STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 WAUKESHA COUNTY

DESSA BEARDEN, KYLE JENSEN, ANDREW JANNY, CORDARIO GOOCH, KAREEM BEARDEN, and JESSE ANDERSON,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE, AND CONSUMER PROTECTION,

and

WISCONSIN DEPARTMENT OF JUSTICE,

Defendants.

Case No. 23-CV-001102

Hon. Michael J. Aprahamian

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

Plaintiffs—mom-and-pop landlords owning a handful of properties in Waukesha- and Milwaukee-area communities—are intelligent, conscientious, law-abiding Wisconsinites of diverse backgrounds. One manages a property to pay for his elderly mother's medical care. Two others have invested in real estate to support their children. Several have or had careers in education. One is a former Army veteran. Although none is wealthy or trained in the law, each is determined to do all he or she can to comply with the rules and regulations of our State. One, a newer landlord with just one property, even took an advanced, university-level course covering landlord-tenant law, partly so that he would better understand his responsibilities.

Plaintiffs' efforts to discern what the law requires and forbids have not been fruitful. In truth, they were futile from the start. Plaintiffs have struggled especially with Wisconsin Administrative Code Sections ATCP 134.06 and 134.09, which impose myriad requirements on landlords and property managers of all sizes. Of course, sometimes even lawyers have difficulty interpreting laws. And some difficulty is to be expected, and tolerated, in the civil context, where landlords and tenants are free to dispute in small-claims court whether carpet damage is "normal wear and tear" (for which the landlord is responsible) or "tenant damage, waste or neglect" (for which she is not), or whether a landlord's unwelcome entry into a unit to look over and replace an old window was truly an "inspect[ion]" and a "repair." Resolving these disputes might even require extensive discovery, expert reports, complex records, and lengthy trials—all of which our civil courts are more than capable of handling.

But violations of ATCP 134.06 and 134.09 are not mere civil infractions. They are crimes—punishable by up to a year in jail. And, just as shocking, they are strict-liability offenses, so the mental state of the alleged "wrongdoer" is irrelevant. No amount of good faith, diligence, intellect, or training will save a landlord in the crosshairs of a district attorney or a bureaucrat who insists (in hindsight) that a tenant should not have been held responsible for an especially filthy carpet, that the replacement of a drafty window was not technically a "repair," or that some other of the rules' blurred lines had been crossed.

Defendants should be enjoined, under the state due-process clause, from enforcing these hopelessly vague criminal prohibitions. Defendants should also be enjoined from enforcing Section ATCP 134.08, which exceeds the agency's authority. Not only are Plaintiffs very likely to succeed on the merits, but, without an injunction, they have been and will continue to be irreparably harmed by the threat of a criminal indictment hanging over their heads, notwithstanding their completely innocent, good-faith conduct. They also lack any adequate remedy at law, since waiting to press these arguments in an actual criminal case filed against them is obviously inadequate. An injunction is also necessary to restore the lawful status quo.

STATEMENT OF FACTS

Plaintiffs are five landlords and one prospective landlord, from different walks of life. Plaintiff Kareem Bearden works as a commercial truck driver. Affidavit of Kareem Bearden (K. Bearden Aff.) ¶ 22. He owns and manages a rental property originally purchased by his mother about 18 years ago. *Id.* ¶¶ 2–3, 6. Mr. Bearden

manages the property for his now-elderly mother and devotes all of the income from the property to her medical expenses. *Id.* ¶ 4.

Plaintiff Cordario Gooch works as the director of facilities for a non-profit organization providing educational and social services for children throughout Milwaukee. Affidavit of Cordario Gooch (Gooch Aff.) ¶¶ 5–7. He has purchased two rental properties in the past six years as an investment for his children. *Id.* ¶¶ 2–4. He hopes to pass these properties on to his children so that they can both inherit income from the properties and work to sustain them throughout adulthood. *Id.* ¶ 4.

Plaintiff Dessa Bearden works as an educator and guidance counselor. Affidavit of Dessa Bearden (D. Bearden Aff.) ¶ 2. She has been purchasing and leasing properties for over 20 years to earn additional income. *Id.* She currently owns two rental properties—a duplex that she purchased in 2005 and a single-family home that she purchased in 2022. *Id.* ¶¶ 3–4.

Plaintiff Jesse Anderson is an Army veteran and retired public school teacher. Affidavit of Jesse Anderson (Anderson Aff.) ¶ 2. He has owned and managed rental properties for nearly 30 years. *Id.* ¶ 4. He currently owns approximately 20 properties with a total of approximately 40 rental units. *Id.* ¶ 3.

Plaintiff Kyle Jensen is a relatively new landlord, purchasing his first property in 2021 as an investment. Affidavit of Kyle Jensen (Jensen Aff.) ¶¶ 2–4. He learned about real estate investments through advanced courses at the University of Wisconsin, Milwaukee, and hopes to invest in larger properties in the future. *Id.* ¶ 4. Ultimately, his goal is to earn a living solely through real estate. *Id.*

Finally, Plaintiff Andrew Janny plans to begin renting out his property soon. Affidavit of Andrew Janny (Janny Aff.) ¶ 3. He purchased a duplex in 2022 and lives in one unit with his family. *Id.* ¶¶ 3–4. He plans to rent out the other unit later this year to provide his family with additional income. *Id.*

Plaintiffs also purchased their properties to support housing needs in their communities. Plaintiff Cordario Gooch, for example, rents out to tenants who could not otherwise afford the amount of housing square footage he provides at his monthly price. Gooch Aff. ¶ 9. He also knows his tenants from the neighborhood and takes care of them, including one who is blind, by promptly responding to all their housing needs. *Id.* ¶¶ 8–11. Plaintiff Kareem Bearden has a single renter who other landlords would decline to enter into a lease with. K. Bearden Aff. ¶ 5. Because Mr. Bearden supports housing in his community, he decided to rent to this tenant to allow them to build credit and credibility. *Id.* Plaintiff Dessa Bearden's tenants are also primarily low-income earners. D. Bearden Aff. ¶ 6.

Most Plaintiffs manage their own properties, some on a full-time basis and others on a part-time basis. As part of managing their properties, Plaintiffs respond to maintenance requests, draft and sign leases, and/or collect rent and security deposits, among other things. Plaintiff Kareem Bearden responds to all of his tenants' housing needs, ranging from maintenance requests to collecting money. K. Bearden Aff. ¶ 6. He uses contractors from time to time to respond to immediate housing needs, but he attempts to do all routine maintenance requests himself. *Id*. Plaintiff Cordario Gooch ordinarily responds to all maintenance requests from his tenants. Gooch Aff.

¶ 10. He also handles the back-office work of processing rent checks, drafting and signing rental agreements, and handling security deposits. *Id.* ¶ 11. Plaintiff Kyle Jensen likewise responds to many maintenance requests, drafts and signs leases, and handles rent checks and security deposits. Jensen Aff. ¶ 6. Plaintiff Dessa Bearden similarly handles all her tenants' housing needs, including drafting and signing leases, handling rent checks and security deposits, and responding to maintenance requests, although she has used contractors to respond to some of these needs. D. Bearden Aff. ¶ 5.

All of the Plaintiffs are aware of Wisconsin landlord-tenant law and try their best to comply with this complicated legal regime. By way of example, Plaintiff Kyle Jensen learned about Wisconsin landlord-tenant law through advanced courses at the University of Wisconsin, Milwaukee in 2018 and 2019. Jensen Aff. ¶¶ 4, 8.

Plaintiffs have all read Wisconsin Administrative Code Sections ATCP 134.06(3), ATCP 134.06(4)(a), and ATCP 134.09(2), yet each of the Plaintiffs finds these regulations confusing and vague. Plaintiffs, for example, do not know what is meant by "tenant damage, waste or neglect" versus "normal wear and tear" under Section ATCP 134.06(3). *See* K. Bearden Aff. ¶ 10; Gooch Aff. ¶ 13; D. Bearden Aff. ¶ 9; Jensen Aff. ¶ 11; Janny Aff. ¶ 7. Nor are Plaintiffs legal experts, able to determine whether a tenant is "legally responsible" to pay for something "under the applicable law," as Section ATCP 134.06(3) mandates. *See* K. Bearden Aff. ¶ 11; D. Bearden Aff. ¶ 10; Janny Aff. ¶ 8. Plaintiffs likewise do not know what it means to sufficiently itemize a security-deposit withholding statement under Section ATCP 134.06(4)(a).

See K. Bearden Aff. ¶ 12; Gooch Aff. ¶ 14; D. Bearden Aff. ¶ 11; Jensen Aff. ¶ 13; Janny Aff. ¶ 9. And Plaintiffs cannot discern when it is permissible to enter a tenant's dwelling under Section ATCP 134.09(2), including because it is not clear whether replacing something is a "repair," what it means to "inspect" the premises, how much time is considered "reasonably necessary" to accomplish these tasks, what a "health or safety emergency is," or when a tenant is "absent" and it is "reasonabl[e]" to believe entry is "necessary" to prevent damage. *See* K. Bearden Aff. ¶¶ 13–14; Gooch Aff. ¶ 15; D. Bearden Aff. ¶¶ 12–13; Jensen Aff. ¶¶ 14–15; Janny Aff. ¶¶ 10–11.

Plaintiffs fear prosecution under these confusing regulations, which fear has caused them to forgo money to which they believe they are entitled, strained relations with their tenants, and made it more difficult to maintain their buildings. *See* K. Bearden Aff. ¶¶ 12–13, 15–16; D. Bearden Aff. ¶¶ 12–14; Jensen Aff. ¶¶ 12–14, 16. More, a prosecution would cause significant harm to Plaintiffs, including harm to their reputations and financial burden. *See* K. Bearden Aff. ¶¶ 20–24; Gooch Aff. ¶¶ 17–18; D. Bearden Aff. ¶¶ 16–18; Anderson Aff. ¶¶ 8–9; Jensen Aff. ¶¶ 18–19; Janny Aff. ¶¶ 13–15.

Many of the Plaintiffs are African American and are acutely aware of the harms caused by prosecution, especially under vague laws. *See, e.g.*, K. Bearden Aff. ¶ 21. Indeed, "[o]ne of the main problems with vague statutes is their capacity to further racial injustice in the criminal justice system." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 780 (1999). Vague laws have historically been used to target

minority groups. For example, vague vagrancy laws "have a notorious background," having been used in the South "as the central mechanism for regulating the black workforce." Shon Hopwood, *Clarity in Criminal Law*, 54 Am. Crim. L. Rev. 695, 705–06 (2017). In more recent times, "the racial disparity in loitering arrests is part of pervasive discrimination," the impact of which "is magnified tremendously by laws that leave . . . the very definition of offending conduct almost entirely to an officer's judgment." Roberts, *supra*, at 786. Vagueness doctrine, therefore, has acted "as a powerful means of sweeping away laws used to enforce racial apartheid," and the Supreme Court's seminal case on the topic, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), is "generally viewed as a case about police racism." Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 Harv. C.R.-C.L. L. Rev. 149, 155–56 (2011).

