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Nos. 2020AP2081-AC & 2020AP2103-AC

In the Supreme Court of Wisconsin

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA
CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF
COMMERCE AND VISITORS BUREAU,
PLAINTIFFS-RESPONDENTS-PETITIONERS

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WISCONSIN,
KAREN TIMBERLAKE, IN HER OFFICIAL CAPACITY AS INTERIM
SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH SERVICES
AND JOEL BRENNAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE
WISCONSIN DEPARTMENT OF ADMINISTRATION
DEFENDANTS,

AND

MILWAUKEE JOURNAL SENTINEL
INTERVENOR-APPELLANT.

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NON-PARTY LETTER BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

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Introduction

On May 4th, the Court received a petition for review in the above-listed case. Amicus briefs supporting the petition are due by May 18th. NFIB submitted an amicus brief at both the Waukesha County Circuit Court and District IV Court of Appeals in support of Wisconsin Manufacturers & Commerce (WMC). NFIB respectfully submits this brief to the Court urging it to grant the petition for review, so it may adequately consider the small business interests involved, which the opinion below negatively impacts.¹

Statement of Interest

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 is the nation's leading small business association, representing members in Washington D.C. and all fifty state capitals. Founded in 1943 as

¹ The NFIB Small Business Legal Center confirms this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the NFIB SBLC made a monetary contribution intended to fund the preparation or submission of this letter.

a nonprofit, nonpartisan organization, 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 and expresses the interests of its members in cases that affect small businesses.

Argument

The court of appeals' opinion primarily focused on the "interpret[ation] [of] the applicable statutes" and a review of the complaint's sufficiency. While the court of appeals cited to many of this Court's decisions, it is unclear whether these precedents were correctly applied. For example, the court of appeals flatly rejected Petitioners' argument that they had a legally protectable interest based on taxpayer standing, stating in no uncertain terms: "doctrines that confer standing on a party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest." *Wisconsin Manufacturers & Commerce, et al. v. Evers, et al.*, Nos. 2020AP2081-AC & 2020AP2103-AC, 2021 WL 1248960, *8 (Wis. Ct. App. Apr. 5, 2021). Whether this is the law in Wisconsin, or ought to be, is not something the NFIB SBLC takes a position on. However, we do

note for this Court's attention that just over a month ago, this Court held that an individual bringing a declaratory relief action challenging Governor Evers's state of emergency had a legally protected interest based solely on the "expenditure of taxpayer funds giv[ing] [him] a legally protected interest[.]" *Fabick v. Evers*, 2021 WI 28, ¶11, __ Wis. 2d __, 956 N.W.2d 856. The conflicting nature of the lower court opinion and this Court's recent statement on the same topic warrants further review by the State's highest court, especially since the lower court's proclamation is binding statewide.²

More concerning is the court of appeals' lack of consideration for the impact its decision will have on those harmed by the Governor's edicts – the small business community. While there appears to be light at the end of the long and dark COVID-19 tunnel, the impacts of the pandemic will be felt for years to come. Businesses are finally seeing an improvement in sales, but now a shortage of interested labor threatens their continued vitality. In a recent survey, forty-four percent of small business reported job openings they were unable to fill, for both skilled and unskilled

² See Wis. Stat. § 752.41(2) ("Officially published opinions of the court of appeals shall have statewide precedential effect.").

positions.³ In addition to driving consumers away from businesses and negatively impacting their bottom line, the Governor's proposed policy threatens to stigmatize these businesses in the minds of qualified labor and cause irreversible reputational damage.

Conclusion

Small businesses need the State's highest court to thoroughly consider the issues involved in this case through merits briefing, oral argument, and review of the court of appeals' decision, before giving the green light for the implementation of this ill-advised and harmful policy. Thus, on behalf of the Wisconsin small business community, NFIB respectfully asks that this Court grant the Petition for Review.

* * *

³ See William C. Dunkelberg & Holly Wade, *NFIB Small Business Economic Trends*, *1, NFIB RES. CTR. (Apr. 2021), <https://assets.nfib.com/nfibcom/SBET-Apr-2021.pdf>.

DATED this 13th of May, 2021.

Respectfully Submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 837 words including footnotes.

DATED this 13th of May, 2021.



Lane E.B. Ruhland

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form 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 13th of May, 2021.



Lane E.B. Ruhland

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2021, I caused three copies of the foregoing brief to be served upon counsel of record via U.S.

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