STATE OF WISCONSIN
SUPREME COURT

CHRISTUS LUTHERAN CHURCH
OF APPLETON

Plaintiff-Appellant-Respondent,

v.

Appeal No.
2018AP1114

WISCONSIN DEPARTMENT OF
TRANSPORTATION,

Circuit Court
Case No. 17CV452

Defendant-Respondent-Petitioner

NON-PARTY BRIEF OF AMERICAN TRANSMISSION COMPANY LLC AND ITS CORPORATE MANAGER ATC MANAGEMENT INC.; WISCONSIN PUBLIC SERVICE CORPORATION; WISCONSIN ELECTRIC POWER COMPANY; AND WISCONSIN GAS LLC IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

> "No 'heads I win, tails you lose,' play should be tolerated in the administration of justice." *Lehner v. Berlin Pub. Co.*, 211 Wis. 119, 135, 246 N.W. 579 (1933) (J. Fritz, dissenting).

While dressed in procedural clothes, this case is about attorney fees. Plaintiff-Appellant-Respondent Christus Lutheran Church of Appleton ("Church") filed an action claiming Defendant-Respondent-Petitioner Wisconsin Department of Transportation ("State") offered *too much compensation* for a taking. Why? The lower the jurisdictional offer is, the lower the threshold for recovering attorney fees in an eventual compensation appeal. *See* Wis. Stat. § 32.28(3)(d)-(h). This tactic – maximizing the odds of recovering attorney fees by forcing the condemnor to make a low jurisdictional offer – is the critical backdrop to the issues now before the Court.

This tactic appears regularly in eminent domain practice in Wisconsin. *See, e.g., Otterstatter v. City of Watertown*, 2017 WI App 76, 378 Wis. 2d 697, 904 N.W.2d 396; *VE Properties, LLC v. Am. Transmission*

Co., No. 16-CV-151 (Wis. Cir. Ct. Columbia Cty.); *Mitton v. Am. Transmission Co.,* No. 09-CV-326 (Wis. Cir. Ct. Shawano Cty.); *Wis. Gas LLC vs. Weninger*, No. 08-CV-214 (Wis. Cir. Ct. Dodge Cty.), etc.

A 2017 decision from District IV, *Otterstatter v. City of Watertown*, 2017 WI App 76, seemed to put this tactic to rest. But the Court of Appeals' decision here brought it to back to life. *See Christus Lutheran Church of Appleton v. Wis. Dep't of Transp.*, 2019 WI App 67, Case No.2018AP1114 (Wis. Ct. App. Dist. III, Nov. 26, 2019).

The Circuit Court dismissed the Church's right-to-take claim on grounds that the State met the *Otterstatter* test and that the Church's position would encourage, not avoid, litigation. (*See* Pet.-App.162-68.)

The Court of Appeals reversed, concluding that the State failed to procure an appraisal of "all property proposed to be acquired" under Wis. Stat. § 32.05(2)(a). The Court's reasoning, however, conflates "property" and "damages" and renders the statutory negotiation requirement superfluous. The

decision also creates an ethical dilemma for professional appraisers, splits with *Otterstatter*, and makes litigation inevitable.

This case goes far beyond these parties. It will affect thousands of condemnations per year statewide under Wis. Stat. §§ 32.05 and 32.06 and add significant cost to public projects. Given the statewide importance of this case, the Court should grant review.

STATEMENT OF ISSUES

1. Does a condemnor's offer of too much compensation constitute a jurisdictional defect, requiring invalidation of a taking?

2. Is an owner prejudiced by a compensation offer that exceeds the compensation in the appraisal, requiring invalidation of a taking?

3. Does Wis. Stat. § 32.05 preclude a condemnor from offering more compensation without first obtaining a new appraisal that "substantiates" the condemnor's views?

STATEMENT OF CRITERIA FOR REVIEW

This case meets the following criteria for review by this Court.

First, this case presents novel issues of first impression, the resolution of which will have a statewide impact. *See* Wis. Stat. § 809.62(1r)(c)2. *Christus Lutheran* affects nearly every eminent domain-related acquisition in the state of Wisconsin.

