

RECEIVED
03-09-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

WISCONSIN MANUFACTURERS AND COMMERCE, et al.
Plaintiffs, Respondent.

Case No. 2020AP002081-AC
2020AP002103-AC

v.

TONY EVERS, et al.,
Defendants, Appellants.

&

MILWAUKEE JOURNAL SENTINEL,
Intervenor-Defendant, Appellants.

ON APPEAL FROM NONFINAL ORDERS ENTERED BY
THE WAUKESHA COUNTY CIRCUIT COURT
THE HONORABLE LLOYD V. CARTER, PRESIDING

**AMICUS CURIAE BRIEF BY NATIONAL FEDERATION
OF INDEPENDENT BUSINESS,
WISCONSIN RESTAURANT ASSOCIATION, AND
RESTAURANT LAW CENTER**

Robert I. Fassbender (1013985)
Great Lakes Legal Foundation
Attorney for Movants-Amici:

10 East Doty Street, Suite 504
Madison, WI 53703
Telephone: (608) 310-5315

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
I. Allowing Wisconsin’s Governor to bypass privacy laws will detrimentally and permanently impact restaurants and small businesses throughout Wisconsin.....	4
CONCLUSION.....	14
CERTIFICATION REGARDING ELECTRONIC BRIEF.....	16

TABLE OF AUTHORITIES

Cases

<i>Abbott Laboratories v. Mead Johnson & Co.</i> , 971 F.2d 6 (7th Cir. 1992) .	13
<i>American Mut. Liability Ins. Co. v. Fisher</i> , 58 Wis. 2d 299, 206 N.W.2d 152 (Wis. 1973)	5, 13, 14
<i>Backpage.com, LLC v. Dart</i> , 807 F.3d 229 (7th Cir. 2015)	6
<i>John B. Hull, Inc., v. Waterbury Petroleum Prods. Inc.</i> , 588 F.2d 24 (2d Cir. 1978)	5, 6, 13
<i>Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.</i> , 2016 WI App 56, 370 Wis. 2d 644, 883 N.W.2d 154	4
<i>Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.</i> , 992 F.2d 430 (2d Cir. 1993)	5, 13
<i>Service Employees International Union, Local 1 v. Vos</i> , 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35	4
<i>Werner v. A. L. Grootemaat & Sons, Inc.</i> , 80 Wis. 2d 513, 259 N.W.2d 310 (Wis. 1977)	4, 5
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008)	4

Statutes

Wis. Stat. § 813.02(1)(a)	4
---------------------------------	---

Other Authorities

Alex Bell, <i>How Long Does it Take for Symptoms of COVID-19 to Appear?</i> , Medical News Today (June 17, 2020), https://www.medicalnewstoday.com/articles/how-long-does-it-take-for-covid-19-symptoms-to-appear	6
Chris Hubbuch, <i>Wisconsin Businesses Still Waiting on Help as Federal Program Runs Dry</i> , Wisconsin State Journal (Apr. 17, 2020), https://madison.com/wsj/business/wisconsin-businesses-still-waiting-on-help-as-federal-program-runs-dry/article_d73cda6a-af0d-594f-9075-dce3de7947f2.html	10
<i>Coronavirus Disease Reducing Stigma</i> , Centers for Disease Control and Prevention (June 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsymptoms-testing%2Freducing-stigma.html	12

Mitchell Schmidt, <i>COVID-19 Edges Out Workforce Shortage as Biggest Concern among Wisconsin Businesses, Survey Finds</i> , Wisconsin State Journal (July 12, 2020), https://madison.com/business/covid-19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article_fe649fa2-92bc-58fc-aae2-443d022517a0.html	9
Mitchell Schmidt, <i>WMC Files Lawsuit to Block State Plans to Reveal Businesses with Multiple COVID-19 Cases</i> , The Journal Times (Oct. 2, 2020), https://journaltimes.com/news/state-and-regional/govt-and-politics/wmc-files-lawsuit-to-block-state-plans-to-reveal-businesses-with-multiple-covid-19-cases/article_f1f35fab-b5b1-5661-9eed-62aa980f320e.html	2