LEGAL STANDARD

Temporary injunctions are governed by Wis. Stat. § 813.02. "A circuit court may issue a temporary injunction if four criteria are fulfilled: (1) the movant is likely to suffer irreparable harm if an injunction is not issued, (2) the movant has no other adequate remedy at law, (3) an injunction is necessary to preserve the status quo, and (4) the movant has a reasonable probability of success on the merits." *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶ 17, -- Wis. 2d. --, 989 N.W.2d 561. Before granting a temporary injunction or temporary restraining order, "the court may attempt to contact the party sought to be restrained, or his or her counsel if known, by telephone," but is not required to do so. Wis. Stat. § 813.02(1)(b).

ARGUMENT

I. PLAINTIFFS ARE VERY LIKELY TO SUCCEED ON THE MERITS

Three of DATCP's regulations—Sections ATCP 134.06(3), 134.06(4)(a), and 134.09(2)—are void for vagueness under the due-process clause of the Wisconsin Constitution. These regulations, which create indefinite strict-liability crimes for acts that are not *malum in se*, are vague and confusing, failing to give ordinary persons fair notice of what is prohibited and inviting arbitrary enforcement. A fourth regulation—Section ATCP 134.08—exceeds DATCP's statutory authority because no statute authorizes DATCP to declare contracts void and unenforceable, and declaring contracts void and unenforceable does not "forbid[ ]" or "prescrib[e]" any trade practice or method of competition in business. Wis. Stat. § 100.20(2). DATCP and DOJ should therefore be enjoined from enforcing these invalid regulations.

A. Criminally Enforceable, *Malum Prohibitum* Regulations Lacking a *Mens Rea* Element Are Subject to Heightened Vagueness Scrutiny, Requiring a "High Level of Definiteness" Giving Fair Notice of What Is Prohibited and Containing Clear Standards for Enforcement

Like the federal constitution, the Wisconsin Constitution forbids the State from depriving persons of life, liberty, or property without due process of law. Wis. Const. Art. I, § 1; *State v. Neumann*, 2013 WI 58, ¶ 32 n.10, 348 Wis. 2d 455, 832 N.W.2d 560.[1] The government violates this provision by taking life, liberty, or property under a law "so vague that it fails to give ordinary people fair notice of the

[1] Plaintiffs seek relief under Wisconsin's due-process clause only. Wisconsin courts interpret Wisconsin's due-process requirements consistent with those of the federal constitution. *See Cnty. of Kenosha v. C & S Mgmt., Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999).

conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). These concepts are known as the "two due process essentials:" (1) "fair notice," which means the law is defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited," and (2) fair enforcement, meaning that the law's language "does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (citation omitted); *see also State v. Starks*, 51 Wis. 2d 256, 262, 186 N.W.2d 245 (1971) (striking down loitering statute as void for vagueness); *State v. Popanz*, 112 Wis. 2d 166, 172–73, 177, 332 N.W.2d 750 (1983) (holding that statutory phrase "private school" was void for vagueness); *State v. Janssen*, 213 Wis. 2d 471, 478, 570 N.W.2d 746 (Ct. App. 1997) (ruling that "casting contempt upon the flag" is void for vagueness). Administrative regulations are also subject to these requirements. *State v. Courtney*, 74 Wis. 2d 705, 709, 247 N.W.2d 714 (1976).

The first requirement—fair notice—stems from the "important value[ ]" "that man is free" and so should be able to "steer between lawful and unlawful conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Courts therefore "insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* "Vague laws may trap the innocent by not providing fair warning." *Id.*

The second requirement—fair enforcement—stems from the "important value[ ]" that "arbitrary and discriminatory enforcement is to be prevented." *Id.* Hence "laws must provide explicit standards for those who apply them." *Id.* "A vague

law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.* at 108–09. The Supreme Court has described this requirement as "the more important aspect of vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

In all, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but . . . the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Hence no "important element" of the law may be "left to conjecture, or [to] be supplied by either the court or the jury." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 392 (1926) (citation omitted).

More specifically, this means that terms calling for "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" will render laws unconstitutionally vague. *Williams*, 553 U.S. at 306. (describing terms such as "annoying" or "indecent"). The same is true of "terms of degree" with "no settled usage or tradition of interpretation in law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991) (for example, "general" and "elaboration"); *see also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding that "annoy" was unconstitutionally vague and explaining that "[c]onduct that annoys some people does not annoy others"); *Connally*, 269 U.S. at 392 ("What may be regarded as a crowded car by one jury may not be so considered by another.") (citation omitted). Finally, even if the constitution might tolerate an unclear term or phrase in isolation,

vagaries can accumulate, such that a patchwork of hazy terms within one provision will render the entire provision invalid. *Johnson*, 576 U.S. at 602 (citation omitted).

Courts assessing vagueness challenges consider several factors. For instance, "repeated attempts and repeated failures [by courts] to craft a principled and objective standard out of" a law can "confirm its hopeless indeterminacy." *Id.* at 598. An inference of vagueness also arises when courts and juries come to differing conclusions on the meaning of a term or phrase. *See id.* at 601; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 & n.2 (1921). Vagueness is also more likely when dictionary definitions and other writings "are numerous and varied" on the meaning of a term. *Lanzetta v. State of N.J.*, 306 U.S. 451, 454 (1939).

"The degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Laws carrying only civil penalties receive greater tolerance for vagueness, while laws imposing criminal penalties must possess "a high level of definiteness." *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999); *see also Vill. of Hoffman Ests.*, 455 U.S. at 498–99; *State v. Neumann*, 2013 WI 58, ¶ 36, 348 Wis.2d 455, 832 N.W.2d 560. Courts are even less tolerant of vagueness when the threat of the prohibited activity is lower. *See Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 602 (7th Cir. 2021) (noting vagueness problem because "the Statute criminalizes malum prohibitum ('wrong only because it is prohibited') as opposed to malum in se

('inherently wrong') conduct"); *see also Papachristou*, 405 U.S. at 163 (due-process problem when law "makes criminal activities which by modern standards are normally innocent").

In addition, courts apply especially "heightened" scrutiny to a law that "contains no *mens rea* requirement," *United States v. Cook*, 970 F.3d 866, 873 (7th Cir. 2020), since a strict-liability prohibition can easily become "little more than 'a trap for those who act in good faith,'" *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("[The] Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.") (citation omitted), *overruled in part on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Since "strict-liability [criminal] offenses" are "generally disfavored" in the law, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978), they receive "a relatively stringent review" for vagueness, *Peoples Rts. Org., Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998). Hence, as Justice Abrahamson explained, "Courts have struck down statutes creating strict liability crimes as violating due process," including because "these statutes are vague and lack notice." *State v. Stepniewski*, 105 Wis. 2d 261, 303, 314 N.W.2d 98 (1982) (dissenting op.).[2] Finally, courts weigh whether the challenged law "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests.*, 455 U.S. at 499. If it does, "a more stringent vagueness test should apply." *Id.*

[2] Importantly, "to cure an otherwise vague statute, [a] scienter requirement must envisage not only a knowing what is done but a knowing that what is done is unlawful, or at least, so 'wrong' that it is probably unlawful." *Nova Recs., Inc. v. Sendak*, 706 F.2d 782, 789 (7th Cir. 1983) (citations omitted).

Vague laws are often facially invalid. Although courts used to insist that facial vagueness challenges could succeed only if the challenged provision is "impermissibly vague in all of its applications," *id.* at 497, that is no longer the law. Rather, the Supreme Court has clarified that a "vague provision is [not] constitutional merely because there is *some conduct* that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602 (emphasis added). A law is across-the-board invalid so long as it is "permeate[d]" with vagueness, *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality op.), or "lacks 'any ascertainable standard for inclusion and exclusion,'" such that it simply "poses a trap for a person acting in good faith, who is given no guidepost by which he can divine what sort of conduct is prohibited." *Cook*, 970 F.3d at 873 (citation omitted).

B. At Least Three of DATCP's Criminal Rules Lack Fair Notice and Invite Arbitrary, Discriminatory Enforcement

This case centers on three strict-liability criminal "prohibitions" promulgated by the most powerful agency in Wisconsin, DATCP. In general, Section 100.20 allows DATCP to "issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair" and "prescribing methods of competition in business or trade practices in business which are determined by the department to be fair." Wis. Stat. § 100.20(2)(a). Invoking this authority, DATCP adopted Chapter ATCP 134, regulating landlords. *See* Wis. Admin. Code § ATCP 134.01. Section 100.26 sets forth penalties for violations of Chapter ATCP 134, which include a "fine[ ] [of] not less than $25 nor more than $5,000" and "imprison[ment] in the county jail for not more than one year" for each offense. Wis.

Stat. § 100.26(3). The Wisconsin Supreme Court has held that these regulations create strict-liability crimes, *Stepniewski*, 105 Wis.2d at 279, which "impose[ ] a heavy penalty and a serious stigma on a violator," *id.* at 304 (Abrahamson, J., dissenting). On top of those punishments Section 100.26 also provides "a civil forfeiture to the state of not less than $100 nor more than $10,000 for each violation" of Chapter ATCP 134. Wis. Stat. § 100.26(6).

Because Chapter ATCP 134 creates strict-liability crimes, it is subject to "a relatively stringent review" for vagueness. *Peoples Rts. Org.*, 152 F.3d at 534; *see also Vill. of Hoffman Ests.*, 455 U.S. at 499. This is true even though the regulations may be enforced through either civil or criminal actions. After all, a statute or regulation providing both civil and criminal penalties must be given the same construction. *See Fed. Commc'ns Comm'n v. Am. Broad. Co.,* 347 U.S. 284, 296 (1954). And it "must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring); *accord Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846, 852 (N.D. Ohio 2010), *aff'd*, 736 F.3d 722 (6th Cir. 2013); *Barry v. City of New York*, 933 F. Supp. 2d 416, 433 (E.D.N.Y. 2013).

Three of DATCP's regulations would fail to satisfy even the lower scrutiny afforded to civilly enforced laws and so easily fail to provide the "high level of definiteness" demanded of laws carrying criminal sanctions. *Belle Maer Harbor*, 170 F.3d at 557. Those regulations are (1) Section ATCP 134.06(3), which forbids a landlord from withholding money from a security deposit except in certain

circumstances; (2) Section ATCP 134.06(4)(a), which requires a landlord to send a security-deposit withholding statement that is sufficiently itemized; and (3) Section ATCP 134.09(2), which forbids a landlord from entering a tenant's dwelling except in certain circumstances.