Second, the *Christus Lutheran* decision conflicts with a controlling opinion of another appeals court, *Otterstatter*, 2017 WI App 76, as well as controlling statutes, conflating the terms "property" and "damages" as those terms are used in Wis. Stat. § 32.05(2)-(3). *See* Wis. Stat. § 809.62(1r)(d). The decision also conflicts with *Fields v. Am. Transmission Co.*, 2010 WI App 59, 324 Wis.2d 417, 782 N.W.2d 729.

Third, a decision by this Court is necessary to develop, clarify, or harmonize the law relating to when condemnors may offer more compensation than the compensation in an appraisal. *See* Wis. Stat. § 809.62(1r)(c). This Court should also determine

whether Wisconsin requires condemnors to obtain a new appraisal that "substantiates" the condemnor's belief before increasing a compensation offer. *See* Wis. Stat. § 809.62(1r)(c)1; *Christus Lutheran*, 2019 WI App 67, ¶ 32.

Finally, the issues presented are pure questions of law of the type that are certain to recur unless resolved by this Court. *See* Wis. Stat. § 809.62(1r)(c)3.

STATEMENT OF THE CASE

The State made an initial offer to acquire a portion of the Church's property based on appraised damages of $133,400. *Christus Lutheran*, 2019 WI App 67, ¶ 3. The appraisal expressly considered "severance damages" and concluded that no severance damages would occur as a result of the project. *Id.*

The Church did not accept the offer, but also refused to negotiate. *Id.* ¶ 5. The State reconsidered, increased the offer amount to include various additional damages, and issued a jurisdictional offer

at $270,000 higher than the amount of damages in the appraisal. *Id.* ¶¶ 5-8.

The Church challenged the taking on grounds that the jurisdictional offer was defective. *Id.* ¶ 10. On appeal, the Court concluded that the State failed to arrange for an appraisal of "all property proposed to be acquired" under Wis. Stat. § 32.05(2)(a). *Id.* ¶ 33. The Court reasoned that the appraisal did not include certain items of damage that were later included in the amount of the jurisdictional offer. *See id.* The Court went on to say:

> [A]bsent a negotiated agreement with the property owner, if the DOT, based solely upon its independent review of an appraisal, believes additional statutory items of just compensation warrant inclusion in the jurisdictional offer, *it must obtain a new appraisal that substantiates that belief and provides an opinion as to the value of those interests.*

Id. ¶ 32 (emphasis added).

ARGUMENT

I. THIS CASE PRESENTS NOVEL ISSUES OF FIRST IMPRESSION, WHICH ARE OF STATEWIDE IMPORTANCE AND LIKELY TO RECUR.

It is difficult to overstate the significant, statewide impact of the issues in this case. *See* Wis. Stat. § 809.62(1r)(c)2.

Condemnors acquire interests in thousands of properties per year statewide pursuant to the statutes involved in this case. For example, each year the State Department of Transportation completes 350 to 400 state highway projects, costing an average of $1.5 million each.[1] In addition, the State returns more than $500 million to local governments to help finance the operation and improvement of locally-owned roads, streets and bridges.[2]

In the last three years, American Transmission Company LLC and its corporate manager, ATC Management Inc., acquired an estimated 400 to 650

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[1] https://wisconsindot.gov/Pages/projects/lif-hwy-proj/default.aspx.

[2] *Id.*

easements per year for transmission line projects in Wisconsin. Over the same time period, *amici* Wisconsin Public Service Corporation, Wisconsin Electric Power Company, and Wisconsin Gas LLC collectively acquired an average of 7,300 easements per year, of which roughly 375 per year were subject to Wisconsin's eminent domain law.[3]

These figures do not include acquisitions for public projects carried out by development authorities, cities, villages, counties, school districts, or many other condemnors, most of which will be governed by the eminent domain statutes at issue in this case or the parallel procedures in Wis. Stat. § 32.06.