INTEREST OF AMICI CURIAE¹

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

The Wisconsin Restaurant Association (WRA) is one of the largest trade associations in the state with over 7,000 member locations throughout Wisconsin. The WRA's mission is dedicated to the success of the Foodservice and Hospitality Industry. The Association advocates on behalf of the restaurant industry, including filing amicus briefs such as this one, to provide a voice for the Wisconsin restaurant industry in the courts to highlight the real-world implications of important cases on the industry. WRA membership includes a wide range of foodservice businesses representing virtually every size and style of restaurant in the state.

¹ Counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association. The restaurant and foodservice industry employs approximately 10 percent of the U.S. workforce. The Restaurant Law Center's goal is to protect and advance the restaurant industry and to ensure the views of America's restaurants are taken into consideration by giving them a voice in the courtroom. Through regular participation in amicus briefs, such as this one, the Restaurant Law Center provides courts with the industry's perspective on legal issues in pending cases that have industry-wide implications.

SUMMARY OF ARGUMENT

After flip-flopping on his authority to release the names of businesses that have had employees test positive for COVID-19 and the number of employees who have tested positive, Governor Evers now plans to publish this information in response to public records requests.² Permitting the Governor to do so will irreparably harm small businesses and the temporary injunction issued below was necessary to preserve the status quo, not only for Plaintiffs and their members, but for all restaurants and small businesses across Wisconsin. Surveys of restaurants and small

² In July, the Administration backtracked on prior plans to publicly list names of businesses with multiple positive COVID-19 cases. On September 9th, Governor Evers confirmed this backtracking due to some "privacy things going on there" and "we need to keep [this information] in a way that . . . protects the businesses." Mitchell Schmidt, *WMC Files Lawsuit to Block State Plans to Reveal Businesses with Multiple COVID-19 Cases*, The Journal Times (Oct. 2, 2020), https://journaltimes.com/news/state-and-regional/govt-and-politics/wmc-files-lawsuit-to-block-state-plans-to-reveal-businesses-with-multiple-covid-19-cases/article_f1f35fab-b5b1-5661-9eed-62aa980f320e.html.

businesses, plus consumer activity analyses, demonstrate that COVID-19 is taking a monumental toll on the financial health of businesses and their ability to survive these disastrous times. Governor Evers's decision to publish the names of businesses with COVID-19 cases from months ago does nothing to stop the spread of the virus or ensure workplace safety. Instead, it simply instills fear in consumers and causes them to second-guess or forego patronizing establishments with a link to COVID-19, however remote. As empirical survey evidence demonstrates, further loss in revenue will detrimentally and permanently harm the Wisconsin business community. Without the temporary injunction, the Defendants' actions inflict immense and irreversible harm on Plaintiffs with lost revenue, stigma, and reputational damage. Businesses will likely close, hundreds or thousands could lose their jobs, and out-of-work citizens will have difficulty providing food and shelter for their families.

Therefore, the *Amici* urge this Court to uphold the circuit court's issuance of the temporary injunction.

ARGUMENT

I. Allowing Wisconsin's Governor to bypass privacy laws will detrimentally and permanently impact restaurants and small businesses throughout Wisconsin.

Wisconsin Stat. § 813.02(1)(a) provides that state courts may grant a temporary injunction when “the commission or continuance of [some act] which during the litigation would injure the party[.]” Wis. Stat. § 813.02(1)(a). To obtain a temporary injunction, the movant need only show “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Serv. Emps. Int’l Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008) (affirming a likelihood of irreparable harm for a preliminary injunction). “[A]t the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.” *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (Wis. 1977) (footnote omitted). A showing of “irreparable harm” simply means that a permanent injunction issued post-merits proceedings, cannot

remedy the actions taken during litigation. *See Id.* at 520. That showing was easily satisfied in the circuit court due to the immediate detrimental impact the Governor’s proposed action would have on the business community.

