Nos. 17AP13, 16AP2503

In the Supreme Court of Wisconsin

ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP,
PETITIONERS,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE AND ROGER LANE, DANE COUNTY ZONING ADMINISTRATOR,
RESPONDENTS

ROBERT CAMPBELL, HEIDI CAMPBELL, KEITH REOPELLE, TRISHA REOPELLE, JAMES HOLMES, JAN HOLMES AND TIM JENSEN,
PLAINTIFFS-APPELLANTS,

v.

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP AND ENBRIDGE ENERGY LIMITED PARTNERSHIP WISCONSIN,
DEFENDANTS-RESPONDENTS-PETITIONERS

On Appeal From The Dane County Circuit Court,
The Honorable Peter Anderson, Presiding,
Case Nos. 16CV8, 16CV350

NONPARTY BRIEF OF THE STATE OF WISCONSIN IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Legislature has the authority to displace any county action through "uniform[ ]" legislation on matters of "statewide concern," Wis. Stat. § 59.03(1), such as beneficial development projects that create jobs and economic prosperity for the people of Wisconsin. In 2015 Wis. Act 55, the Legislature enacted the Pipeline-Insurance Statute, which provides that a county cannot require the operator of an "interstate" pipeline to "obtain insurance" if the operator's comprehensive general liability policy covers pollution that is both "sudden and accidental." Wis. Stat. § 59.70(25). Act 55 also prevents counties from imposing requirements for conditional-use permits that are preempted by federal or state law. Wis. Stat. § 59.69(2)(bs). Taken together, these provisions prevent counties from interfering with statewide projects by imposing non-uniform insurance requirements on pipeline operators.

Here, Dane County required Petitioners (hereinafter "Enbridge") to obtain "and maintain" millions of dollars' worth of liability insurance, among other requirements, in order to procure a conditional-use permit for its "interstate" pipeline, which cuts diagonally across the State from near Superior to Pontiac, Illinois. Enbridge Br.6; P-App.5–9. The circuit court concluded that Act 55 voided these conditions because Enbridge qualified for the Pipeline-Insurance Statute's protections, but the Court of Appeals reversed that decision. P.-App.15, 47. The Court of Appeals narrowed Act

55's limitation on county action by concluding, as relevant to the arguments in this brief, that the Legislature intended for the Pipeline-Insurance Statute's exclusion to apply only if the operator's policy covered all "accidental" pollution, including gradual pollution. P.-App.33–39. This interpretation rewrites the statute, contrary to the plain statutory text, and undermines Act 55's goal by giving each county in Wisconsin the ability to undermine projects of statewide importance.[1]

STATEMENT OF INTEREST

This case implicates the ability of the State to govern county actions, an issue in which the State has a core interest. *See* Wis. Stat. §§ 59.03, 59.69(2)(bs). The Department of Justice shall "appear" in actions in the Supreme Court "in which the state is interested." *Id.* § 165.25(1). In Wisconsin, "legislative power . . . is lodged in the Legislature." *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 28 (1936). Counties, which have statutory—not constitutional—home-

[1] In this brief, the State focuses on the proper interpretation of "sudden and accidental" in the Pipeline-Insurance Statute, an issue of statewide importance. The State does not opine on the more case-specific questions of whether the circuit court properly allowed the landowners to intervene in the certiorari action, whether this Court should strike the two permit conditions at issue if it concludes that they are invalid under Act 55, whether Enbridge showed that it has coverage for "sudden and accidental" pollution, and whether Dane County can impose insurance-related requirements that do not require Enbridge to obtain insurance, including a "continuous duty" to demonstrate compliant insurance "on demand." The State agrees with Enbridge that the plain language of Wis. Stat. § 59.69(11) does not allow landowners to enforce conditional-use-permit conditions, Enbridge Br.35–41, but will not repeat those arguments here.

rule authority, "have no inherent right of self-government beyond the powers expressly granted to them." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337; *compare* Wis. Stat. § 59.03(1), *with* Wis. Const. art. XI, § 3(1). Thus, any "enactment of the legislature . . . of statewide concern" that "uniformly affects every county" trumps county action. Wis. Stat. § 59.03(1).