Finally, the issues presented are legal questions that are certain to recur unless resolved by this Court. *See* Wis. Stat. § 809.62(1r)(c)3. This case presents a common scenario in eminent domain. The issues presented are already recurring as condemnors

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[3] Amici use the condemnation procedures in Wis. Stat. § 32.06, rather than Wis. Stat. § 32.05. However, the portions of section 32.05 at issue in this case are mirrored in section 32.06.

struggle to reconcile *Otterstatter* and *Christus Lutheran*. These issues will continue to recur every time condemnors consider increasing a compensation offer.

II. *CHRISTUS LUTHERAN* CONFLICTS WITH THE STATUTES, *OTTERSTATTER V. CITY OF WATERTOWN,* AND *FIELDS V. AMERICAN TRANSMISSION CO.*

A. The Court of Appeals Conflates "Property" and "Damages."

The Court of Appeals' decision flows from a fundamental error of law: conflation of the statutory terms "property" and "damages." With that thread cut, the whole decision unravels.

Before acquiring property, condemnors must first arrange for an appraisal of "all property proposed to be acquired." Wis. Stat. § 32.05(2)(a). Condemnors must then share the appraisal with the owner and attempt to negotiate personally with the owner. Wis. Stat. § 32.05(2)(b)-(2a). If negotiation is unsuccessful, condemnors may issue a "jurisdictional offer" under Wis. Stat. § 32.05(3). Condemnors must provide the owner with an appraisal "upon which the

jurisdictional offer is based." Wis. Stat. § 32.05(2)(b). Among other things, the jurisdictional offer must state "the amount of compensation offered, itemized as to the items of damage as set forth in s. 32.09…" Wis. Stat. § 32.05(3)(d).

Here, the Court of Appeals invalidated the taking, concluding that the independent appraisal obtained by the State ("State's appraisal") failed to appraise all *property* proposed to be acquired pursuant to Wis. Stat. § 32.05(2)(a). (*See Christus Lutheran*, 2019 WI App 67, ¶ 2, emphasis added.) The Court based that conclusion on the fact that the State included certain *damages* in the jurisdictional offer that were not included in the State's appraisal. *See id.*

But subsection (2)(a) does not require the appraisal to include all *damages*. Subsection (2)(a) only requires an appraisal of all *property* proposed to be acquired.[4]

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[4] The Court of Appeals focuses on "severance damages." But subsection (2)(a) does not require an appraisal to include all damages *or* all severance damages.

"When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings." *Pawlowski v. Am. Family Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67. "Property" means "estates in lands, fixtures and personal property directly connected with lands." Wis. Stat. § 32.01(2). "Damages" are "money claimed by, or ordered to be paid to, a person as compensation for loss or injury."[5] In other words, damages are the amount of money claimed for the injury to the property: i.e. compensation.

The Church has not claimed that the State's appraiser excluded some part of the Church's *property* from the appraisal. The State's appraisal valued the entire 30.66 acres owned by the Church, as well as the 24.79 acres remaining after the acquisition. (Pet.-App.131, 133, 140, etc.) That is all Wis. Stat. § 32.05(2)(a) requires.

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[5] *Damages,* Black's Law Dictionary (11th ed. 2019).

In practice, appraisers routinely disagree about the nature and extent of *damages*. Without disagreement over damages, it would be superfluous to require condemnors to attempt negotiation. *See* Wis. Stat. § 32.05(2a). That does not mean the appraiser failed to appraise the *property*.

When presented with the statutory definition of "property" on a motion for reconsideration (see Pet.-App.120-21), the Court of Appeals scolded the State for not developing this argument earlier. But appellate courts may affirm a circuit court decision on any grounds. *See State v. Baeza*, 156 Wis. 2d 651, 657-58, 457 N.W2d 522 (Ct. App. 1990). Furthermore, given the plain error of the Appeals Court's decision and the statewide importance of this case, review by this Court is appropriate. *See Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 52, 245 Wis. 2d 772, 629 N.W.2d 727.