1. Section ATCP 134.06(3) is unconstitutionally vague

Section ATCP 134.06(3) states that, "[w]hen a landlord returns a security deposit to a tenant after the tenant vacates the premises, the landlord may withhold from the full amount of the security deposit only amounts reasonably necessary to pay for," as relevant, "tenant damage, waste, or neglect of the premises," but not "for normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law"; and "[u]npaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats."

Three phrases in Section ATCP 134.06(3) are impermissibly vague: (a) "normal wear and tear," (b) "tenant damage, waste, or neglect," as well as (c) "legally responsible" and "responsible under applicable law." Each of these phrases—whose vagueness is exacerbated by the layered requirement that only "reasonably necessary" amounts be withheld—independently invalidates the rule. *A fortiori*, viewing these cumulatively indefinite phrases in combination reveals a thoroughly "shapeless" law, susceptible of only "guesswork" by those subject to it and those enforcing it. *Johnson*, 576 U.S. at 602.

a. Start with the agency's criminal bar on withholding for "normal" wear and tear. Bent on complying with the rule, a person of ordinary intelligence—or, more likely, her lawyer—would "search[ ] the statutes, administrative rules and

regulations and official [agency] writings for a definition" of "normal" wear and tear, or at least for "criteria" that wear and tear must meet to be considered "normal." *State v. Popanz*, 112 Wis. 2d 166, 174, 332 N.W.2d 750 (1983) (holding statutory phrase "private school" void for vagueness). But she would find nothing—no "definition," no "prescribed criteria," and not even "a well-settled meaning [set forth] in decisions" of a Wisconsin court. *Id.* She would discover instead that Wisconsin courts have struggled themselves to come up with a legal definition for "normal wear and tear." Even in the small-claims setting—where the stakes are considerably lower than under ATCP 134.06(3)—discerning what is "normal wear and tear" in the fact-intensive context of a particular landlord-tenant dispute is complicated, as is assessing whether that phrase covers everything but a tenant's "negligence or improper use" of a dwelling. *Howells v. Grosso Inv. Properties, LLC*, 2009 WL 3127925, at *2 (Wis. Ct. App. Oct. 1, 2009) (unpublished) (28-paragraph opinion addressing these issues and reversing in part and affirming in part); *see also, e.g., Sunflower Condo. Ass'n, Inc. v. Everest Nat'l Ins. Co.*, No. 19-CV-80743, 2020 WL 7061597, at *3 (S.D. Fla. Nov. 12, 2020) (relying upon testimony of public adjuster that "normal wear and tear is very . . . vague" to find genuine issue of material fact over whether condominium damage had been caused by normal wear and tear or Hurricane Irma), *report and recommendation adopted*, 2020 WL 7059352 (S.D. Fla. Dec. 1, 2020); *Weeks Marine, Inc. v. Picone, Inc.*, No. 97 CIV. 9560, 1998 WL 717615, at *6 (S.D.N.Y. Oct. 14, 1998) (finding that "[t]he contract is ambiguous because the term 'ordinary wear and tear' is not defined"); *Zidell, Inc. v. Pac. N. Marine Corp.*,

744 F. Supp. 982, 986 (D. Or. 1990) (concluding that the phrase "good order and condition excepting ordinary wear and tear" was "capable of more than one reasonable interpretation" and was therefore "ambiguous"); *Marina Food Assocs., Inc. v. Marina Rest., Inc.*, 394 S.E.2d 824, 830 (NC Ct. App. 1990) (same).

Looking beyond our State's case law and outside the "wear and tear" context, a person of ordinary intelligence would also learn that, unfortunately, the term "normal" is notoriously "susceptible to many different interpretations, and so raises questions with no clear answers." *United States v. Hall*, 912 F.3d 1224, 1227 (9th Cir. 2019) (per curiam) (holding term of probation relating to "normal familial relations" unconstitutionally vague); *see also Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (observing that the term "normal" is "ambiguous" and vulnerable to "various interpretations").

Even before parsing cases, an ordinary mom-and-pop landlord—lacking the resources to hire counsel or set up a Westlaw account—would start where most of us do: Google. There, she would find numerous sources, but none that is particularly elucidating and many that admit that the meaning of "normal wear and tear" is extremely difficult to pin down. Adding to her confusion, she would find that some of the sources even contradict each other. For example, while DATCP's informal guidance suggests that "painting" or "carpet cleaning" are the landlord's responsibilities, DATCP, *Landlord Tenant Guide* at 4,[3] the University of Wisconsin–Milwaukee's Legal Clinic maintains that "the landlord is [not] always prohibited from

[3] https://datcp.wi.gov/Documents/LT-LandlordTenantGuide497.pdf.

withholding for carpet cleaning or painting." *Tenant Rights and Responsibilities* at 11, University Legal Clinic (Rev. 2010).[4] Rather, the clinic advises, the tenant is on the hook "if there is excessive damage to the carpet or walls that was caused by tenant abuse or neglect." *Id.* The clinic later updated its guidance to advise that deductions from security deposits for "'carpet cleaning,' 'cleaning,' and 'painting,' . . . would be illegal[ ] unless the tenant . . . caused 'unusual damages.'"[5] Reading the same regulation, some rental experts think that landlords may use security-deposit money to clean a carpet "that was dirtier than normal";[6] while others insist that "Wisconsin tenant-landlord law prohibits [landlords from] using security deposits to cover the costs of cleaning, painting, or cleaning the carpet" at all.[7] Consistent with the latter view, some hold that "the legalese around tenants' rights" in Wisconsin are not "friendly" and are "confusing," suggesting it is best to err on the side of withholding very little.[8] A year in jail, after all, is probably not worth charging the tenant for a particularly disheveled carpet, given that the agency or a district attorney might instead conclude that the carped showed had only "normal" damage.

Real-estate attorneys agree that the meaning of "ordinary" or "normal" wear and tear is amorphous. O'Flaherty Law, operating throughout Wisconsin and specializing in real estate, points out that "[t]here is no definition for normal wear and tear" and that it is "up to the parties and a judge to decide whether something is

[4] https://uwm.edu/university-legal-clinic/wp-content/uploads/sites/298/2015/06/Landlord-Tenant-Book-March-2010.pdf.

[5] https://uwm.edu/off-campus-resources/wp-content/uploads/sites/149/2014/10/Landlord-Tenant-Booklet-Revised-2017.pdf.

[6] https://www.tenantresourcecenter.org/normal_wear_and_tear.

[7] https://rentberry.com/blog/tenant-rights-wisconsin.

[8] *Id.*

normal wear and tear."[9] Another firm agrees "that 'normal wear and tear' is a term that Wisconsin laws do not clearly define."[10]

Summing up these sentiments, the Tenant Resource Center, a leading Wisconsin non-profit organization dedicated to housing justice, puts it best: "[N]ormal wear and tear" is "haaaaard" to explain to tenants. Laura Dixson-Kruijf, *Normal Wear and Tear*, Tenant Resource Center (Feb. 24, 2022).[11] "[I]t's up to a judge" to decide, the non-profit concludes, because "the law doesn't define it very well."[12] Cold comfort for good-faith landlords wishing to avoid incarceration.

Compounding its unconstitutionality, the formlessness of "normal" is problematic in yet another respect: contrary to the teaching of *Johnson*, it requires a landlord, as well as a prosecutor, judge, or jury, to conceptualize an abstract, idealized "normal" scenario, against which she would then need to judge the circumstances that she confronts. It was precisely this difficulty—coming up with a theoretical "normal" or "ordinary" circumstance—that led the *Johnson* Court to strike down the Armed Career Criminal Act's residual clause. 576 U.S. at 597. The Court explained that the clause was problematic because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 597. The Court asked, "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state

[9] https://www.oflaherty-law.com/learn-about-law/can-i-sue-my-landlord-for-withholding-my-security-deposit-in-wisconsin.

[10] https://www.johnsflaherty.com/blog/landlord-tenant-law-under-what-circumstances-can-a-landlord-keep-a-security-deposit.

[11] https://www.tenantresourcecenter.org/normal_wear_and_tear.

[12] *Id.*

reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* (citation omitted). A good-faith landlord would have the same questions.

Applying similar reasoning, the Seventh Circuit in *Whatley v. Zatecky*, 833 F.3d 762, 784 (7th Cir. 2016), held unconstitutional as applied an Indiana statute using the term "on a regular basis." The law prohibited the possession of cocaine within 1,000 feet of a "building or structure that on a regular basis provides recreational, vocational, academic, social, or other programs or services." *Id.* at 765. But the word "regular" is "amorphous," "susceptible to multiple meanings," "provides no objective standard," "and thereby fails to place persons of ordinary intelligence on notice of the conduct proscribed and allows for arbitrary enforcement." *Id.* at 772, 779, 784. So the court granted habeas relief to a petitioner who had been convicted under the law. *Id.* at 784; *see also, e.g., Doe v. Snyder*, 101 F. Supp. 3d 672, 687–90 (E.D. Mich. 2015) (holding law void for vagueness because the words "regularly" and "routinely" failed to provide fair notice of the conduct proscribed and were imprecise enough to invite arbitrary enforcement).

For the same reasons that the phrase "normal familial relations," "'ordinary case' of a crime," or "on a regular basis" fail to afford due process, the phrase "normal wear and tear" also falls short. Consider some of the countless questions that the ordinary landlord must ponder. "Must [wear and tear] be 'normal' for that particular [kind of rental unit], or 'normal' for [rental units] in general?" *Hall*, 912 F.3d at 1227; *see Weeks Marine,* 1998 WL 717615, at *6 ("What is considered 'normal and reasonable' depends on the object's intended use and the age of the object."). What is

"normal" wear and tear among the myriad variations of living arrangements? What qualifies as "normal" wear and tear for tenants with teenagers, young children, or pets? Is "normal" there different than "normal" wear and tear more typical of adult-only tenants or tenants with no pets? How about "normal" wear and tear of a unit with one tenant versus one with six? *See Hall*, 912 F.3d at 1227 ("[H]ow is a defendant to know what a 'normal' family is and does, in light of the tremendous diversity of family structures and family habits, customs, and activities in this country."). And "[h]ow does one go about deciding what kind of [wear and tear] the [normal tenancy] involves?" *Johnson*, 576 U.S. at 597. "A statistical analysis[?] A survey? Expert evidence? Google? Gut instinct?" *Id.* (citation omitted). The regulation, its context, case law, and secondary sources furnish no answers. Even Google confounds more than it helps. The term is therefore unconstitutionally vague. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 784.

b. Separately, but relatedly, the terms "tenant damage, waste, or neglect" are unduly vague. The person of ordinary intelligence—acting in good faith and wishing to avoid a one-year jail sentence—would alas find that these words, too, are undefined and that other regulations provide no guidance. *See generally* Wis. Admin. Code ch. ATCP 134. Even so, the mom-and-pop landlord is forced make a complicated, *ex ante* legal determination—that must be correct—concerning the culpability of another person, the tenant, whose circumstances the landlord likely will not even fully know. After all, to discern whether a person has been negligent, one must know all of the "facts and circumstances present in each individual case" to assess whether the

tenant, months or years ago, breached a duty of ordinary care "under the circumstances" that existed at the time. *Hoida, Inc. v. M & I Midstate Bank*, 291 Wis. 2d 283, 306, 717 N.W.2d 17 (2006) (defining elements of negligence). Of course, in many cases, the landlord will have no way of knowing or collecting the "circumstances" leading to property damage. She can't read his mind. She can't depose him. The tenant has no duty to inform her. Perhaps even the tenant himself does not know all the circumstances.

