In the Supreme Court of Wisconsin

Appeal No. 2022AP13

AMAZON LOGISTICS, INC.,
Plaintiff-Respondent-Petitioner,
v.
LABOR AND INDUSTRY REVIEW COMMISSION,
Defendant-Appellant,
DEPARTMENT OF WORKFORCE DEVELOPMENT UI DIV. BUREAU OF LEGAL AFFAIRS,
Defendant-Co-Appellant

MERITS AMICUS BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

Nathan J. Kane
Wis. Bar No. 1119329
Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org
srosenow@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.

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Introduction

The importance of this case is nearly impervious to hyperbole. This case will affect every sector of the state's economy and every stratum of its society. This case could eviscerate the autonomy of millions of Wisconsin workers. And this case could destroy remedies for life-threatening mental illnesses. Though all this Court's cases have statewide reach, this one's is uniquely apparent.

In its nonparty brief at the petition-for-review stage, Wisconsin Manufacturers & Commerce, Inc. explained how this case could affect Wisconsin's burgeoning gig economy (and how California's AB5—a bill producing results like those of the decision below—disrupted California's economy). In this brief, WMC will identify three more results this case may have if the decision below is not reversed and its reasoning replaced with a framework producing predictable outcomes under Wis. Stat. § 108.02(12)(bm)2. Then, it will explain how to construct parts of that framework.

Discussion

I. Without consistent application of Wis. Stat. § 108.02(12)(bm)2., valuable sectors of the economy cannot thrive.

From quaint family homes to high-tech arenas, every modern structure is the sum of countless hands. Take a school. To build one, a company might enlist a concrete pourer to mold a foundation, then a bricklayer to build up the walls. Eventually, an

electrician will install wires for lights and outlets and PA systems. These companies, called contractors, come in two kinds. General contractors plan and oversee construction; subcontractors (like concrete pourers, brick layers, and electricians) perform jobs specific to their expertise.[1] For some projects, even subcontractors hire subcontractors, creating lines of interdependent contracts—one general contract demanding subcontracts, which in turn demand different, more specific contracts, and so on.[2] Without this complex contractual structure, few projects could ever be complete, much less with the competence customers expect. *See* Mark R. Hinkston, *Limited Duty to Independent Contractors' Employees*, Wis. Law., May 2011, at 16.

All that aside, construction is a risk-filled business. Profits depend on consistency of costs. Turbulent up-down swings in inflation, interest rates, material availability, and more can cheapen profits in the short term and disrupt planning for the long term.[3] However burdensome it might be, cost fluctuation comes with the territory. But through its interpretation of Wis. Stat. § 108.02(12)(bm)2., the court of appeals has catapulted into this

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[1] Chris Hendrickson, *Project Management for Construction*, 1.5 Construction Contractors (2d ed. 2008), available at https://www.cmu.edu/cee/projects/PMbook/index.html.

[2] Internal Revenue Service, *Subcontractors*, https://www.irs.gov/pub/irs-regs/subcontractorsfaq&a.prn.pdf.

[3] Association of General Contractors of America, *2022 Construction Inflation Alert* (July 2022), https://www.agc.org/sites/default/files/users/user21902/Construction%20Inflation%20Alert%20Cover_Jul2022_V4.pdf.

industry an uncertainty of a different sort: judge-made uncertainty. With the integral role contracting plays in construction, the law must enable landowners to reliably predict whether their contractors will be rightly categorized under the law. Yet up to now, Wis. Stat. § 108.02(12)(bm)2. litigation has been resolved with the predictability of a slot machine. At LIRC,[4] Amazon Logistics scored a 1/9. It pulled the levers of justice and on administrative appeal scored another but different 1/9. It pulled again, and in circuit court, received a clean sweep, 9/9. But then LIRC and DWD[5] appealed. The result: a 5/9—just one short of the required six. And so it will go in every dispute, unless this Court ends that wild unpredictability.

This case will affect more than construction, however. It will affect education. The Wisconsin education system is sputtering. Two thirds of Wisconsin's students can neither read nor do math at grade level.[6] In the workplace, this deficiency is apparent. Almost 60% of our state's businesses have employees who struggle

[4] Labor & Industry Review Commission.

[5] Department of Workforce Development.

[6] National Center for Education Statistics, *The Nation's Report Card: 2022 Mathematics Snapshot Report: Wisconsin Grade 8*, https://nces.ed.gov/nationsreportcard/subject/publications/stt2022/pdf/2023011WI8.pdf.

with these skills,[7] so nearly two thirds of employers have eased their hiring requirements.[8]

To succeed in school, and to translate education into salable skills, many students need help outside of school. But getting that help is often easier said than done. Evening jobs, childcare duties, simple financial struggle—all that can impede a student's access to assistance. And those obstacles, burdensome to begin with, can prove insurmountable when help available lacks the flexibility to meet one's after-school schedule. As it happens, the gig economy has solved these problems, offering tutors with flexibility to reach any student.[9] But for that model to remain sustainable, the law must be clear—clear enough for companies to remain confident LIRC will not misclassify their tutors and drive up costs. For if the risk of undue expenses climbs too high, tutors will dwindle.