One such "enactment" is the Pipeline-Insurance Statute, Wis. Stat. § 59.70(25), which prevents counties from requiring operators of "interstate" pipelines to obtain additional insurance as long as the operators' insurance policies cover "sudden and accidental" pollution. The Legislature enacted the statute in 2015 along with another provision restricting counties in issuing conditional-use permits, *id.* § 59.69(2)(bs); 2015 Wis. Act 55. The contextually and textually "manifest [] purpose" of these provisions restricting localities is to ensure that individual counties cannot stop a statewide project. *See State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, the State has an interest in a correct interpretation of the Pipeline-Insurance Statute consistent with its express purpose.

ARGUMENT

I. Under The Pipeline-Insurance Statute, If A Pipeline Operator Has Insurance For Liability From "Sudden And Unexpected" Pollution, A County May Not Require The Operator To Obtain Additional Insurance

A. This Court looks to the "language of the statute" to discern the statute's meaning. *Kalal*, 2004 WI 58, ¶ 44. "Statutory language is given its common, ordinary, and accepted meaning," usually by "reference to the dictionary definition." *Id.* ¶¶ 45, 53; *see* Wis. Stat. § 990.01(1); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69, 418 (2012). The words are "interpreted in [ ] context." *Kalal*, 2004 WI 58, ¶¶ 46, 49. This Court "give[s] reasonable effect to every word," and aims "to avoid absurd or unreasonable results." *Id.* ¶ 46. This Court also examines the statute "as a coherent whole" and in relation to "surrounding . . . statutes" to identify the "textually or contextually manifest statutory purpose." *Id.* ¶ 49. "[A] statute's construction will stand unless the legislature explicitly changes the law." *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120. If this examination of language, "[c]ontext," and "purpose" results in a "plain, clear statutory meaning," then the Court applies the statute accordingly. *Kalal*, 2004 WI 58, ¶¶ 46, 49 (citation omitted).

B. Under the Pipeline-Insurance Statute, a county cannot require an "interstate . . . pipeline" "operator" to

"obtain insurance" if the operator's "general liability insurance" covers liability for pollution that is "sudden and accidental," such as from a burst pipeline or an explosion. Wis. Stat. § 59.70(25). Most comprehensive general liability insurance policies issued today do not cover damages from pollution, whether sudden or gradual. Penny R. Warren, *"Sudden and Accidental" Pollution Exclusions: The Battle Between Insurance Carriers and Insureds Continues*, 12 J. Nat. Resources & Envtl. L. 243, 249 (1997); *Exclusion*, Black's Law Dictionary (10th ed. 2014). Some policies, however, include coverage if the release of pollutants is "sudden and accidental," e.g., from an explosion as opposed to a gradual leak. Warren, *supra*, at 249. In the Pipeline-Insurance Statute, the Legislature wanted to ensure that individual counties cannot force pipeline operators to cover non–"sudden and accidental" events.

The statutory text makes clear the type of insurance that a pipeline operator must have in order to benefit from the Pipeline-Insurance Statute's protections. The word "sudden" in the Statute limits the type of accidental pollution that the policy needs to cover to that which happens *quickly or abruptly*. The "common, ordinary, and accepted meaning" of the word "sudden" has a temporal component. *See Kalal*, 2004 WI 58, ¶ 45. The Oxford English Dictionary, an "authoritative" "contemporaneous-usage" dictionary "for the English language," *see* Scalia & Garner, *supra*, at 419, 423–24; *Kalal*, 2004 WI 58, ¶ 53, defines "sudden" as "taking place

or appearing *all at once*." 17 Oxford English Dictionary 115 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). The dictionary then notes, in smaller print and set off from the main definitions, that sudden "impli[es]" "[u]nexpected" "[i]n some contexts." *Id.*