B. *Christus Lutheran* Conflicts With *Otterstatter v. City of Watertown.*

Christus Lutheran also conflicts with *Otterstatter*, 2017 WI App 76. Consistent with *Otterstatter*, the jurisdictional offer need not equal the appraisal on which the offer is based. *Id.* ¶ 27. The *Otterstatter* Court went on to say:

> [T]he statutory scheme contemplates exactly the opposite of what Otterstatter advocates. The statute explicitly establishes a process of required opportunity for negotiation in recognition of the "public policy which encourages the settlement of [eminent domain] controversies without resort to litigation." Pursuant to that process, the City was not required to stick with its initial offer based on its appraisal, but rather was required to negotiate to see if that number was too low. Otterstatter points to no language in the statute that would prevent a condemnor, such as the City, from offering more than the appraised amount as part of the effort it is required to make to "attempt to negotiate personally with the owner . . . of the property sought to be taken for the purchase of the same." Otterstatter's argument to the contrary defies both common sense and the clear intent of the statutory scheme.

Id. ¶ 28 (citations omitted).

That is precisely what occurred here. The State was required to attempt to negotiate, with the goal of settling any dispute without litigation. *See id.* The State was not required to stick with its initial offer based on its appraisal. *See id.* Nothing in the statutes

prohibits the State from offering more compensation than the appraisal. *See id*. Nevertheless, the *Christus Lutheran* Court reached a different result.[6]

This split leaves condemnors uncertain when they can offer more compensation. The *Christus Lutheran* Court concedes that under *Otterstatter*, a condemnor may increase an offer "based on its own conclusions about the value of the property and considerations attendant to litigation." *Christus Lutheran*, 2019 WI App 67, ¶ 32.[7]

It cannot be the law that a condemnor can increase an offer based on its views of the property's value or to guard against litigation risk, but not to include new or increased compensation for a specific

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[6] The Court of Appeals tried to distinguish *Otterstatter*. *See Christus Lutheran*, 2019 WI App 67, ¶ 32. The distinction alleged is one without a difference. In both cases, the jurisdictional offers included compensation that was not part of the condemnor's appraisal.

[7] The *Christus Lutheran* Court reads *Otterstatter* to allow a condemnor to "adjust[] the appraisal value upward in an immaterial amount…" *See Christus Lutheran*, 2019 WI App 67, ¶ 32. This is an incorrect and unduly narrow reading of *Otterstatter* and the statutes.

item of damages. This is illogical, bad policy, and unsupported by the statutes.

C. *Christus Lutheran* Conflicts With *Fields v. American Transmission Co.*

The *Christus Lutheran* decision also conflicts with *Fields v. American Transmission Co.*, 2010 WI App 59. The decision suggests that the State's appraisal should have valued the individual items of damage. This is wrong.

Fields makes clear that the appraisal values the *property*, not the damages. *See Fields*, 2010 WI App 59, ¶ 14. Compensation is based on the difference in the value of the whole property before and after the taking, not the sum of the interests taken. *Id.; see also* Wis. Stat. § 32.09(6)-(6g). As the *Fields* Court explained:

> [T]he jury is not to determine the value of those property rights taken by the new easement to arrive at its just compensation award. Rather, a just compensation determination is based on the fair market value of the land as a whole, which is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all not as separate things, but as inseparable parts of one harmonious entity.

Id. (quotation and citations omitted).

Under *Fields* and section 32.09(6), the State's appraiser was required to value the whole property before and after the taking. While an appraiser must take various damages (impacts) into account, it is not necessary or proper for the appraisal to value the rights or interests taken to arrive at a just compensation award. The Court of Appeals erred on these grounds as well.

III. A DECISION BY THIS COURT IS NECESSARY TO CLARIFY WHEN A CONDEMNOR MAY OFFER MORE COMPENSATION.

A. The New Obligation to Obtain a New Appraisal That "Substantiates" the Condemnor's Beliefs Is Unworkable and Unethical.