The effects of this case will sweep even beyond workplace organization, economic health, and education. This case could indirectly darken private lives. Mental illness torments over a quarter of this state's population.[10] And each year, that number

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[7] WMC, *Wisconsin Employer Survey* (2023), https://media.wmc.org/wp-content/uploads/2023/07/17104044/CEO-Survey-Report_Summer-2023_EDUCATION.pdf.

[8] *Id.*

[9] *See* Gili Malinsky, *Online tutoring side hustles are in demand, and can pay up to $180 an hour—here's how to get started*, CNBC (Dec. 14, 2022), https://www.cnbc.com/2022/12/14/in-demand-side-hustle-for-2023-is-online-tutoring-how-to-start.html.

[10] *Mental Health in Wisconsin*, KFF (2023), https://www.kff.org/statedata/mental-health-and-substance-use-state-fact-sheets/wisconsin/.

only (unfortunately) grows.[11] Although the COVID-19 pandemic aggravated many mental illnesses, it also coaxed forward up-and-coming platforms for mental-health treatment.

Online-therapy platforms boomed during the pandemic, and their user rates continue to rise. BetterHelp, the most-used platform, serves over 2.5 million patients alone.[12] A direct-to-consumer service, online therapy works differently from traditional models. No longer must patients search out suitable therapists themselves; using algorithms, these platforms do that for them, matching patients with licensed therapists who fit their individual needs. ET Marcelle et al., *Effectiveness of a Multimodal Digital Psychotherapy Platform for Adult Depression: A Naturalistic Feasibility Study*, 7 JMIR Mhealth Uhealth 1 (2019).

This model has produced genuine results. About 40% of users see "clinically significant improvement in depressive symptoms within 3 months." *Id.* Better still, "telehealth is essentially just as effective as face-to-face psychotherapy—and retention rates are higher[.]"[13]

Yet even after the rise of online therapy, therapist demand is projected to exceed supply by 2025. U.S. Department of Health

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[11] *Id.*

[12] Danielle Dresden, *Our BetterHelp Review (2023): Is This Online Therapy Worth It?*, Medical News Today (Oct. 5, 2023), https://www.medicalnewstoday.com/articles/betterhelp-reviews#_noHeaderPrefixedContent.

[13] Zara Abrams, *How well is telepsychology working?*, American Psychological Association (July 1, 2020), https://www.apa.org/monitor/2020/07/cover-telepsychology.

and Human Services, *National Projections of Supply and Demand for Selected Behavioral Health Practitioners: 2013-2025* at 4 (2016). Online therapy works against this trend.

But inconsistency under Wis. Stat. § 108.02(12)(bm)2. threatens these platforms, which rely on therapists with independent-contractor status. This threat was apparent to Californians when their legislature passed AB5—a law that would have reclassified countless online therapists as employees. To prevent that law from "diminishing [therapists'] ability to earn a living" and "cutting off [patients'] access to mental health services," the California Psychological Association pushed to exempt therapists from the law's reach.[14] The opinion below here is like AB5 without that exception. Platforms cannot prosper and patients cannot receive steady help unless the law is clear how gig-working therapists must be treated under it.

Whether it's construction, education, healthcare, or one-off gig work, the economy needs legal consistency. Under lower courts' erratic precedents, the economy has a dog's chance of thriving. This Court should deliver consistency.

II. Consistent application of Wis. Stat. § 108.02(12)(bm)2.a–i. is best realized via close adherence to the statutory text.

To determine whether a worker is an employee or independent contractor, courts must apply Wis. Stat. § 108.02(12).

[14] Stacey Larson, *Psychologists win exemption to new 'gig workers' law in California*, American Psychological Association (Oct. 24, 2019), https://www.apaservices.org/practice/advocacy/state/state-beat/exemption-gig-workers.

Subsection (12)(a) defines "employee," and subsection (12)(bm)2. contains the test for identifying workers who are independent contractors.

To show a worker is an independent contractor, the "employing unit" must, "by contract and in fact," "satisf[y]" the DWD of two conditions. Wis. Stat. § 108.02(12)(bm). Everyone agrees the first condition is not at issue, so the controversy here lies only in the second. That condition requires the employer prove "6 or more" of nine conditions in subdivision 2.a–i. Below, WMC explains how Wisconsin courts have misinterpreted three of those conditions (subdivisions. a., f., and g.), and how this court can rightly interpret them now.

