STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2023AP0367

WISCONSIN COTTAGE FOOD ASSOCIATION, MARK RADL, STACY BEDUHN, STEPH ZINK, KRISS MARION, LISA KIVIRIST, DELA ENDS, and PAULA RADL,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE, AND CONSUMER PROTECTTION and RANDY ROMANSKI,

Defendants-Appellants.

ON APPEAL FROM DECISIONS AND ORDERS GRANTING SUMMARY JUDGMENT AND DENYING A STAY, ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE RHONDA LANFORD, PRESIDING

APPELLANTS' BRIEF

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INTRODUCTION

This case involves a challenge to Wisconsin's retail-food establishment laws. These laws require a person who wants to sell food directly to consumers to obtain a license, receive training in food safety and hygiene, utilize appropriate facilities for their food preparation, and undergo occasional inspections, among other requirements.

Plaintiffs claim that these laws violate their rights under the equal protection and due process clauses because the foods they want to sell—candies, vegetable fritters, energy bars, dried soup mixes, and dehydrated vegetables, among others—are supposedly as safe as some foods that are sold under statutory or regulatory *exemptions* from the retail-food laws. They claim that because nonprofit organizations are granted limited exemptions from the retail-food laws (they can sell foods directly to consumers at up to twelve events per year), and because nonprofits can thus sell, without a license, some of the same foods that Plaintiffs wish to sell, it is unconstitutionally irrational to require Plaintiffs to comply with the food laws.

The circuit court agreed, granted summary judgment for Plaintiffs, and enjoined the Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) from enforcing multiple statutes and two chapters of the Wisconsin Administrative Code against "Plaintiffs and all other similarly situated individuals." The injunction provided no definition of who is "similarly situated" to Plaintiffs.

The judgment below should be reversed. All agree that Plaintiffs' claims are subject to rational-basis review, which is the most deferential standard of constitutional review, and is met if there is *any conceivable basis* on which the Legislature reasonably might have passed the challenged laws. There are multiple conceivable bases on which the Legislature might have enacted Wisconsin's retail-food laws, including food-

safety, consumer protection, and promoting consumer confidence in foods sold in Wisconsin, among others. With these conceivable bases identified, the complaint should have been dismissed at the threshold.

While the circuit court *cited* principles of rational-basis review, its analysis reflected none of them. The court stated that it "[could] not contemplate" any conceivable legal basis for the laws other than "food safety," and that because nonprofits can sell foods that the court believed to have "the exact same food safety concerns," it was unconstitutionally irrational to grant exemptions to nonprofits but not Plaintiffs.

This type of courtroom second-guessing of legislation is prohibited on rational-basis review. The court's comparison between Plaintiffs and exempted food sellers is irrelevant: this case is about the constitutionality of the retail-food laws as applied to Plaintiffs—not about the exemptions as applied to others, or about the *lack of* laws passed for Plaintiffs' benefit.

And even putting aside the court's erroneous constitutional analysis, its injunction is independently, fatally flawed. The injunction amounts to "judicial legislation," effectively enacting a new exemption from the retail-food laws for "Plaintiffs and all other similarly situated individuals." Not only does that impermissibly arrogate the legislative role, but the terms of the injunction are so broad and undefined as to provide no guidance of what is actually prohibited or required.

The retail-food laws are constitutional and the injunction is unlawful. The judgment below should be reversed.

ISSUES PRESENTED

1. Where social and economic welfare laws are challenged as violating equal protection and due process, courts apply rational-basis review and will uphold the law if there is any conceivable, legitimate basis on which the Legislature might have enacted the law. Once a conceivable basis is identified that would sustain the challenged law, the inquiry stops and the law will be upheld. Fact-finding about the Legislature's bases for the law is prohibited, as doing so would involve second-guessing legislative decisions based only on material introduced in the court record. Challenges to legislative line-drawing are therefore "virtually unreviewable," as those scope-of-coverage determinations are a quintessentially legislative task, not subject to judicial revision.

Here, Plaintiffs challenged Wisconsin's retail-food-establishment laws, which impose requirements on entities that wish to sell food directly to Wisconsin consumers. Requirements include obtaining a license, undergoing food-safety training and safety inspections, and using appropriate facilities for food production. Plaintiffs claim that the retail-food laws are unconstitutional because the foods they wish to sell are "as safe as, or safer than" foods that may be sold under certain exemptions from the food laws.

