And the complaint relies heavily on these exhibits. For example, the State cites Exhibit 1—which consists solely of documents provided by Defendants in response to the CIDs, Berrada Aff. ¶ 20—nine times, to support at least a dozen allegations. *See* Dkt. 3:3–9, 11–12.

More, many of the tenants mentioned in the complaint are those about whom the State received information from Defendants in response to the CIDs, which information then appears in the complaint. For example, the complaint discusses a "TJ" living at "4938 W. Hampton Avenue." Dkt. 3:14. The State's CID to BPM sought information about a TJ living at that same address. *See* Dkt. 56:10. And BPM provided this information. *See* Dkt. 58:3 Similarly, the complaint mentions a "VG" living on "Good Hope Road," Dkt. 3:21, and the State sought and obtained information, through the unlawful CIDs, about a VG living on Good Hope Road, *see* Dkt. 56:9; 58:3. The same is true of "LM" at "9510 W. Thurston Avenue," Dkt. 3:8; 56:10; 58:3, "MW" at "2933 W. Wells Street," Dkt. 3:7; 56:11; 58:3, "QT" on "Good Hope," Dkt. 3:9; 56:11; 58:3, "KM" at "10213 W. Fond Du Lac Avenue," Dkt. 3:10; 56:10; 58:3, and "JT" at "5760 N. 91st Street," Dkt. 3:7; 56:11;

58:3. The complaint then uses the information the State obtained about these tenants, including the terms of their leases, notices sent to them, and their tenant ledgers. *See* Dkt. 3:6–12, 14 (discussing lease terms or tenant ledgers of MW, JT, LM, KM, and TJ); 21 (discussing a notice sent to VG). Likewise, the notice sent to "SP and AD" at "8949 N. 9th Street," which is Exhibit 4 of the State's complaint, is from the Defendants' CID responses. *See* Berrada Aff. ¶ 23.

And the complaint is replete with other allegations drawn from CID responses. For example, Paragraph 59 of the Complaint is BPM's involuntary response to the CIDs Dkt.3:17; 58:3—a response which cannot be used against it in this case. *See supra* Section II. The complaint also alleges that Defendants' renovation projects "commonly include replacing roofs, siding, walkways, and entrances; and replacing doors and windows inside apartments." Dkt. 3:4, *see also* Dkt. 3:18, 23. Defendants' supplemental response to the CIDs stated that "[t]he renovation work" done at two particular complexes "included the removal and replacement of the roof, siding, water heaters, windows, and doors and also included landscape and concrete work." Berrada Aff. ¶ 18.

Indeed, from the very start, the complaint is awash with allegations derived from CID responses, beginning with those relating to the LLCs owned by Mr. Berrada and Mr. Berrada's role in BPM. *See* Dkt. 3:2–3; 56:5; 57:5–6; 58:1–2; 59:2–3. The complaint discusses "[t]he standard rental agreements used by Defendants," Dkt. 3:3, which were provided by Defendants in response to the unlawful CIDs. *See* Dkt. 58:2; 59:2. The complaint moves to renovation projects and notices to tenants, Dkt. 3:4–5, another topic upon which Defendants provided responses to the unlawful CIDs. *See* Dkt. 58:7; Berrada Aff. ¶ 17. The complaint then discusses late fees charged to tenants, *see* Dkt. 3:5; another topic upon which Defendants provided responses to the unlawful CIDs. *See* Dkt. 56:6; 58:3–4; Berrada Aff. ¶ 17.

As this exercise demonstrates, the State's allegations in its complaint are overwhelmingly derived from Defendants' responses to the unlawful CIDs. Thus, the State should not be permitted to seek discovery on the basis of a complaint that is so replete with references to, and allegations drawn from, tainted evidence. *Cf. Van Linn*, 401 Wis. 2d 1, ¶ 12; *Carroll*, 322 Wis. 2d 299, ¶ 45.[20]

C. Separately, All Statements and Documents Provided by Mr. Berrada in Response to the CIDs, and Evidence Derived Therefrom, Must be Suppressed Under Section 93.17, and the State Should Be Barred From Seeking Discovery of the Same

Section 93.17 prohibits the State from using an individual's response to demands under Section 93.15 against him. It states that "no person may be excused from testifying or rendering a report or answer or producing or submitting a document, in response to a demand made under [Section] 93.15, upon the ground or for the reason that the testimony or report or answer or document required of him or her may tend to incriminate him or her or subject him or her to a penalty or forfeiture." Wis. Stat. § 93.17(1). The statute further provides, however, that "no natural person may be prosecuted or subjected to any penalty or forfeiture for or on account of testifying or rendering a report or answer or producing or submitting a document, in response to a demand made under [Section] 93.15, and no testimony so given or report or answer so rendered or document so produced or submitted may be received against him or her in any criminal action, investigation or proceeding." Wis. Stat. § 93.17(1). This "immunity . . . is subject to the restrictions under s. 972.085." *Id.* § 93.17(2). That statute states, "Immunity from . . . forfeiture prosecution under [Section] 93.17 . . . provides immunity only from the use of the compelled testimony or

[20] Indeed, given the breadth of the CIDs and Defendants' responses, *see* Dkt. 56, 57, the State cannot prove its case and dismissal may well be warranted. *See United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) (explaining that dismissal is "usually" a "proper sanction" when "the only evidence against [a defendant] was seized in violation of the Fourth Amendment"). This Court should therefore consider dismissing the entire case.

evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence." *Id.* § 972.085.