"Context" indicates that "sudden," as used in the Pipeline-Insurance Statute, means "taking place or appearing all at once," not "unexpected." *Kalal*, 2004 WI 58, ¶¶ 46, 49; Scalia & Garner, *supra*, at 31–33. Specifically, the Statute requires coverage for pollution that is "sudden *and accidental*." Wis. Stat. § 59.70(25) (emphasis added). "Accidental" means "[h]appening . . . unexpectedly." 1 Oxford English Dictionary, *supra*, at 75. If "sudden" also meant "unexpected," that would render the words "and accidental" mere surplusage. *Kalal*, 2004 WI 58, ¶ 46; *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 152 (7th Cir. 1994).

Again, the Pipeline-Insurance Statute means that if an operator has insurance that will cover damages from abrupt, unexpected pollution (e.g., resulting from an explosion, fire, or burst pipeline), a county cannot require it to purchase more. Reading the statute to require coverage for gradual pollution would so narrow the application of the statute as to render it meaningless, allowing counties to interfere with beneficial interstate projects.

II. The Court Of Appeals' Interpretation Of The Pipeline-Insurance Statute Is Contrary To The Statutory Text And Would Undermine The Statute's Fundamental Purpose

The Court of Appeals held—and the Landowners argue, Landowners' Br.27–31[2]—that the Pipeline-Insurance Statute's insurance limitation "is not triggered" unless an operator shows that it carries coverage for gradual pollution. P-App.33–38. The Court of Appeals did not engage in a textual analysis of the Pipeline-Insurance Statute. Instead, it relied entirely on a 25-year-old contract case which held that "sudden" could mean "unexpected." P-App.33–38 (citing *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990)). The Court of Appeals concluded that the Legislature intended to import that meaning of "sudden" when it passed 2015 Act 55, so an operator needs coverage for *all* unexpected pollution, including gradual pollution, to qualify. P-App.33–38. This interpretation greatly narrows the applicability of the Pipeline-Insurance Statute and undermines the statute's express purpose: to prevent county interference with beneficial statewide and interstate projects.

The *Just* Court interpreted the word "sudden" in an insurance contract between a landfill operator and its insurer. *Just*, 155 Wis. 2d 737. Property owners sued the landfill operator for gradual pollution. *Id.* at 741–42. The property

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[2] Dane County does not argue for the Court of Appeals' and Landowners' interpretation of the statute. *See* Enbridge Br.43.

owners, who wanted the pollution covered, argued that "sudden" is "ambiguous" and could reasonably mean "unexpected"; the insurer argued that "sudden" unambiguously means "abrupt or immediate." *Id.* at 741. The *Just* Court noted that one dictionary first defined "sudden" as abrupt or immediate, but another dictionary defined it first as "unexpected[ ]" and "[o]nly later" as "immediate." *Id.* at 745 (citation omitted). Thus, the Court held, the word was "ambiguous." *Id.* at 746. It then applied a principle *specific to* "insurance contract[s]": it must construe any "ambiguity in favor of the insured and against the insurance company *that drafted the ambiguous language*." *Id.* (emphasis added). As a result, the *Just* Court chose to define "sudden" in that contract to mean "unexpected and unintended" so that the policy covered the gradual pollution at issue. *Id.* at 742–43, 746.

There is no basis to hold that *Just*'s interpretation of "sudden" controls its meaning in the Pipeline-Insurance Statute. *Just* did not interpret a prior version of the statute, a related statute, or a well-established common-law term of art.

The presumption that the Legislature acts with "knowledge of the existing case law," *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296, applies to decisions construing *that very statute*, *see Czapinski*, 2000 WI 80, ¶ 22; *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), and "with less force[ ] to interpretations of the same

wording [even] in *related statutes*," Scalia & Garner, *supra*, at 322 (emphasis added). Under a textualist analysis, "context is as important as sentence-level text"; "[t]he entire document must be considered." As a result, rarely does a true "prior construction" ever exist. *Id.* at 323; *compare Superior Steel Prod. Corp. v. Zbytoniewski*, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) ("adjacent" in Wis. Stat. § 85.06(5) would not require contiguity), *with City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 355, 382 N.W.2d 52 (1986) ("adjacent" required "contigu[ity]" in Wis. Stat. § 60.81).