The Court of Appeals' decision attempts to create a new rule that before condemnors can offer more compensation, the condemnor "must obtain a new appraisal that substantiates [the condemnor's] belief." *See Christus Lutheran*, 2019 WI App 67, ¶ 32. This rule is nowhere in the statutes. Instead, the decision of whether to obtain more than one appraisal

is "in the condemnor's discretion." *See* Wis. Stat. § 32.05(2)(a). Moreover, the rule is unworkable and unethical in practice.

It is unclear how a condemnor is supposed to "obtain a new appraisal that substantiates" the condemnor's belief that additional compensation is required.

Condemnors cannot direct their appraisers' conclusions. Wisconsin appraisers must comply with the Uniform Standards of Professional Appraisal Practice ("USPAP"). *See* Wis. Admin. Code §§ SPS 85.110-115; 85.120(26); 86.01(1). Under USPAP, appraisers have an ethical obligation to be "independent, impartial, and objective." *See* USPAP (ed. 2020-21), Ethics Rule at 185:186. Appraisers "must not agree to perform an assignment that includes the reporting of predetermined opinions and conclusions." *Id.* at 190:91. Therefore, at most, condemnors can ask their appraisers to *consider* an issue.

And what if the new appraiser considers the issue and concludes that it will not affect the value of the property – i.e. that no compensation is warranted for that issue?[8] The condemnor is back to square one.

Christus Lutheran puts the condemnor in an impossible position: stick to its appraisal number and pay too little compensation, or offer more compensation and risk a *Christus Lutheran*-style challenge on grounds that the condemnor is paying too much. Either way, litigation is inevitable.

Litigation expenses, including attorney fees, are also inevitable. *See* Wis. Stat. § 32.28. The lower the jurisdictional offer, the lower the threshold for the owner to recover litigation expenses later. *See* Wis. Stat. § 32.28(3)(d)-(h). Litigation expenses are also recoverable in a right-to-take challenge, such as this case. *See* Wis. Stat. § 32.28(3)(b).

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[8] That is essentially what happened here. (*See* Pet.-App.140-41, 151-52.)

In short, the new rule is unworkable and unethical in practice.

B. *Christus Lutheran* Contravenes the Policies Underlying Wisconsin's Eminent Domain Law.

The *Christus Lutheran* holding contravenes the policies underlying Wisconsin's condemnation laws: encouraging reasonable offers early and avoiding litigation.

The purpose of the fee-shifting statutes is "to discourage low jurisdictional offers and to make the condemnee whole when the condemnee is forced to litigate in order to get the full value of the property." *Standard Theatres, Inc. v. State Dep't of Transp.*, 118 Wis. 2d 730, 745, 349 N.W.2d 661 (1984). "Section 32.28, Stats., contemplates the complete avoidance of litigation expenses by making a reasonable jurisdictional offer from the start." *Gottsacker Real Estate Co. v. State Dep't of Transp.*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984).

The State's conduct here was consistent with the law and policy above. The State obtained an appraisal

and made an offer equal to the loss of value reflected in the appraisal and attempted to negotiate. The Church refused to obtain its own appraisal, negotiate, or share any evidence of value with the State. Nevertheless, the State increased the final offer and jurisdictional offer. In other words, the State tried to make a fair and reasonable jurisdictional offer that would avoid unnecessary litigation. That is exactly how the process *should* work.

If allowed to stand, the Court of Appeals' decision will produce absurd results. It embraces a "heads-I-win-tails-you-lose" eminent domain policy, ties the hands of condemnors trying to do the right thing, and makes litigation inevitable. This Court's review is necessary to develop, clarify, and harmonize this area of law.

CONCLUSION

For the reasons above, and given the statewide importance of this case, the Court should grant the State's Petition for Review.

Dated this 12th day of February, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in §§ 809.19(8)(b) and (c) and 809.62(4)(a) for a brief produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief is 2,992 words.

The text of the electronic copy of this brief is identical in content and format to the printed form of the brief filed as of this date.

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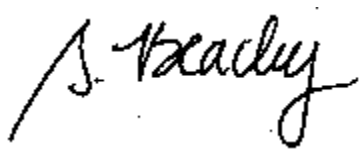
Dated this 12th day of February, 2020.

AXLEY BRYNELSON, LLP



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