Hence a natural person's responses to any demand issued under Section 93.15, and any evidence derived from those responses, cannot be used against him in a subsequent forfeiture proceeding. First, Section 972.085, incorporated by reference in Section 93.17, states this outright: the "[i]mmunity from . . . forfeiture prosecution under [Section] 93.17 . . . provides immunity [ ] from the use of the compelled testimony or evidence in subsequent . . . forfeiture proceedings, as well as immunity from the use of evidence derived form that compelled testimony or evidence." *Id.*; *see also State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is given its common, ordinary, and accepted meaning" and interpreted "in relation to . . . closely related statutes"). And the State's use of a person's response to a Section 93.15 demand as evidence to "prosecute[ ]" the person and "subject[ ] [him] to a[ ] penalty or forfeiture" would constitute a prosecution and forfeiture "on account of" the person's responses. *See* Wis. Stat. § 93.17(1). In other words, by serving as evidence against the person, the person's responses will have caused him to be subjected to the forfeiture. This would violate the immunity provided by Section 93.17.

Even if the statute's text were not clear, the canon of constitutional avoidance compels the reading that all evidence obtained from a person in response to a Section 93.15 demand, and all evidence derived therefrom, cannot be used against the person. *See State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997) ("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.") (citation omitted). A statute may, as Section 93.17 does, prohibit a person from invoking the privilege against compelled self-incrimination and refusing to answer. *See Kastigar v. United States*, 406

U.S. 441, 445–47 (1972). To pass constitutional muster, however, that statute must provide sufficient immunity to the person compelled to testify—namely, immunity "coextensive with the scope of the privilege" against compelled self-incrimination. *See id.* at 448–49. The privilege, in turn, prohibits the use of compelled testimony against a defendant, as well as all evidence derived therefrom. *See id.* at 454–59. So too, then, must the statute. *See id.* Thus, to avoid potential unconstitutionality, the courts must read Section 93.17 as prohibiting both the use compelled responses and all evidence derived therefrom. *See Hall*, 207 Wis. 2d at 89.

And, for the same reasons discussed *supra* Section III.B., this Court should issue a protective order prohibiting the State from seeking discovery that repeats the CID issued to Mr. Berrada or is derived from his CID responses. This includes all discovery requests mentioned above that rely on those documents and information—namely, all Interrogatories (Numbers 2 through 7), and all Requests for Production except Request for Production 2.

CONCLUSION

This Court should suppress all evidence obtained directly or derivatively though the CIDs, and should issue an order prohibiting the State from seeking any such evidence in discovery here.

Dated: September 14, 2022

Respectfully Submitted,

Electronically signed by Ryan J. Walsh

Jessica Hutson Polakowski
WI State Bar ID No. 1061368
jpolakowski@reinhartlaw.com
Delanie Breuer
WI State Bar ID No. 1085023
dbreuer@reinhartlaw.com
David G. Peterson
WI State Bar ID No. 1001047
dpeterson@reinhartlaw.com
Olivia J. Schwartz
WI State Bar ID No. 1115787
oschwartz@reinhartlaw.com
REINHART BOERNER VAN DEUREN S.C.
22 East Mifflin Street, Suite 700
Madison, WI 53703
Telephone: 608-229-2200
Facsimile: 608-229-2100

Mailing Address:
P.O. Box 2018
Madison, WI 53701-2018

Ryan J. Walsh
State Bar No. 1091821
Amy C. Miller
State Bar No. 1101533
EIMER STAHL LLP
10 East Doty Street, Suite 621
Madison, WI 53703
(608) 620-8346
(312) 692-1718 (fax)
rwalsh@eimerstahl.com
amiller@eimerstahl.com

Counsel for Berrada Properties Management, Inc. and Youssef Berrada

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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. § 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:

Joshua L. Kaul
Attorney General of the State of Wisconsin
Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
806.04service@doj.state.wi.us

Jessie Augustyn
Counsel for:
Senator Devin LeMahieu
Senate Majority Leader
Room 211 South
State Capitol
PO Box 7882
Madison, WI 53707
jessie@augustynlaw.com

Steve Fawcett
Counsel for:
Representative Robin Voss
Speaker of the Assembly
Room 217 West
State Capitol
PO Box 8953
Madison, Wisconsin 53708
Steve.Fawcett@legis.wisconsin.gov

Jessie Augustyn
Counsel for:
Senator Chris Kapenga
President of the Senate
Room 220 South
State Capitol
PO Box 7882
Madison, WI 53707
jessie@augustynlaw.com

Dated: September 14, 2022

Electronically signed by Ryan J. Walsh
Ryan J. Walsh

Counsel for Berrada Properties Management, Inc. and Youssef Berrada