Nor does *Just* establish or imply that "sudden" is a common-law term of art that this Court would expect the Legislature to be aware of. *See Carter v. United States*, 530 U.S. 255, 264 (2000). A term of art is one "in which are *accumulated* the legal tradition and meaning of *centuries* of practice." *Id.* (emphases added and citation omitted); *see also State v. McKellips*, 2016 WI 51, ¶ 32, 369 Wis. 2d 437, 881 N.W.2d 258; *Bilski v. Kappos*, 561 U.S. 593, 602–03 (2010). A single 25-year-old contract case, *Just*, does not constitute a legal tradition; rather, that case dealt with a particular insurance contract between two private parties and relied on the principle that ambiguous contractual language is construed against the drafter, the insurer. This Court's construction of a single word in one case does not control that word's meaning indefinitely no matter where it appears.

To the extent that the phrase "sudden and accidental" was used in the commercial-insurance industry, its meaning

is far from settled and any widespread discussion about it ended decades before Act 55. Many federal and state courts disagreed about its meaning, and by 1997, "a majority of state and federal courts" contravened the *Just* Court's interpretation of "sudden and accidental." *See* Warren, *supra*, at 245, 249–56; *see also Flanders*, 40 F.3d at 152. In addition, industry discussion and publicity about this issue reached its apex in the mid-1980s, thirty years before the Legislature passed Act 55. *See* Warren, *supra*, at 245. By 2015, most comprehensive general liability policies issued did not use any "sudden and accidental" language. *See id.* at 249.

At the very least, this Court should hold that "the application of other sound rules of interpretation overcome[ ]" any presumption about *Just* in order to avoid enshrining *Just*'s interpretive mistake in the Pipeline-Insurance Statute. Scalia & Garner, *supra*, at 324. "No canon of interpretation is absolute," and this Court must assess the appropriate weight to give to each. *Id.* at 59; *see State v. Popenhagen*, 2008 WI 55, ¶ 42, 309 Wis. 2d 601, 749 N.W.2d 611. *Just* deserves little weight in the context of interpreting the Pipeline-Insurance Statute. The *Just* Court erroneously concluded that the ordinary meaning of "sudden" was "ambiguous" simply because two dictionaries had different "primary definition[s]" of the term. 155 Wis. 2d at 745 (majority op.);

id. at 761 (Steinmetz, J., dissenting).[3] But "multiple" dictionary definitions do not, by themselves, create ambiguity. *Kalal*, 2004 WI 58, ¶ 49. Courts must look to textual context, which the *Just* Court did not do. *Id.* ¶¶ 46, 49; Scalia & Garner, *supra*, at 31–33. As discussed *supra* p. 6, the presence of "and accidental" next to "sudden" indicates that "sudden" "add[s] the element of brevity, the temporal element." *Just*, 155 Wis. 2d at 762 (Steinmetz, J., dissenting). Thus, "sudden," in that context, obviously means abrupt and immediate. *Id.*

Adopting the Court of Appeals' narrow interpretation of the Pipeline-Insurance Statute would undermine the Statute's purposes by disqualifying innumerable operators from its protection and permitting a single county to stall, control, or effectively veto a project of statewide importance, contrary to the Legislature's clear intent in passing Act 55: preventing county interference in beneficial statewide and interstate projects. For example, a county could require an operator to obtain a prohibitively expensive amount of liability insurance, even if all of the other affected counties