Suppose, for example, that the landlord notices that the dry wall in the now-vacated apartment is badly cracked. The landlord rules out her own neglect, having confirmed that no foundation settlement or framing deterioration (problems with the building) have occurred.[13] She wonders whether a change in temperature over the winter caused the fissures, but, even then, she does not know whether the cause was tenant neglect (perhaps he did not keep the thermostat at the lease-prescribed temperature) or her own failing (perhaps the thermostat that she installed was not working properly). Even if she discovers the thermostat had not been working properly, she still might not know whether the tenant learned of the defect long ago and negligently failed to notify the landlord, or whether the tenant was simply oblivious to the temperature problem, because he was hyperthermic or traveling overseas through the winter. Notwithstanding all of these questions, the regulation requires the landlord to uncover all of the facts and perfectly answer all of these questions in the 21 days after the tenant vacates, when the security-deposit

[13] https://tinyurl.com/n4s43zum.

withdrawal letter is due. Even with a crack team of engineers and investigators on staff, a landlord might not be able to determine to a moral certainty, in those three weeks, what exactly happened and who is to blame. That task might even prove difficult for the courts, who, unlike the tenant, have the benefit of hindsight, adversarial briefing, discovery, and other factfinding procedures. Of course, all of these same fatal defects afflict the term "waste," which is, itself, unconstitutionally vague on its face. *Champlin Ref. Co. v. Corp. Comm'n of State of Okl.*, 286 U.S. 210, 243 (1932) ("[T]he court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste").

A Google search of secondary sources here would again prove unhelpful. DATCP's informal guidance parrots the rule, reiterating that "the landlord may withhold money from the security deposit" for "[t]enant damage, waste, or neglect of the premises," but it declines to define those terms.[14] Given the phrase's indefiniteness, one treatise advises landlords "to prescribe precisely what acts or omissions are to be considered waste."[15] This might include, for example, "failure to maintain [the property] as required under the lease, destroying property, failure to take reasonable precautions to protect the premises from the elements," and more.[16] This guidance is of little assistance, however, because damage from failure to take reasonable precautions is arguably just "normal wear and tear." Industry guidance

[14] https://datcp.wi.gov/Documents/LT-LandlordTenantGuide497.pdf.
[15] 1 Wis. Prac., *Methods of Practice* § 13:32 (5th ed 2022).
[16] *Id.*

acknowledges this problem: "Damage is the destruction caused by abusive or negligent use of a rental unit," a leading property management website advises, "like ripped carpets and heavily stained walls."[17] Yet ripped carpet or stained walls could conceivably be, under the circumstances, the kind of "normal wear and tear" that DATCP apparently does not think merits a security-deposit deduction.

In sum, this language fails to give "person[s] of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304. The kinds of determinations that it requires "are questions of law mixed with questions of fact which perplex [even] judges"—who have the luxury of answering them in hindsight, with the benefit of a full record—"little less than they baffle 'men of common intelligence.'" *Williams v. State of N.C.*, 325 U.S. 226, 276–77 (1945) (Black, J., dissenting). The government cannot imprison landlords for their "failure to prophesy what a judge or jury will do" when presented with then-unknown-and-unknowable facts that ultimately would drive any later determination of whether a tenant committed "waste" or "neglect." *Id.* at 278 (Black, J., dissenting); *see also Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 877 (N.D. Tex. 2008) (holding ordinance unconstitutionally vague because it "fail[ed] to put" "landlords with no training or expertise in federal immigration law . . . on sufficient notice of what acts may be punished by the city").

c. For similar reasons, the regulation's use of terms like "legally responsible" and "responsible under applicable law" are equally problematic. Merely to avoid

[17] https://ipropertymanagement.com/laws/wisconsin-security-deposit-returns.

jailtime, a landlord must answer the unanswerable: whether all of the facts that might come out later, in a potentially years-long court proceeding and multi-day trial, would render the tenant ultimately "responsible" for payments that, before litigation is even foreseeable, he seemingly owes. *See Villas at Parkside Partners*, 577 F. Supp. 2d at 877; *see also Williams*, 325 U.S. at 276–77 (Black, J., dissenting). Making matters more difficult, the mom-and-pop landlord of ordinary intelligence also must figure out what law or laws would even "appl[y]" to yet unknown and potentially unknowable facts—something that even attorneys and courts have trouble agreeing upon. *See Smart v. Thompson*, 2014 WL 642059, at *7–*8 (Wis. Ct. App. Feb. 20, 2014) (unpublished) (reflecting that the parties, circuit court, and court of appeals disagreed on the meaning of "applicable law" in 134.06(3)). This violates due process. *See Villas at Parkside Partners*, 577 F. Supp. 2d at 877.

Similarly, Section ATCP 134.06(3) allows a landlord to withhold only unpaid rent for which a tenant is "legally responsible" after applying the provisions of Wis. Stat. § 704.29. *See* Wis. Admin. Code § ATCP 134.06(3)(a)1. That statute, in turn, allows landlords to recover unpaid rent when a tenant "unjustifiably removes from the premises," but only to the extent that the landlord cannot "mitigate" with "reasonable efforts" the lack of payment. Wis. Stat. § 704.29. Determining whether a tenant has "unjustifiably remove[d]" from the premises, including whether the landlord has accepted the tenant's removal, can prove a Herculean task at best (and a Sisyphean effort at worst) and so it, too, fails to give "person[s] of ordinary intelligence fair notice of what is prohibited." *Williams*, 553 U.S. at 304; *see also*

Williams, 325 U.S. at 276–77 (Black, J., dissenting). Courts themselves, even with the benefit of hindsight, adversarial briefing, and a record, are forced to undertake complex legal analyses to assess whether a tenant is legally responsible for unpaid rent, either under a rental agreement, under Section 704.29, or under the common law. For example, in *Long v. Weber*, the circuit court and court of appeals struggled to determine whether the tenants were legally responsible for certain unpaid rent under the rental agreement. 2021 WL 2577058, at *1–*4 (Wis. Ct. App. 2021) (unpublished). Similarly, in *Wyndham Properties, LLC v. Kingstad L. Offices, S.C.*, the court of appeals engaged in a lengthy exposition to discern whether the tenant had "surrender[ed]" the premises and the landlord had accepted the surrender under Section 704.29(1). 2010 WL 1753300, at *2–*3 (Wis. Ct. App. May 4, 2010) (unpublished). The court explained that the tenant—a law firm—had "misapplie[d]" the words of Section 704.29 in arguing that it did not owe the landlord for certain monies. *Id.* Likewise, in *Butler Plaza, LLC v. Curtis*, the court of appeals has analyzed the issues of "surrender" and "acceptance" in treatise-like fashion. 2019 WL 1796113, at *2–*5 (Wis. Ct. App. Apr. 25, 2019) (unpublished). Yet a mom-and-pop landlord is asked to figure all of this out on her own, without all of the facts—and go to jail if she makes an innocent mistake.

Having to decide whether a landlord's mitigation efforts were "reasonable" under Section 704.29 adds even more uncertainty. Parties constantly clash over whether attempts at mitigation were "reasonable." *See, e.g.*, *Butler Plaza*, 2019 WL 1796113, at *5–*6; *Lagunas v. Wis. O'Connor Corp.*, 2016 WL 4083580, at *4 (Wis.

Ct. App. Aug. 2, 2016) (unpublished); *Sun-P Enterprises, LLC v. Jbeck Pizza LLC*, 2011 WL 6224512, at *4–*6 (Wis. Ct. App. Dec. 15, 2011) (unpublished). There are also questions regarding whose burden it is to prove that mitigation efforts were reasonable. *See Butler Plaza*, 2019 WL 1796113, at *5–*6. Under the statute, the landlord must show that they made efforts to mitigate, shifting the burden to the tenant to prove the efforts were not reasonable. *See id.* Does a landlord have to predict whether the tenant will succeed in overcoming a prima facie case in order to determine whether the landlord can withhold unpaid rent from a security deposit? A person's liberty cannot be made to turn on what would constitute sheer speculation even in a law office. *See Coates*, 402 U.S. at 614.[18]

At the very least, the combination of and relationship between these amorphous terms and provisions—their cumulative vagueness, so to speak—renders the regulation hopelessly indefinite. *See Johnson*, 576 U.S. at 602 ("Each of the uncertainties in the residual clause may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork,'" violating due process) (citation omitted). Forced to navigate the term "reasonably necessary," an ordinary

[18] The regulation's earlier use of "reasonable"—requiring withdrawals in amounts that are "reasonably necessary" to cover the enumerated costs—while arguably not vague in isolation, adds yet another stumbling block to the good-faith landlord. Here, too, the rule does not define "reasonably necessary" withholdings, and it furnishes no standard by which to judge whether certain withholding amounts are "reasonably necessary" based on the regulatory categories. This is a problem because what is "reasonable" to one person might not be to another. *See Coates*, 402 U.S. at 614. Accordingly, the Sixth Circuit held that the term "reasonable radius" is unconstitutionally vague. *Belle Maer Harbor*, 170 F.3d 553. As the court explained, no "commonly accepted meaning exists for the term 'reasonable,'" and that the term is instead "susceptible to a myriad of interpretations." *Id.* at 558. The Supreme Court, likewise, has held that certain criminal statutes setting a "reasonable[ness]" standard are void for vagueness. *See, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) ("reasonable profit"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) ("unreasonable rate").