A. Subdivision a. does not require a worker hold herself out to the public.

The court of appeals concluded delivery partners do not "hold themselves out as in business" because they communicate only "with Amazon Logistics, and not to advertise or offer their services to the wider public or third parties seeking delivery services." *Amazon Logistics, Inc. v. LIRC*, 2023 WI App 26, ¶36, 407 Wis. 2d 807, 992 N.W.2d 168. That's wrong; the statutory text does not specify to whom or to how many a worker must hold herself out. And such a threshold is nowhere implicit in the meaning of "hold out." To hold out is to "make out to be [or to] represent." *Hold out*, Merriam-Webster's Unabridged Dictionary, https://unabridged.merriam-webster.com/unabridged/hold%20out

(last visited Oct. 9, 2023). The court of appeals ignored the plain, simple meaning of this provision's language.

What's more, the court of appeals' holding on this point smacks of a once-widespread but now defunct test called the IRS common-factor test. Originating in a 1987 IRS revenue ruling, this 20-factor common-law framework has been judicially contracted, and courts no longer apply many of its factors. *Defining the Term "Employee" Under Federal Statutes Relating to Employment*, SG016 ALI-ABA 1063, 1066. Yet despite this test's abundance of problems, lower courts have seemingly grafted parts of it onto our state's distinct codified framework. For instance, here's what the IRS test says about holding oneself out: "[t]he fact that a worker makes his or her services available *to the general public* on a regular and consistent basis indicates an independent contractor relationship." Rev. Rul. 87-41, 1987-1 C.B. 296 (1987) (emphasis added). Unlike that provision, Wis. Stat. § 108.02(12)(bm)2.a. makes no mention of the public. Had the legislature wished to adopt this part of the IRS test, it would have used identical language or directed courts "to incorporate or apply" it. *See Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, ¶32, 405 Wis. 2d 157, 982 N.W.2d 898. Neither happened, yet via judicial interpretation below, this condition wound up as effective Wisconsin law. The Court should now apply the statute's language and simply ask: do delivery partners make themselves available for work to anyone at all?

B. Under subdivision f., the primary purpose of a business is narrow, and courts should not ask whether a worker's service is integrated into a business's.

Subdivision f. analyses have two steps. At step one, courts must articulate both the service the worker performs and the primary service the business performs.[15] At step two, courts must compare those services and decide whether they are "related to" one another. In court of appeals precedent, inconsistency abounds at each step.

To begin with, lower courts have failed to issue step-one descriptions of equal breadth. Take two like and recent cases. Not long ago, the court of appeals considered a dispute involving an online tutoring platform. *Varsity Tutors LLC v. LIRC*, No. 2018AP1951, unpublished slip op. (Wis. Ct. App. Oct. 15, 2019). There, the court held the platform's primary service was merely to connect students with appropriate tutors. *Id.*, ¶33. Notice what the purpose was not. It was not to provide high-quality tutoring. It was not, for that matter, to provide any tutoring at all. The platform's primary purpose was narrow.

In this case, the court of appeals took a different tack, describing the service of Amazon Logistics broadly. Its primary service, the court concluded, is to "ensure that Amazon's products get into the hands of its customers as quickly and efficiently as possible." *Amazon Logistics*, 407 Wis. 2d. 807, ¶97. This

[15] Although the statute does not mention the business's primary purpose, courts must identify it to make an apples-to-apples comparison to the services the worker performs—something the statute *does* mention.

articulation, compared to the articulation in *Varsity Tutors*, could not be more expansive. Analytical heartlands formed out of the same text should not vary so widely in size.

With this case, the Court can stabilize the scope of subdivision f. descriptions. To do so, it should mimic the federal courts' method for applying the Portal-to-Portal Act. That law governs which activities count as compensable work under the Fair Labor Standards Act. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 32 (2014). In analyzing an activity, courts must ask whether it is part of an employee's "principal activity of employment." *Id.* at 33. The United States Supreme Court has established a clear rule on this score: principal activities are narrow things.

One recent holding to this effect came in *Integrity Staffing*. Like this case, that case involved Amazon.com. *Id.* at 29. There, however, the dispute was about fulfillment-center workers (those who prepare the packages that delivery partners bring to customers' doors). *Id.* The Court could have described the workers' principal activity broadly, as the court of appeals did here. That is, it could have described it like this: "to efficiently retrieve and package products from warehouse shelves and ensure those products are taken for quick shipment to Amazon customers." But it didn't. The workers, the Court explained, were employed only "to retrieve products from warehouse shelves and package those products for shipment to Amazon customers." *Id.* at 35. This is a

bald recital of the employees' daily actions. It uses no adverbs. It mentions no later results.