The retail-food laws conceivably serve multiple legitimate purposes, including protecting consumers from various food-based risks and promoting consumer confidence in foods sold in Wisconsin. Specifically, the Legislature might reasonably have concluded that requiring food sellers—including Plaintiffs—to comply with the food laws' various requirements will minimize consumers' exposure to allergens, minimize the risk of consuming adulterated foods, and minimize the risk that Wisconsinites will consume foods

contaminated with food-borne pathogens such as *Salmonella* and *E. coli*.

Do those laws pass rational-basis review, such that Plaintiffs' complaint should have been dismissed?

The circuit court answered no.

This Court should answer yes and reverse the circuit court's decision granting summary judgment for Plaintiffs.

2. To be enforceable, an injunction must be definite and specific as to the acts or conduct prohibited so the person enjoined can know what conduct must be avoided. Additionally, injunctions of statutes or administrative rules may prohibit the enforcement of the laws only as written; an injunction may not be used to expand legislative rights. An injunction that attempts to do so is impermissible as usurping the legislative lawmaking role.

Here, the circuit court enjoined DATCP from enforcing two multi-part statutes and two chapters of the Wisconsin Administrative Code relating to retail-food licensing, inspection, facilities requirements, and training. The injunction prohibits application of these laws "against the Plaintiffs and all other similarly situated individuals," although the order does not define the class of "similarly situated individuals." The effect of the injunction was to create a new exemption for Plaintiffs from Wisconsin's generally applicable retail-food laws. The injunction does not define multiple terms that would be necessary for DATCP to understand what is definitively prohibited and allowed under both the injunction and existing law.

Is the injunction void for vagueness, or did the injunction exceed the court's authority by effectively enacting a new exemption from the retail-food laws?

The circuit court implicitly answered no to both.

This Court should answer yes to both and reverse the circuit court's injunction and order.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be helpful to the Court in analyzing Plaintiffs' novel constitutional claims and the circuit court's multiple analytical errors in applying rational-basis review. *See* Wis. Stat. § (Rule) 809.22(2)(b).

Publication may be warranted because the appeal will involve application of established principles of rational-basis review to a situation different from that in published Wisconsin opinions, and could decide matters of substantial and continuing public interest—namely, the viability of constitutional challenges to the Legislature's decision *not* to enact a statute for the benefit of a challenger. *See* Wis. Stat. § (Rule) 809.23(1)(a)1., 5.

STATEMENT OF THE CASE

Wisconsin statutes and administrative code provisions establish detailed rules and procedures related to licensing, training, and inspection of retail-food establishments (collectively referred to herein as the "retail-food laws"). The circuit court's injunction prohibited DATCP from enforcing these laws against Plaintiffs and other similarly situated individuals.

I. Wisconsin law regulates the preparation and sale of food.

A. Food sellers must obtain a license and comply with food safety laws.

Wisconsinites who want to sell food directly to consumers for profit must be licensed as a "[r]etail food establishment," and follow food-safety procedures. Wis. Stat. §§ 97.30(1)(c), (2)(a); *see also* Wis. Admin. Code ATCP ch. 75 and ch. 75 App. (often referred to as "the Food Code"). These include requirements governing the cleaning, sanitation, and maintenance of food contact surfaces, equipment, and utensils. Wis. Admin. Code ATCP ch. 75 App. 4-1–4-2, 4-5–4-7. Food sellers must use a commercial-grade kitchen to prepare the foods to be sold to the public, *see id.* App. 1-103.10(A), 3-201.11(B), 6-1–6-5, and any food-preparation area be separated from toilet rooms and sleeping quarters, *id*. App. 6-202.111.

Retail food establishments also must follow requirements for safe handling and storage of food. *Id.* App. 3-1–3-8. The operator of a retail food establishment must be able to describe foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction. *Id.* App. 2-102.11(C)(9). Food contact surfaces must be cleaned and sanitized and the label on packaged food must list major food allergens that are ingredients. *Id.* App. 3-602.11, 4-6–4-7.

B. DATCP is responsible for licensing and inspecting retail food establishments.

DATCP conducts regular inspections of licensed retail food establishments to ensure compliance with Wisconsin's food safety regulations. Wis. Admin. Code ATCP § 75.10; *see also* Wis. Admin. Code ATCP ch. 75 App. 2-1. As part of the inspection process, DATCP sanitarians educate operators

on food safety standards and provide suggestions to correct any problems. (R. 69 ¶¶ 27, 29.)