landlord is then confronted with the prohibition on withholding for "normal wear and tear" and rent for which the tenant is not "legally responsible" and costs for which the tenant "cannot reasonably be held responsible under applicable law," as well as the requirement to apply Section 704.29, and all of its vague and confusing requirements. There is no stick by which to measure "wear and tear" to determine whether it is "normal" or not. And a person of ordinary intelligence cannot be expected to undertake advanced legal analyses of statutory, common, and contract law—without even knowing all the facts—to determine whether the tenant can be held responsible for certain costs. When these problems are aggregated, "their sum makes a task . . . which at best could be only guesswork." *Id.* (citation omitted). Section ATCP 134.06(3) therefore violates due process. *Id.*

2. Section ATCP 134.06(4)(a) is unconstitutionally vague

Section ATCP 134.06(4)(a) of the Wisconsin Administrative Code provides that, "[i]f any portion of a security deposit is withheld by a landlord, the landlord shall," in the relevant timeframe defined elsewhere, "deliver or mail to the tenant a written statement accounting for all amounts withheld." Wis. Admin. Code § ATCP 134.06(4)(a). That statement must "describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim." *Id.*

Section ATCP 134.06(4)(a) is subject to exacting vagueness analysis. For one thing, it compels speech, or at the very least impinges upon free-speech interests, triggering "a more stringent vagueness test." *Vill. of Hoffman Ests.*, 455 U.S. at 499; *see also Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006)

("[F]reedom of speech prohibits the government from telling people what they must say.") (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)). In any event, even if it did not compel speech, this regulation, like the others, imposes criminal penalties with no *mens rea* requirement, necessitating a high degree of definiteness. *See Vill. of Hoffman Ests.*, 455 U.S. at 499. Finally, stricter scrutiny is required because the threat to the public of the conduct prohibited—not sufficiently itemizing a security-deposit return letter—is exceedingly low (and certainly is not *malum in se*). *See Planned Parenthood*, 7 F.4th at 602.

Section ATCP 134.06(4)(a) cannot withstand heightened constitutional scrutiny. The regulation's requirement to "describe each item of physical damages or other claim" and to account for the amount withheld for "each item or claim" is undefined and is open to numerous interpretations. Lay and legal dictionaries provide multiple open-ended definitions for "claim," including "a demand for something due or believed to be due," "a right to something," "an assertion open to challenge," or "something that is claimed." *Claim*, Merriam-Webster;[19] *see also Claim*, Black's Law Dictionary (11th ed. 2019) ("[a] statement that something yet to be proved is true," [t]he assertion of an existing right; any right to payment or to an equitable remedy," "[a] demand for money, property, or a legal remedy to which one asserts a right," "[a]n interest or remedy recognized at law"). The term "item" likewise has many definitions, including "a distinct part in an enumeration, account, or series," "an object of attention, concern, or interest," or "a separate piece of news or

[19] https://www.merriam-webster.com/dictionary/claim.

information." *Item*, Merriam-Webster.[20] None of these definitions clarify whether a security-deposit return is sufficiently detailed to satisfy the requirement to describe each "item of physical damage" and each "claim."

For instance, if a landlord withholds money from a tenant's security deposit to cover the damage of several holes in a wall, is each hole an "item of physical damage" or is the wall the "item of physical damage"? And if a tenant owes utilities for multiple months, is each month owed a separate "claim," or are the unpaid utilities as a whole the "claim"? Indeed, much like the terms "neighborhood" and "locality" at issue in *Connally*, the terms "item" and "claim" "offer a choice of uncertainties," since they "are elastic and . . . may be equally as satisfied by areas measured by rods or miles. *Connally*, 269 U.S. at 395. An "item of physical damage[ ]" or a "claim" can fairly be used and understood either narrowly or broadly. Such "elastic" terms fail to provide fair notice or standards for fair enforcement. *Id.* A landlord should not be imprisoned for failing to navigate these trivialities to the State's arbitrary satisfaction.

Courts themselves differ over whether certain charges are sufficiently itemized. Consider first *Heiman v. Roe*, in which the court of appeals disagreed with a circuit court on this point. 2022 WL 14177251, at *3–5 (Wis. Ct. App. Oct. 25, 2022) (unpublished). While the circuit court reasonably thought that, because unpaid water bills exceeded the security-deposit amount, the landlord was not required to itemize any other money owed to him by the tenant, *id.* at *3, the court of appeals reasonably saw it differently, concluding that the statement failed to sufficiently itemize the

[20] https://www.merriam-webster.com/dictionary/item.

withholding statement, *see id.* at *4–*5. Cases from other jurisdictions have likewise clashed over such technicalities, such whether a "general cleaning" charge is sufficiently itemized. *Compare Nolan v. Sutton*, 647 N.E.2d 218, 220 (Oh. App. Ct. 1994) (finding "$40–cleaning" charge to be insufficiently itemized), *with Castillo-Cullather v. Pollack*, 685 N.E.2d 478, 485 (Ind. Ct. App. 1997), *abrogated on other grounds by Mitchell v. Mitchell*, 695 N.E.2d 920 (Ind. 1998) (finding $26 "general cleaning" charge to be sufficiently itemized). This confirms that this phrase contains no discernible standard. *See Cohen Grocery Co.*, 255 U.S. at 89–91.

In other contexts, as well, courts struggle to define the term "claim." Indeed, this issue often arises in insurance contracts that limit liability or provide deductibles on a "per claim" basis. Parties frequently disagree and courts labor to discern whether and when something is a "claim," such that "each claim" is covered (or not) by the insurance policy. *See, e.g.*, *Lamberton v. Travelers Indem. Co.*, 325 A.2d 104, 106 (Del. Super. Ct. 1974), *aff'd*, 346 A.2d 167 (Del. 1975) ("claim" was an "[a]ssertion by a person injured"); *ProBuilders Specialty Ins. Co., RRG v. Yarbrough Plastering, Inc.*, 739 F. App'x 395, 396–97 (9th Cir. 2018) ("claim" was legal action filed against subcontractor, not original claims of injury by homeowners); *Atlas Underwriters, Ltd. v. Meredith-Burda, Inc.*, 343 S.E.2d 65, 68 (Va. 1986) (disagreeing with trial court on the meaning of the term "claim").

Section 134.06(4)(a)'s requirement to "describe each item of physical damages or other claim" and to account for the amount withheld for "each item or claim" can also lead to confusion among landlords. By way of example, the University of

Wisconsin–Madison provides an exemplar security deposit letter itemizing withdrawals.[21] One item is a "[c]leaned stove top and replace[d] burner drip pans that couldn't be cleaned."[22] Yet the landlord, reading the regulation for herself, might instead have itemized the entire stove (less the top), thinking the stove the relevant "item."

In all, the requirement to "describe each . . . claim" or "each item of physical damages" leaves landlords, courts, juries, and all others to simply "guess" as to whether any given description meets this standard, in violation of due process. *Coates*, 402 U.S. at 614; *Larson v. Burmaster*, 2006 WI App 142, ¶ 29, 295 Wis. 2d 333, 720 N.W.2d 134.

The Wisconsin Court of Appeals' decision in *State v. Lasecki*, 2020 WI App 36, 392 Wis. 2d 807, 946 N.W.2d 137, has no impact on this analysis. There, the court addressed a challenge to a different portion of the regulation—namely, the requirement to send a statement at all. *Id.* ¶¶ 17, 40 (addressing only the language that a "landlord shall deliver or mail to the tenant a written statement accounting for all amounts withheld") (citation omitted). The requirement to send a statement was, of course, clear in the law. *Id.* But the requirement to "describe each item of physical damages" and "claim" against the security deposit is not nearly as straightforward,

[21] https://fyi.extension.wisc.edu/rentsmart/modules/module-f/activity-5-security-deposit-deductions.

[22] https://fyi.extension.wisc.edu/rentsmart/files/2019/10/F-act-5-handout-6.pdf.

and the *Lasecki* court offered no opinion as to that portion of the regulation. *See generally id.* ¶¶ 15–17, 40.[23]

3. Section ATCP 134.09(2) is unconstitutionally vague

Section ATCP 134.09(2) of the Wisconsin Administrative Code prohibits a landlord from "[e]nter[ing] a dwelling unit during tenancy except to inspect the premises, make repairs, or show the premises to prospective tenants or purchasers" and requires the landlord entering for such purposes to stay only for "the amount of time reasonably required" to carry out the specific task. Wis. Admin. Code ATCP § 134.09(2)(a)(1). Further, under this provision, no landlord may "[e]nter a dwelling unit during tenancy except upon advance notice and at reasonable times" (with advance notice defined as at least 12 hours). *Id.* § 134.09(2)(a)(2). The law provides exceptions where a tenant has consented to or requested the landlord's entry, a "health or safety emergency exists," or if "[t]he tenant is absent and the landlord reasonably believes that entry is necessary to protect the premises from damage." *Id.* § 134.09(2)(b).

Section ATCP 134.09(2) would fail even under a more forgiving vagueness test. But, again, a landlord is subject to criminal penalties for violating Section ATCP 134.09(2), which contains no *mens rea* requirement and regulates conduct merely

[23] Nor is the court of appeals' unreasoned decision in *State v. LaPlant*, 204 Wis. 2d 412, 555 N.W.2d 389 (Ct. App. 1996), relevant here. There, the court considered a vagueness challenge to an entirely different regulation, Section ATCP 134.04. *Id.* at 422–23. The defendant challenged the phrases "good operating condition," "safe operating condition," "substantial hazard to health and safety," and "disclose." *Id.* The court asserted that "the ordinary meaning of these phrases" was sufficiently definite for fair notice and fair enforcement because, unlike the phrases challenged here, they permit a landlord to "determine[ ] when he or she is reaching [a general] zone of conduct proscribed." *Id.* at 423.

malum in prohibitum. *See* Wis. Stat. § 100.26(6); *Planned Parenthood*, 7 F.4th at 602. The regulation is therefore subject to a "stringent" vagueness test. *Peoples Rights Org.*, 152 F.3d at 534; *Vill. of Hoffman Estates*, 455 U.S. at 498–99. And Section ATCP 134.09(2) utterly fails to meet it. Several of the terms used in the regulation are unconstitutionally vague on their own and certainly unconstitutional in combination. *See Johnson*, 576 U.S. at 602.

First, the word "repair" is unconstitutionally vague. While the regulation permits entry for a "repair[ ]," Wis. Admin. Code § ATCP 134.09(2)(a)1., the term is undefined in the regulations, *see* Wis. Admin. Code Ch. ATCP 134, and is susceptible of different meanings. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 772–73. The dictionary defines "repair" as "to restore by replacing a party or putting together what is torn or broken," or "to restore to a sound or healthy state." *Repair*, Merriam-Webster Dictionary. Under the law, however, it is not clear whether replacing an item is the same as repairing it. In a closely related statute, the Legislature imposes upon landlords a duty to keep the premises "in a reasonable state of repair," to "[m]ake all necessary structural repairs," and to "repair or replace any plumbing, electrical wiring, machinery, or equipment furnished with the premises and no longer in reasonable working condition." Wis. Stat. § 704.07(2); *see State v. Reyes Fuerte*, 2017 WI 104, ¶¶ 26–27, 378 Wis. 2d 504, 904 N.W.2d 773 (laws are interpreted "in relation to the language of . . . closely-related statutes," which are those that "use similar terms"). That the statute separates the terms "repair" and "replace" sows confusion as to whether a replacement is a repair.