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[3] The *Just* majority also misinterpreted the dictionary that created the alleged ambiguity, Webster's Third New International Dictionary. Webster's first listed definition for "sudden" was about unexpectedness, and only later did it define "sudden" as happening quickly. 155 Wis. 2d at 745. But Webster's ordered its definitions by "earliest ascertainable meaning," not common contemporaneous usage. *Id.* at 761 (Steinmetz, J., dissenting). Random House Dictionary, which organized definitions by "most frequently used meaning," defined "sudden" first as "happening . . . or done quickly." *Id.* at 761–62 (citation omitted); *id.* at 745 (majority op.).

want the project to proceed as-is. In addition, county-specific insurance requirements could result in unfair recovery across the State at the expense of other counties and Wisconsin citizens. At minimum, a complicated patchwork of local requirements will make Wisconsin less attractive to interstate business investors and developers to the detriment of statewide economic growth.

III. The Statute Does Not Require Unlimited Coverage For "Sudden And Accidental" Pollution

Operators do not need unlimited coverage to qualify for the Pipeline-Insurance Statute's protections. The statute indicates that the Legislature clearly contemplated that the policy would not cover *all* damages from pollution. *See Kalal*, 2004 WI 58, ¶¶ 46, 49 (statutory context). For example, the statute does not require any minimum dollar amount of coverage. *Compare* Wis. Stat. § 59.70(25), *with id.* § 632.32(4) (requiring minimum coverage). In addition, the statute undisputedly does not require coverage for intentional or expected pollution. And nowhere does the statute require the operator's insurer to omit notice or reporting deadlines, a typical feature of comprehensive general liability policies. Lisa S. Keyes & Steven P. Means, *Comprehensive General Liability Policies: Insurance Coverage for Environmental Cleanup*, 66 Wis. Law. 14, 17 (Apr. 1993); *see also* Wis. Stat. § 632.26 (discussing insurers' notice provisions). Indeed, notice deadlines are common in all types of insurance. *See, e.g., id.* § 632.26(6)(c) (motor vehicle). The Legislature merely

wanted to ensure that the interstate-pipeline operator had some form of coverage for the type of pollution it deemed most important: "sudden and accidental." Then it could proceed with its interstate project free from county-imposed insurance requirements.

The Court of Appeals and Landowners argue that a policy with a "time-element exception" does not trigger the Pipeline-Insurance Statute's protection because it has reporting deadlines. P-App.39; Landowners' Br.26. A time-element exception means that an operator must discover and report a polluting incident within a certain timeframe to obtain coverage. *See, e.g.*, Enbridge Br.9, 13, 17, 19–20; Fall 2018 Survey, 3 Envtl. Ins. Litig.: L. & Prac. Appendix E, Part I, No. 16. But, as discussed above, reporting and notice deadlines are a typical feature of insurance policies. There is no reason to think that the Legislature required an exception here.

CONCLUSION

This Court should reject the Court of Appeals' interpretation of the Pipeline-Insurance Statute.

Dated: November 7, 2018.

Respectfully submitted,

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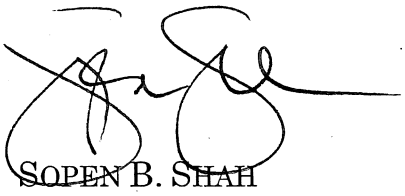

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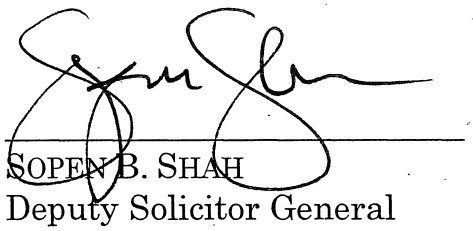
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,965 words.

Dated: November 7, 2018.



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I hereby certify that:

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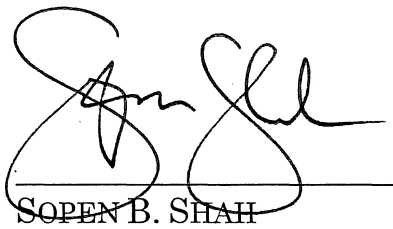

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