That scope is well drawn, neither too narrow nor too broad. Descriptions too narrow can strip parties of outcomes they justly deserve. And descriptions too broad can force outcomes unforeseeable to the parties. Issuing plain recitals of actions performed, the Supreme Court has shown how to strike the ideal balance. All that said, the primary function of Amazon Logistics is to "coordinate[] and arrange[] for the delivery of products to Amazon.com customers via contracts with a variety of delivery service providers." *Amazon Logistics*, 407 Wis. 2d. 807, ¶98. Because that is what the company does.

As at step one, lower courts have erred at step two. Here, courts must ask whether the worker's and the business's services "relate to" one another. Rather than asking that decisive question, lower courts have asked whether the worker's service has been "integrated" into the business's service.[16] *See*, *e.g.*, *id.*, ¶96. This is a fool's errand. Integration is different from relation.

To be "related" means to "hav[e] similar properties." *Related*, Webster's Third New International Dictionary (1966). To be integrated, meanwhile, is to be "composed of separate parts" but "united together to form a more complete, harmonious, or coordinated entity." *Integrated*, Webster's Third New International Dictionary. Though similar, these concepts are

[16] This analysis might stem from the IRS test, which refers to integration. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

critically different. Two services can be unrelated yet integrated. For example, companies often integrate consumer perks into their business models. These perks serve to leg up competition and garner a wider slice of the market. Take almost any industry: within it, the highest performers offer extras their less profitable peers do not. *See*, *e.g.*, Nathaniel Meyersohn, *The Happy Meal inventor says McDonald's didn't want it at first*, CNN Business (Oct. 31, 2022), https://www.cnn.com/2022/10/29/business/mcdonalds-happy-meal-history-trnd/index.html (explaining how McDonald's began including toys with Happy Meals). With integration as the judicial benchmark, production or maintenance of these perks can be "related to" the business's primary service, even if those activities are not, actually, related to the business at all. Manufacturing Happy Meal toys, for instance, is unrelated to making and serving fast food; the two activities have nothing in common. But McDonald's has no doubt integrated the manufacturing of those trinkets into its business model. The integration analysis thus encourages results untenable under the plain meaning of subdivision f.

Just as problematic, lower courts apply this condition using a hypothetical tinsmith from *Moorman Mfg. Co. v. Industrial Comm'n,* 241 Wis. 200, 5 N.W.2d 743 (1942). *See*, *e.g.*, *Amazon Logistics,* 407 Wis. 2d 807, ¶97. However fanciful, this analogy is a poor compass under current law. When that hypothetical was introduced, Wis. Stat. § 108.02 required businesses to prove a worker "is customarily engaged in an independent trade, business,

profession or occupation." Wis. Stat. § 108.02(5)(a) (Stats. 1937). In expounding on *that* language, which is *not* part of subdivision (12)(bm)2., the court remarked upon the hypothetical tinsmith. *Moorman*, 241 Wis. at 206. So in effect, the court of appeals has applied today's statute as if it hasn't changed in 90 years. The Court should forsake the tinsmith and adhere to the meaning of the statute as written today.

C. Only workers who are paid job-by-job can realize profits or losses under subdivision g.

The meaning of this provision turns on two words: "profit" and "loss." A profit is not just any money made; it is money made beyond one's expenditures. *Profit*, Webster's Third New International Dictionary (1966). Loss, too, is tied to money spent. It occurs when money coming in falls short of money invested. *Loss*, Webster's Third New International Dictionary. For that reason, a gift is not a profit, nor a misplaced wallet a loss, because neither comes to pass through investment. Also for that reason, neither salaries nor wages are profits because neither constitute revenue from investment.

With that understanding in mind, this condition's analysis is limited. To apply this condition, courts need not generate (as they have been) effective profit-projection analyses. *See Amazon Logistics*, 407 Wis. 2d. 807, ¶112. It's simpler. Courts need only read the underlying contract and ask: does it set a salary or wage? Or does pay depend on the number of jobs performed? If a salary or wage is set, subdivision g. supports discerning an employee-

employer relationship (again, because salaries and wages are not profits). If, by contrast, a worker will be paid job-by-job, subdivision g. suggests independent-contractor status.

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From gig work to construction, and from education to mental healthcare, the economy—indeed, society—needs legal consistency. This Court can deliver just that here. It must simply follow the plain meaning of the statute before it.

Conclusion

This Court should reverse the court of appeals' decision.

Dated this 23rd day of October 2023.

Respectfully Submitted,

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org
srosenow@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,000 words.

Dated this 23rd day of October 2023.

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org
srosenow@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.

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 Rule 809.19(12).

Dated this 23rd day of October 2023.

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org
srosenow@wmc.org

Attorneys for Wisconsin Manufacturers & Commerce, Inc.