As evidence of this vagueness, courts and attorneys have struggled to determine when something is a "repair" and when something is a "replace[ment]." For example, during a summary-judgment hearing in a case alleging that a landlord impermissibly charged tenants for certain "repairs," the court and counsel engaged in an extended discussion of "the [statutory] meaning of repair and replacement," with the court describing this conversation as "going around in circles." Summ. J. Mot. Hr'g Tr. 37–42, *State of Wisconsin v. Wis. O'Connor Corp.*, No. 15-CX-0001 (Milwaukee Cnty. Cir. Ct. Feb. 7, 2017). In particular, the court asked whether replacing a washer within a leaking faucet would constitute a "repair" or a "replacement"—and struggled to find an answer. *Id.* at 38–40. Confirming the ambiguity of the term "repair," ATCP required an Attorney General Opinion to determine whether cleaning can constitute a "repair." *See* OAG-04-13 (July 30, 2013).[24] This opinion, in turn, "disagree[d] with" an earlier opinion of an Assistant Attorney General on the subject. *Id.* ¶¶ 12, 18. That courts and the Wisconsin Department of Justice struggle to define the term "repair" consistently over time and disagree over its application indicates that the term is insufficiently definite. *See Cohen Grocery Co.*, 255 U.S. at 89–91.

A landlord misunderstands "repair" at her peril. Suppose she wishes to replace a window in one of her apartments because, although it works well (it easily opens and shuts, keeps out water, etc.), it does not perfectly seal and therefore creates a draft, causing an uptick in heating and cooling bills. The tenant refuses to permit

[24] https://docs.legis.wisconsin.gov/misc/oag/recent/oag_4_13.pdf.

entry, so the landlord posts a 12-hour notice of entry and prepares to do the work. But, since she would prefer not to commit a crime, she wonders what work, exactly, she may do. She knows that it would be more cost-effective over the long run simply to swap out the old window for a newer model, which she has on hand and has installed in several other units. But would this constitute a "repair" or a "replacement"? Perhaps she would be better off tinkering with the existing, faulty window to seal the leak—at greater cost to herself and (ultimately) to tenants—since that would seem more comfortably to fit the definition of a "repair." But what if the minimal patch-up work fails to block the draft? Now she has failed to "repair" anything, under any definition of the word. She has instead unlawfully entered a dwelling during tenancy. Her only hope is that the tenant, with whom she has had issues in the past, does not notify the State of her crime and that, if he does, the State shows mercy and declines to seek her imprisonment.

Additional problems are raised by the landlord's duty to "repair" and "replace" certain items. Wis. Stat. § 704.07(2). A landlord cannot avoid entering a dwelling unit—she is required by law to do so. *See id.* But when she enters, she opens herself up to potential criminal liability. *See* Wis. Stat. § 100.26(3). And because the law imposes strict liability, landlords who unintentionally violate § 134.09(2)(a)(1) in their efforts to meet other legal obligations will not be able to defend themselves on the grounds that they reasonably believed they were discharging a legal duty. *See Stepniewski*, 105 Wis. 2d 261. This renders the vagueness of Section ATCP 134.09(2) even more offensive to notions of due process and fair play. *See Loc. 8027, AFT-N.H.,*

AFL-CIO v. Edelblut, No. 21-CV-1077-PB, 2023 WL 171392, at *14 (D.N.H. Jan. 12, 2023) (explaining that a ban's vagueness "problems [were] compounded" by the fact that teachers had "an affirmative duty to teach topics that potentially implicate several of the banned concepts"); *see also Doe v. Snyder*, 101 F. Supp. 3d 722, 724 (E.D. Mich. 2015) ("Holding an individual criminally liable for failing to comply with a duty imposed by statute, with which it is legally impossible to comply, deprives that person of his due process rights.").

The term "inspect" is equally vague. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Glickman*, 127 F. Supp. 2d 243, 247 (D.D.C. 2001) (the term "inspection" is "*absolutely* ambiguous"), *aff'd sub nom.*, 284 F.3d 125 (D.C. Cir. 2002). A landlord may enter to "inspect the premises," Wis. Admin. Code § ATCP 134.09(2)(a)1., but "inspect" is not defined. *See generally* Wis. Admin. Code ch. ATCP 134. And it is a term susceptible of different meanings. *See Hall*, 912 F.3d at 1227; *Whatley*, 833 F.3d at 772–73. Indeed, dictionaries provide "numerous" and "varied" meanings. *Lanzetta*, 306 U.S. at 453–55; *see, e.g.*, *Inspect*, Merriam-Webster ("to view closely in critical appraisal," "look over," "to examine officially"); *Inspect*, Cambridge Dictionary ("to look at something carefully in order to check its quality or condition," "to officially visit a building or organization in order to check that everything is correct and legal"); *see People v. Bailey*, 903 N.E.2d 409, 413 (Ill. 2009) (dictionaries and "various intrinsic aids to construction . . . do not resolve" the meaning of "inspect" but "instead, only add ambiguity"). Hence "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Larson*, 2006 WI App 142, ¶ 29 (citation

omitted). For example, must a landlord have an express or "apparent purpose" when looking at the dwelling to be considered an "inspect[ion]"? *See Morales*, 527 U.S. at 57. Does the "inspect[ion]" need to be "official" in some way? If so, what does that even mean? How carefully must a landlord look at the premises for it to be considered an "inspect[ion]"? Must it be a thorough examination of the unit? Or is *any* entry an inspection, so long as the landlord is not blindfolded and therefore cannot help but "look over" some part of the unit because her vision is unimpaired?

Industry guidance is once again unhelpful and contradictory. Legal Action of Wisconsin maintains that an inspection is something more official, calling them "health/building inspections." *Tenant Sourcebook* at 20, Legal Action of Wisconsin.[25] By contrast, the Tenant Resource Center suggests that an inspection can be something less formal, giving examples of "a routine inspection, to check out a problem prior to making requested repairs, or to inspect for occupancy." *Landlord Entry*, Tenant Resource Center.[26] And "guidance" from DATCP adds nothing, simply repeating its rule that a landlord may enter to "[i]nspect the premises." *Landlord Tenant Guide*, *supra*, at 7.

Third, the term "health or safety emergency" is impermissibly vague. While the regulation allows entry if "a health or safety emergency exists," Wis. Admin. Code § ATCP 134.09(2), this term is, again, not defined. *See generally* Wis. Admin. Code ch. ATCP 134. Dictionary definitions are likewise unhelpful, as they leave the term up to subjective interpretation. *See Emergency*, Merriam-Webster ("an unforeseen

[25] https://www.legalaction.org/data/cms/Tenant%20Sourcebook%20-%20revised%202020.pdf.
[26] https://www.tenantresourcecenter.org/landlord_entry.

combination of circumstances or the resulting state that calls for immediate action"); *Williams*, 553 U.S. at 306 (words requiring "wholly subjective judgments" are unlawfully vague). Men of ordinary intelligence must guess at its meaning and differ in its application. *Larson*, 2006 WI App 142, ¶ 29. What constitutes an "emergency" to one person may not constitute an "emergency" to others. *See Coates*, 402 U.S. at 614. Or, even if the landlord and tenant might generally agree on what qualifies as an "emergency," the landlord might lack perfect information. She might enter after being told of smoke billowing out from under a front door, fearing a fire, only to discover that the tenant and his 12 friends are igniting cedar spills to light cigars before a card game—and that she is now a criminal facing 12 months in jail.

Courts have long strained to define an "emergency." For example, in *Mueller v. McMillian Warner Insurance Co.*, the court of appeals and the circuit court disagreed as to what constituted "emergency care" under the Good Samaritan Law. 2005 WI App. 210, ¶¶ 23–35, 287 Wis. 2d 154, 704 N.W.2d 613. The court of appeals engaged in a lengthy analysis to determine the meaning of "emergency care" and "scene of [an] emergency," admitting that these terms are legally "ambiguous." *Id.* ¶¶ 23–29. The Wisconsin Supreme Court similarly struggled to create a clear definition, instead "attempt[ing] to provide a flexible, broad working definition of emergency care that is suitable for the present case and may be suitable for a multitude of other cases." *Mueller v. McMillian Warner Ins. Co.*, 2006 WI 54, ¶¶ 36–46, 290 Wis. 2d 571, 714 N.W.2d 183. The exigency doctrine of the Fourth Amendment

is another area in which courts struggle to define what is an "emergency" or "exigency." *See State v. Kraimer*, 99 Wis. 2d 306, 316, 298 N.W.2d 568 (1980).[27]

At the very least, Section 134.09(2) is unconstitutionally vague when all of these indefinite terms and phrases are read in combination. Again, the law imposes a duty on a landlord to "repair or replace" certain items. Wis. Stat. § 704.07(2). But a landlord cannot know whether replacing a pipe or fixture, or even a light bulb, is allowed as a "repair" under the regulation. And if there is a problem reported, the landlord does not know whether she can enter to "inspect" the premises. Even if she knew whether she could enter, she has no measure by which to determine what length of time is "reasonably required" to remain in the premises. And while she may be able to enter and stay regardless, this is true only if "a health or safety emergency exists," which she has no way of knowing, as this is a subjective determination. Or she may believe that entry is "necessary" to prevent damage to the premises, but someone else might believe differently. How can she judge if her belief is "reasonable"? In combination, these myriad vague and ambiguous terms call for

[27] This regulation's vagueness is exacerbated by the term "reasonably required," in reference to the permissible amount of "time" spent in the unit. *See supra* n.18. The regulation allows a landlord to "enter [only] for the amount of time reasonably necessary" to do the permitted activity. Wis. Admin. Code § ATCP 134.09(2)(a)1. And the regulation allows a landlord to enter if a "tenant is absent and the landlord reasonably believes that entry is necessary to protect the premises from damage." *Id.* § ATCP 134.09(2)(b)3. But there is no stick by which to measure reasonableness or necessity, so it leaves ordinary persons to guess at its meaning and differ as to its application. *Larson*, 2006 WI App 142, ¶ 29; *see also supra* n.18. Again, what is "reasonable" or "necessary" to one person may not be to another. *See Coates*, 402 U.S. at 614. The term "reasonabl[y]" here is "susceptible to a myriad of interpretations" and unconstitutionally vague. *Belle Maer Harbor*, 170 F.3d at 558; *Cohen Grocery Co.*, 255 U.S. at 89; *Cline*, 274 U.S. at 457.