The loss of business revenue, or business operation altogether, can demonstrate an “irreparable harm.” “Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.” *American Mut. Liability Ins. Co. v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152 (Wis. 1973) (cited sources omitted). Indeed, the United States Court of Appeals for the Second Circuit has noted that “[m]ajor disruption of a business can be as harmful as termination, and a ‘threat to the continued existence of a business can constitute irreparable injury.’” *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (quoting *John B. Hull, Inc., v. Waterbury Petroleum Prods. Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)).

In *John B. Hull, Inc.*, the Second Circuit reviewed the district court’s grant of a preliminary injunction in a price discrimination antitrust suit. 588 F.2d at 26. The district court found Defendants’ pricing practices put one of the Plaintiffs in “danger of losing many customers”

and “if it lost those customers, it would probably be forced out of the heating oil business.” *Id.* at 28. Relying on this threat of business existence, the Second Circuit affirmed and held the loss of customers and threat to the business’s existence constituted an irreparable injury. *Id.* at 29. Similarly, the Seventh Circuit reversed the denial of a preliminary injunction in a case where law enforcement actions negatively affected a business’s financial health. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 230, 237-38 (7th Cir. 2015).

Here, the Governor sought to combat the spread of COVID-19 by releasing the names of businesses with employees who tested positive and the number of employees who tested positive. Bauer Aff. ¶¶ 4, 7, 9. The business community supports the goal of mitigating the COVID-19 spread. However, the Administration’s plan to release the names of businesses who had employees test positive over twenty-eight days ago,³ will not do so. *See generally* Alex Bell, *How Long Does it Take for Symptoms of COVID-19 to Appear?*, Medical News Today (June 17, 2020), <https://www.medicalnewstoday.com/articles/how-long-does-it-take-for-covid-19-symptoms-to-appear> (noting that the typical incubation period is between two and fourteen days, but the mean is just over five days); *When You Can Be Around Others*, Centers for Disease Control and

³ Bauer Aff. ¶ 5.

Prevention (Sept. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> (discussing the time period when spreading the virus is no longer a concern as ten days after symptoms appear for possible, mild, or asymptomatic cases, and typically less than twenty days for serious cases).

It does not take a mathematician to conclude the contagion period for most positive cases will pass before the twenty-eight-day period of non-release. Releasing old data will not only cause irreparable harm to businesses, but it might also jeopardize effective public health response by disincentivizing public cooperation with contact tracing efforts. Individuals who are concerned that naming a business could result in public blacklisting might be reluctant to cooperate with tracing.

Even if the Governor were to change course and release the names of businesses with positive employee tests within the preceding twenty-eight-day window, this would not slow the spread of COVID-19. Publishing the numbers of recent positive tests at a certain business would not inform the public of important contextual information, such as:

- (1) Did the employee contract the virus inside or outside of the workplace;
- (2) If outside, did the employee bring the virus into the workplace;

(3) If the employee never brought the virus into the workplace, did any other employee or owner have contact with the infected employee and return to the workplace;

(4) If the employee brought the virus into the workplace, was there ever a point when he or she was not wearing a mask or social distancing while at work; and

(5) In the case of a restaurant, did the employee engage in food preparation or delivery?

Without this information, members of the public have no way of knowing whether the business was even exposed to the virus, whether they themselves were exposed to the virus and must self-quarantine, or whether they would become exposed to the virus if visiting the business. As the circuit court noted, the Governor's plan leads to an improper "logical conclusion," and there is "no logical connection" between a COVID-positive employee and that business. (Def. Appellant App. 136–137). Releasing names of businesses with positive employee tests in the preceding twenty-eight-day period, without more information, simply brands the restaurant or small business with a COVID-19 badge of infamy.