"guesswork" about whether entry, even when required by law, is forbidden by Section ATCP 134.09(2). *Johnson*, 576 U.S. at 602.

C. Section ATCP 134.08 Exceeds DATCP's Authority and Is Therefore Invalid

An agency exceeds its authority when it exercises power not granted by statute. "[A]dministrative agencies are creatures of the legislature" and therefore have only the authority granted by statute. *Myers v. Wis. Dep't of Nat. Res.*, 2019 WI 5, ¶ 21, 385 Wis. 2d 176, 922 N.W.2d 47. An agency rule that exceeds its statutory authority is invalid. *See Wis. Legislature v. Palm*, 2020 WI 42, ¶¶ 43–59, 391 Wis. 2d 497, 942 N.W.2d 900; *see also* Wis. Stat. §§ 227.11(2)(a), 227.40(4)(a). If a statutory grant of authority is "imprecise," courts will "narrowly construe" the grant. *Palm*, 2020 WI 42, ¶ 52. More, the rule of lenity requires that statutes and regulations carrying criminal penalties be narrowly construed. *See State v. Devitt*, 82 Wis. 2d 262, 269, 262 N.W.2d 73 (1978).

Administrative regulations, as well as statutes, are interpreted according to their plain terms. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶¶ 44–45, 271 Wis. 2d 633, 681 N.W.2d 110; *see also Wis. Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 45, 311 Wis. 2d 579, 754 N.W.2d 95 ("[W]hen interpreting administrative regulations, we use the same rules of interpretation as we apply to statutes.") (citation omitted). Courts "should not read into the [regulation] language that the [agency] did not put in." *Wis. Realtors Ass'n v. Pub. Serv. Comm'n of Wis.*, 2015 WI 63, ¶ 89 n.32, 363 Wis. 2d 430, 867 N.W.2d 364 (citation omitted). More, "where a [regulation] with respect to one subject contains a given provision, the

omission of such provision from a similar [regulation] concerning a related subject is significant in showing that a different intention existed." *Kimberly-Clark Corp. v. Pub. Serv. Comm'n of Wis.*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) (citation omitted). Finally, a "[regulation] must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *State v. Hall*, 207 Wis. 2d 54, 89, 557 N.W.2d 778 (1997) (citation omitted). When a regulation carries criminal penalties, this requires construing the regulation narrowly, to ensure fair warning in accordance with due process. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *Liparota v. United States*, 471 U.S. 419, 426–28 (1985).

No statute provides DATCP with authority to enact Section ATCP 134.08. Section ATCP 134.08 provides that "a rental agreement is void and unenforceable if it does any of the following" enumerated acts. Wis. Admin. Code § ATCP 134.08. But no statute provides DATCP with authority to render contracts void and unenforceable. Section ATCP 134.08 therefore exceeds DATCP's authority. *See Palm*, 2020 WI 42, ¶¶ 43–59; Wis. Stat. §§ 227.11(2)(a), 227.40(4)(a).

DATCP relies on its authority under Wis. Stat. § 100.20 to support Section ATCP 134.08, *see* Wis. Admin. Code § ATCP 134.01 ("This chapter is adopted under authority of s. 100.20, Stats."), but that statute does not provide DATCP with authority to render contracts void and unenforceable. Instead, Section 100.20 provides that DATCP may, by general order, "forbid[ ] methods of competition in business or trade practices in business which are determined by the department to

be unfair" and "prescrib[e] methods of competition in business or trade practices in business which are determined by the department to be fair." Wis. Stat. § 100.20(2)(a). Nothing in this statute allows DATCP to declare contracts void and unenforceable. Nor is declaring contracts void and unenforceable the same thing as "forbidding" or "prescribing" methods of competition or trade practices. Section 134.08 does not say that a landlord "may not" or "shall not" include the listed provisions in a rental agreement. Nor does the rule say that a landlord "is prohibited from" including these provisions. Instead, the rule states only that a contract "is unenforceable" if it contains any of the listed provisions. Including a prohibition on conduct would require "read[ing] into the [regulation] language that [DATCP] did not put in." *Wis. Realtors Ass'n*, 2015 WI 63, ¶ 89 n.32.

Context confirms that Section ATCP 134.08 does not "forbid" or "prescribe" anything. In several other provisions of Chapter ATCP 134, DATCP used language plainly forbidding or prescribing conduct. *See, e.g.*, Wis. Admin. Code § ATCP 134.06(2) ("[a] landlord shall deliver or mail to a tenant the full amount of any security deposit paid by the tenant, less any amounts that may be withheld under sub. (3)"); *id.* § ATCP 134.06(4) ("[i]f any portion of a security deposit is withheld by a landlord, the landlord shall . . . deliver or mail to the tenant a written statement accounting for all amounts withheld."); *id.* § ATCP 134.07(3) ("[n]o landlord shall fail to complete [ ] promised cleaning, repairs or improvements on the date or within the time period represented"); *id.* § ATCP 134.09 ("[n]o landlord may rent or advertise for rent any premises which have been placarded and condemned for human habitation,"

"no landlord may . . . [e]nter a dwelling unit during tenancy except to inspect the premises, make repairs, or show the premises to prospective tenants or purchasers," "[n]o landlord shall enforce, or attempt to enforce, an automatic renewal or extension provision in any lease," "[n]o landlord may exclude, forcibly evict or constructively evict a tenant from a dwelling unit, other than by an eviction procedure specified under ch. 799, Stats."). Clearly, DATCP can write regulations that forbid or prescribe conduct. That Section ATCP 134.08 is not written this way "is significant in showing that a different intention existed," *Kimberly-Clark Corp.*, 110 Wis. 2d at 463—namely, that the regulation does not forbid or prescribe conduct.

If there were any doubt as to whether Section ATCP 134.08 merely, as it plainly states, renders contracts "void and unenforceable," or whether it also forbids conduct, that doubt must be construed in favor of the former. Any "imprecise" delegation of agency power must be construed narrowly. *Palm*, 2020 WI 42, ¶ 52. More, violations of Chapter ATCP 134 are punishable as crimes, *see* Wis. Stat. § 100.26(3), and thus Chapter ATCP 134 must be construed narrowly to avoid doubt upon its constitutionality and under the rule of lenity. *See Davis*, 139 S. Ct. at 2333; *Liparota*, 471 U.S. at 426–28.

Finally, the Wisconsin Supreme Court's decision in *Baierl v. McTaggert* has no bearing on this analysis. 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277. In that case, the Court addressed an entirely different question about an entirely different version of the regulation. At that time, Section ATCP 134.08 stated, "No rental agreement may" do any of a number of enumerated things. *See* Wis. Admin. Code § ATCP 134.08

(1999).[28] And the *Baierl* Court addressed only the question of "whether [a landlord] may enforce" a lease containing a provision enumerated in then-ATCP 134.08. 2001 WI 107, ¶¶ 14, 33. Indeed, the parties did not even dispute that entering a lease with a listed provision constituted a "violation of Wisconsin law." *Id.* ¶ 13. The Court's decision that the "subject matter, history, and object" of then-ATCP 134.08 rendered unenforceable leases "containing [a] prohibited provision," *id.* ¶ 33, has nothing to do with whether current-ATCP 134.08 exceeds DATCP's statutory authority. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 57, 324 Wis. 2d 325 782 N.W.2d 682 (Wisconsin Supreme Court opinion addressing a different legal question was "inapplicable as precedent"); *Wis. Just. Initiative, Inc. v. Wis. Elections Comm'n*, 2023 WI 38, ¶¶ 41, 49, 407 Wis. 2d 87, 990 N.W.2d 122 ("explanatory statement[s]" in Wisconsin Supreme Court opinions are not binding).[29]

II. CONSTANTLY UNDER THREAT OF CRIMINAL PROSECUTION FOR "VIOLATING" DATCP'S INDECIPHERABLE REGULATIONS, PLAINTIFFS ARE SUFFERING—AND WILL CONTINUE TO SUFFER—IRREPARABLE HARM

Under longstanding precedent, injunctive relief is warranted when a plaintiff faces the Hobson's choice of complying with an unlawful regulation or risking criminal penalties. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380–81 (1992). To seek injunctive relief in these circumstances, "[o]ne does not have to await

[28] Indeed, that the regulation no longer contains language indicating a prohibition is further evidence that DATCP did not intend Section ATCP 134.08 to prohibit conduct. *See Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581.

[29] The Wisconsin Circuit Court for Milwaukee County has held that Section ATCP 134.08 prohibits conduct. *See* Decision and Order, *State v. Berrada Properties Management, Inc.*, No. 21-CX-11 (Milwaukee Cnty. Cir. Ct. Feb. 8, 2023). This Court is not bound by that decision. *Teriaca v. Milwaukee Emps.' Ret. Sys./Annuity & Pension Bd.*, 2003 WI App 145, ¶ 17, 265 Wis. 2d 829, 667 N.W.2d 791 ("[T]his court is not bound by the decision of another branch of the circuit court.") (quoting circuit court).

the consummation of threatened injury" to meet the irreparable harm requirement. *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). The mere threat of enforcement is enough. Put another way, "a plaintiff's purported choice to comply—or else—with a challenged government dictate . . . is adequate to establish irreparable harm." *VanDerStok v. Garland*, No. 4:22-CV-00691-O, 2022 WL 4809376, at *5 (N.D. Tex. Oct. 1, 2022); *Morales*, 504 U.S. at 381 (same). Likewise, "[t]he threat of criminal prosecution also constitutes irreparable harm." *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1309 (S.D. Fla. 2008). And the irreparable harm requirement is easily satisfied when a plaintiff faces "[t]he choice between threatened enforcement or complying with an unconstitutional law." *McLemore v. Gumucio*, No. 3:19-CV-00530, 2019 WL 3305131, at *12 (M.D. Tenn. July 23, 2019); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017) (finding plaintiff established a "constitutional injury" and "irreparable harm" "by being forced to comply with an unconstitutional law or else face financial injury"); *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997) (finding irreparable injury where "Plaintiff is faced with the decision of either complying with regulations that are unconstitutional or violating his [t]own's laws.").[30] This is especially so with unconstitutionally vague

[30] The threshold for demonstrating irreparable harm is generally lower when a claim is based on a prospective constitutional violation. *Burgess v. Fed. Deposit Ins. Corp.*, No. 7:22-CV-00100-O, 2022 WL 17173893, at *11 (N.D. Tex. Nov. 6, 2022) (granting injunction from denial of right to jury trial because "[the] concept that a violation of a constitutional right in and of itself constitutes irreparable injury has been universally recognized and is not open to debate"); *Planned Parenthood S.W. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015) ("[W]hen a constitutional right is being threatened or impaired, a finding of irreparable harm is mandated."); *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights.") (collecting cases); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C.Cir. 1998) ("[A] prospective violation of a constitutional right constitutes

laws. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1306–07, 1319 (11th Cir. 2017) (en banc) (affirming enjoining of vague anti-harassment provision). A plaintiff "looking down the barrel of [an agency]'s disciplinary gun" need not "guess whether the chamber is loaded." *Id*. at 1306.