Many restaurants and small businesses could not survive the public shaming that would deter customers and clients as the economy remains perilous for many businesses. Studies show the ravaging effect COVID-19 has taken on businesses. *See Mitchell Schmidt, COVID-19 Edges Out*

Workforce Shortage as Biggest Concern among Wisconsin Businesses, Survey Finds, Wisconsin State Journal (July 12, 2020), https://madison.com/business/covid-19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article_fe649fa2-92bc-58fc-aae2-443d022517a0.html. Of those responding, 75 percent indicated COVID-19 has negatively impacted their business, with 23 percent predicting they would end 2020 in the red. *Id.*

Businesses are also concerned about the economic effect of government measures taken in the name of public health. In July, Wisconsin business owners ranked government response measures as the most important public policy issue in the state. *Id.* The NFIB Research Center has consistently collected information from small businesses about the financial struggles that COVID-19 and the government responses thereto, are imposing on their businesses. In its recent survey of member businesses conducted at the end of January, 53 percent of responders indicated they had applied, were going to apply, or would consider applying for a second Paycheck Protection Program loan to keep their business afloat. NFIB Research Center, *COVID-19 Small Business Survey* (15) 7 (Jan. 2021), https://assets.nfib.com/nfibcom/Covid-19-15-Questionnaire_.pdf.

In this same survey, 16 percent of respondents revealed business sales are still below 50 percent of their pre-crisis levels, or the business

closed altogether; for 40 percent of respondents, sales were under 75 percent of pre-crisis levels, or the business was closed. *Id.* at 9. If current economic conditions persist, 15 percent anticipate being unable to operate their business within 6 months. *Id.* at 10. NFIB's most recent Small Business Economic Trends report revealed the net percent of businesses expecting the economy to improve over the next six months was 23, the lowest number since November 2013. NFIB Research Center, *NFIB Small Business Economic Trends* 1, 5 (Jan. 2021), <https://assets.nfib.com/nfibcom/SBET-Jan-2021.pdf>. “Government regulation,” like the Governor’s plan, was the third-most important problem facing small businesses in January 2021. *Id.* at 18. Wisconsin small businesses have a dire COVID-19-related financial prognosis, as demonstrated by the state ranking in the top ten for early-summer SBA approved loan funding. Chris Hubbuch, *Wisconsin Businesses Still Waiting on Help as Federal Program Runs Dry*, Wisconsin State Journal (Apr. 17, 2020), https://madison.com/wsj/business/wisconsin-businesses-still-waiting-on-help-as-federal-program-runs-dry/article_d73cda6a-af0d-594f-9075-dce3de7947f2.html.

For the Wisconsin restaurant industry in particular, COVID-19 has had a devastating impact. A nationwide survey of restaurant owners and operators provides a shocking data-driven update on the dire state of the restaurant industry in Wisconsin. Of Wisconsin restaurant operators

surveyed, 88 percent say their total dollar sales volume in October decreased compared to October 2019. *Recent Data on the State of the Restaurant Industry in Wisconsin – Dec, 2020*, Wisconsin Restaurant Association (Dec. 8, 2020), <https://wirerestaurant.org/news-details/2020/12/08/recent-data-on-the-state-of-the-restaurant-industry-in-wisconsin---dec-2020>. Sales were down, on average, by 39 percent. *Id.*

While sales were significantly lower, costs did not fall proportionally. Total operational costs (as a percent of sales) were higher than before the COVID-19 outbreak for 56 percent of Wisconsin restaurants. *Id.* Furthermore, 37 percent said it was unlikely their restaurant would still be in business within six months if business conditions continued at current levels. *Id.* Although many restaurants added back employees as restrictions were partially lifted in recent months, overall staffing levels remained below normal. When asked about current staffing levels, 88 percent of Wisconsin restaurant operators revealed their current levels are lower than they would typically be in the absence of COVID-19. *Id.* Overall, 52 percent of Wisconsin restaurant operators expected staffing levels to decline. *Id.*

Instead of preventing the spread of COVID-19 and helping businesses through these hard times, the Governor's plan will further alienate consumers and irreparably damage the outlook for businesses branded as COVID-19-positive businesses. Whether intentionally or

unintentionally, releasing the names of businesses with employees who tested positive for COVID-19 will place an irreversible stigma on the businesses and result in lost revenue. In the minds of the community, this plan will label these establishments as uncompliant, unsafe, or more likely to transmit COVID-19, even though that label is unwarranted. (Def. Appellant App. 136–37). The stigma recognized by the circuit court is not speculative, as one need only look to the CDC for the strength of COVID-19-related stigma and harm thereof:

“Stigma is associated with a lack of knowledge about how COVID-19 spreads, a *need to blame someone* . . . Fear and anxiety about a disease can lead to social stigma, which is negative attitudes and beliefs towards people, *places*, or things. Stigma can lead to labeling, stereotyping, discrimination, and *other negative behaviors* towards others. For example, stigma and discrimination can occur when *people link a disease, such as COVID-19, with a population, community, or nationality* . . . Stigma hurts everyone by creating more fear or anger toward ordinary people instead of focusing on the disease that is causing the problem . . . **Community leaders and public health officials can prevent stigma by:** Maintaining the privacy and confidentiality of those seeking healthcare and those who may be part of any contact investigation.”⁴

Defendants might try to minimize or downplay this stigma and the resulting loss in revenue as speculative. But just as federal courts recognize in other areas, it is entirely impossible to quantify the business loss of revenue in certain contexts, which is also true when being linked with a COVID-19 danger. *See Abbott Laboratories v. Mead Johnson &*

⁴*Coronavirus Disease Reducing Stigma*, Centers for Disease Control and Prevention (June 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsymptoms-testing%2Freducing-stigma.html (some emphasis added).

Co., 971 F.2d 6, 16 (7th Cir. 1992) (applying a presumption of irreparable harm because it “is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill”); *see also American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306 (“Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.”).

Businesses are “fight[ing] to survive.”⁵ Not only will releasing business names with employees who tested positive place a stigma on those businesses and lead to further loss of revenue in an already disastrous business climate, but public disclosure could ultimately force many businesses to shut their doors altogether. This threat to their continued existence was enough to find “irreparable harm” from the Governor’s plan and a necessity to preserve the status quo. *See Nemer Jeep-Eagle, Inc.*, 992 F.2d at 435; *John B. Hull, Inc.*, 588 F.2d at 28-29.

As the circuit court recognized, the release of business names will permanently and irreparably harm businesses in Wisconsin and their reputation by brandishing what amounts to a scarlet letter on businesses.

⁵ *See* Jennifer Valentino-DeVries, et al., *Virus Alters Where People Open Their Wallets, Hinting at a Halting Recovery*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.

(Def. Appellant App. 136). This COVID-19 stigma will inevitably lead to a loss of revenue. This too is enough to find irreparable harm. *See American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306. As such, the circuit court's decision to issue the temporary injunction was correct based on the irreparable harm and necessity to preserve the status quo.

CONCLUSION

Amici curiae respectfully request that this Court affirm the circuit court's grant of the Plaintiffs' motion for a Temporary Injunction.

DATED this 2nd day of March 2021.

Respectfully submitted,
GREAT LAKES LEGAL FOUNDATION

Robert I. Fassbender SBN 1013985
Attorney for Movants-Amici:

National Federation of Independent Business
Wisconsin Restaurant Association
Restaurant Law Center

Address:
10 East Doty Street, Suite 504
Madison, Wisconsin 53703
Telephone: (608) 310-5315
E-mail: fassbender@greatlakeslegalfoundation.org

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for an amicus brief produced with a proportional serif font. The length of this brief, including footnotes, is 2,933 words.

Dated this 2nd day of March 2021.

Robert I. Fassbender (1013985)

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of March 2021.

Robert I. Fassbender (1013985)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2021, I caused a copy of this brief to be served upon each of the following persons via U.S. Mail,

First Class:

Ryan J. Walsh
Amy Catherine Miller
Eimer Stahl, LLP
10 E. Doty Street, Suite 800
Madison, WI 53703

Sarah Ann Huck
Clayton Patrick Kawski
Anne Bensky
Anthony Russomanno
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Thomas Claire Kamenick
Wisconsin Transparency Project
1144 Norridge Trl.
Port Washington, WI 53074

Dated this 2nd day of March 2021.

Robert I. Fassbender (1013985)