Particularly relevant here, a plaintiff suffers irreparable harm when the government unlawfully "interfere[s] with the provisions of [a property] lease" and the plaintiff faces "forfeiture and penalties provided for by [] statute" for failure to comply with the government's demands. *Chippewa Power Co. v. R.R. Comm'n of Wis.*, 188 Wis. 246, 205 N.W. 900, 904–05 (1925) (holding plaintiff would suffer "irreparable loss" due to Railroad Commission's enforcement action and enjoining Commission's efforts "to control the rentals in the lease," including efforts "to approve or disapprove of the lease and [its] terms and conditions"). Put another way, government actions that unlawfully "interfere[] in a substantial way with plaintiffs' efforts to establish or maintain ongoing lease arrangements" constitute irreparable harm. *Ziggy1 Corp. v. Lynch*, 123 F. Supp. 3d 1310, 1320 (W.D. Okla. 2015). In such cases, an injunction is "the only adequate remedy." *Chippewa Power Co.*, 205 N.W. at 905.

Here, absent injunctive relief, Plaintiffs face irreparable harm because they are "vulnerable on a recurring basis to sustaining a criminal charge" and the resulting "stigma[ ]" associated with criminal penalties. *Kenny v. Wilson*, 566 F. Supp. 3d 447, 461, 465 n.9 (D.S.C. 2021), *aff'd sub nom. Carolina Youth Action Project; D.S. by & through Ford v. Wilson*, 60 F.4th 770 (4th Cir. 2023) (enjoining

irreparable injury[.]"); *Anderton v. City of Milwaukee*, 82 Wis. 279, 52 N.W. 95, 96 (1892) (affirming preliminary injunction against ordinance that violated federal due-process clause).

enforcement of vague statutes). This stigma brings with it the risk of harm to Plaintiffs' goodwill and reputation in the residential leasing market for guessing incorrectly. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009) (holding irreparable harm existed where plaintiffs faced the choice of signing unconstitutional agreements or the loss of customer goodwill and significant business).[31] Plaintiffs are thus faced with a choice between "violat[ing] [Wisconsin] law and expos[ing] themselves to potentially huge liability; or violat[ing] the law once as a test case and suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review." *Morales*, 504 U.S. at 381.

More, Plaintiffs are irreparably harmed because the vague mandates of Wisconsin Administrative Code Sections ATCP 134.06(3)–(4) and 134.09(2) allow DATCP to impose unreasonable burdens and arbitrarily interfere with Plaintiffs' ongoing lease arrangements under the threat of criminal prosecution. The regulations' lack of clarity chills lawful commercial conduct. *See, e.g.*, Jensen Aff. ¶¶ 13–16; D. Bearden Aff. ¶¶ 9, 11, 13, 16; K. Bearden Aff. ¶¶ 10, 12, 13, 15, 19. This is irreparable harm. *See Chippewa Power Co.*, 205 N.W. at 905.

Last but not least, the violation of Plaintiffs' constitutional rights constitutes irreparable harm. A deprivation of constitutional rights is irreparable harm. *See*

[31] Indeed, irreparable harm exists merely from the threat of harm to Plaintiffs' goodwill and reputation. *See Trial Laws. Coll. v. Gerry Spence Trial Laws. Coll. at Thunderhead Ranch*, 23 F.4th 1262, 1272 (10th Cir. 2022); *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005) (enjoining order of the Georgia Public Service Commission and holding "the loss of customers and goodwill is an irreparable injury") (citation omitted); *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (holding "[h]arm to reputation and goodwill" constitutes irreparable harm and "is difficult, if not impossible, to quantify in terms of dollars").

Elrod v. Burns, 427 U.S. 347, 373 (1976); 11A C. Wright & A. Miller, *Fed. Prac. & Proc.* § 2948.1 (3d ed. 2021) ("When an alleged deprivation of a constitutional right is involved . . . , most courts hold that no further showing of irreparable injury is necessary.") (collecting cases). And the fact that Plaintiffs even "*may* be" "forced to spend time, money, and resources to comply" with laws "that may later be struck down" is enough to "satisf[y] the [irreparable harm] factor of the preliminary injunction analysis." *Air Evac EMS., Inc. v. Dodrill,* 548 F. Supp. 3d 580, 595 (S.D.W. Va. 2021).

That these regulations have been on the books for several years does not nullify the irreparable harm caused by their vagueness. Some Plaintiffs have been landlords for only a short time or are planning to become landlords soon, and therefore have only recently become aware of and subject to these regulations. *See* Jensen Aff. ¶ 3 (purchased first rental property in May 2021); Janny Aff. ¶ 4 (purchased first rental property in 2022 and plans to rent it soon); Gooch Aff. ¶ 3 (purchased rental properties six and three years ago).

III. AN INJUNCTION IS NECESSARY TO PRESERVE THE LAWFUL STATUS QUO

Courts, including in Wisconsin, routinely issue temporary injunctions where necessary to restore the *lawful* status quo.[32] *See, e.g.*, Order, *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (Wis. April 6, 2020) (enjoining Governor's order moving date of election); Order Granting Temporary Injunction, *Wisconsin State Senate, et*

[32] It is not clear that the "necessary to preserve the status quo" factor applies to all requests for a temporary injunction. *See Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d 356 969 N.W.2d 263 (citation omitted) (explaining that, "*[a]t times*, this court has also noted" that an injunction must be necessary to preserve the status quo) (emphasis added).

al. v. City of Green Bay, et al., No. 2023-cv-250 (Brown Cnty. Cir. Ct. March 2, 2023) (temporarily enjoining the City from continuing to use audio-recording devices in City Hall); Order Granting Temporary Injunction, *Kormanik v. Wisconsin Elections Commission*, No. 2022-cv-1395 (Waukesha Cnty. Cir. Ct. Oct. 7, 2022) (temporarily enjoining agency's promulgated guidance document); Order, *White, et al. v. Wisconsin Elections Commisson*, No. 2022-cv-1008 (Waukesha Cnty. Cir. Ct. Sept. 7, 2022) (same).

"An unconstitutional act . . . is not a law. It confers no rights, imposes no penalty, affords no protection, is not operative, and, in legal contemplation, has no existence." *John F. Jelke Co. v. Hill*, 208 Wis. 650, 242 N.W. 576, 581 (1932). For those reasons, a court properly "exercise[s] its discretion in issuing [a] temporary injunction" over "provisions [that] are unconstitutional." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶¶ 114–15, 393 Wis. 2d 38, 946 N.W.2d 35. Under this framework, "the granting of the temporary injunction [thus] preserve[s], rather than upset[s], the status quo" when a party lacks legal authority to perform the act enjoined. *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964). An injunctive "order does no more than preserve the status quo" when it "does not hinder any legitimate activities of the defendants" and "[t]he only conduct which is enjoined is conduct forbidden by statute or the common law." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 263, 219 N.W.2d 564 (1974).[33] Likewise, a

[33] "The purpose of a preliminary injunction" is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). When "the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d

court "act[s] well within its jurisdiction" to enjoin official acts "in contravention of the Constitution." *John F. Jelke Co.*, 242 N.W. at 581 ("This is the power to preserve the status quo."); *Serv. Emps. Int'l Union, Loc. 1*, 2020 WI 67, ¶ 114 (recognizing the same).

Here, the lawful status quo necessary to be maintained is the prohibition on DATCP's enforcement of unconstitutionally vague regulations. An injunction thus "preserve[s] the status quo" because it "save[s] [Plaintiffs] claiming relief from irreparable injury by the conduct of [DATCP] pending the litigation." *Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436, 78 N.W. 1096, 1099 (1899).

IV. PLAINTIFFS HAVE NO OTHER ADEQUATE REMEDY AT LAW

With respect to constitutional violations, it is generally recognized that there is no adequate remedy at law to rectify any resulting injury. *Allee v. Medrano*, 416 U.S. 802, 814–15 (1974). Moreover, injunctive relief is appropriate when compensatory damages are unavailable as a remedy. *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 859, 434 N.W.2d 773 (1989). "In the context of preliminary

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567, 576 (5th Cir. 1974). Wisconsin courts have long held the same. *See Valley Iron Works Mfg. Co. v. Goodrick*, 103 Wis. 436, 78 N.W. 1096, 1099 (1899) ("[P]reserv[ing] the status quo between the parties pending the final decree" includes "sav[ing] the person claiming relief from irreparable injury by the conduct of his adversary pending the litigation."); *Milwaukee Elec. Ry. & Light Co. v. Bradley*, 108 Wis. 467, 84 N.W. 870, 877 (1901) (same). For that reason, maintaining the status quo is not the foremost purpose in granting an injunction, which is why "not all of [the Wisconsin Supreme] [C]ourt's cases on temporary injunctive relief even impose a status quo requirement." *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.,* 2023 WI 35, ¶ 80, 989 N.W.2d 561 (R.G. Bradley, J., dissenting); *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978) ("Too much concern with the status quo may lead a court into error."). Instead, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod.* Co., 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000) (quoting *Canal Auth. of State of Fla.*, 489 F.2d at 576); *Sluiter v. Blue Cross & Blue Shield of Mich.*, 979 F. Supp. 1131, 1136 (E.D. Mich. 1997) ("[T]he prevention of irreparable harm should outweigh re-establishment of the status quo in fashioning interlocutory relief.").

injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (collecting cases); *Smith v. Wis. DATCP*, 23 F.3d 1134, 1138 (7th Cir. 1994) ("DATCP is a state agency. It therefore has sovereign immunity, and [plaintiff] cannot recover damages against it in federal court."). Here, if Plaintiffs incur monetary losses because of DATCP's enforcement of unconstitutionally vague regulations, no avenue exists to recoup those losses because the State has not waived its sovereign immunity from suits seeking such damages. Even if some forms of compensatory damages are calculable (such as the remaining rent owed on a voided lease or the costs of redundant repairs), the "[h]arm to [Plaintiffs'] reputation and goodwill" due to the stigma of a criminal prosecution "is difficult, if not impossible, to quantify in terms of dollars." *Med. Shoppe Int'l, Inc.*, 336 F.3d at 805.

CONCLUSION

This Court should grant Plaintiffs' motion for a temporary injunction.

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Respectfully submitted,

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