DATCP's inspections include measures to verify proper sanitation and safe food-handling practices. (R. 69 ¶¶ 10, 15–27.) For example, as part of a routine inspection, the sanitarian asks the operator about the establishment's training of employees, hygiene procedures, cleaning procedures, and ingredients. (R. 69 ¶¶ 18–22.) Importantly, sanitarians also ask about the facility's allergen protocols. (R. 69 ¶ 24.) If a licensed facility uses allergens as ingredients, it must separate them from other ingredients during processing to prevent cross-contamination. (R. 69 ¶ 24.) Sanitarians observe how allergens are controlled at the facility, including cleaning procedures and labeling practices. (R. 69 ¶ 24.)

If unsafe or unsanitary conditions are found, DATCP has the authority to stop food production and sale. Wis. Admin. Code ATCP §§ 75.10(3)–(4), 75.12.

These routine inspections have allowed DATCP sanitarians to discover significant food safety concerns at licensed retail food establishments, including pest infestations, rotting ingredients being used to prepare made-to-order foods, and soiled utensils and equipment being used for food preparation. (R. 69 ¶¶ 33–36, 39.) If these establishments were not licensed and inspected, the violations likely would have gone undiscovered and uncorrected. (R. 69 ¶ 41.)

C. Wisconsin law provides limited exemptions from the licensure requirement.

The Legislature has created a limited set of exemptions from the retail-food law's licensing and inspection requirements. *See* Wis. Stat. § 97.30(2)(b). Relevant here, religious, charitable, and non-profit organizations are exempt from the license requirement if they sell food at no more than

12 events in a calendar year. Wis. Admin. Code ATCP §§ 75.063(6)–(7), 75.04(21), (28). There are also exemptions from the retail-food licensure requirement for producers of specific foods, typically consisting of a single ingredient, provided the producers are not engaged in the production or sale of any other foods. Examples include fresh produce, maple syrup and sorghum, cider, honey, and popcorn. *See* Wis. Stat. § 97.30(2)(b)1.a.–b., d.; Wis. Admin. Code ATCP § 75.063(5).

D. The Legislature has rejected proposals to extend licensing exemptions.

In recent legislative sessions, lawmakers have introduced several bills intended to create a licensing exemption for baked goods made by "cottage food" producers like Plaintiffs. If enacted, these bills would have allowed the unlicensed, direct sale of home-baked goods to the public. *See* 2013 Assembly Bill 182; 2013 Senate Bill 435; 2015 Assembly Bill 417; 2015 Senate Bill 330. During the consideration of these bills, commenters raised concerns about food-safety training and allergen labeling. (*See* R. 51:16–20; 52:1–10.) Ultimately, the Legislature did not pass them.

II. Litigation background.

This case involves a constitutional challenge to Wisconsin's retail food licensing laws based in large part on the licensing exemptions for nonprofits and certain foods. A previous challenge to the same laws provides context for this case.

A. *Kivirist v. DATCP*

In 2016, three Wisconsin residents filed a complaint challenging Wisconsin's retail-food laws as applied to "not-potentially hazardous" baked goods, such as cookies, cakes, and muffins. *See Kivirist v. DATCP*, Case No. 16-CV-0006

(Lafayette Cnty.) (hereafter "*Kivirist*"). The term "not potentially hazardous" is not defined in Wisconsin law,[1] but plaintiffs (and eventually the circuit court) interpreted the term as synonymous with "shelf-stable" foods—meaning foods that do not require refrigeration. (*Kivirist* Dkt. 202:30; *see also Kivirist* Dkt. 218:2.)

The *Kivirist* plaintiffs argued that Wisconsin's retail-food laws violated equal protection and due process because they irrationally require a license to sell "not potentially hazardous" foods like cookies and cakes, which plaintiffs claimed were safer than foods sold under the exemptions. (*See Kivirist* Dkt. 6 (complaint).) Plaintiffs sought an injunction prohibiting application of the retail-food laws to them and similarly situated individuals—i.e, anyone wishing to sell not-potentially hazardous homemade baked goods. (*Kivirist* Dkt. 6.)

DATCP responded that Wisconsin's retail-food licensing laws serve multiple legitimate legislative goals and thus easily satisfy the controlling constitutional standard, rational-basis review. (*See generally Kivirist* Dkt. 37.)

The *Kivirist* circuit court disagreed, held that Wisconsin's food safety laws were irrational as to Plaintiffs, and enjoined DATCP from applying the various statutes and regulations to the three named plaintiffs. (*See Kivirist*, Dkt. 202:29–30; *see also Kivirist* Dkt. 218:2.) The *Kivirist* court eventually granted a request by the plaintiffs to extend the injunction to "all other similarly-situated individuals." (*Kivirist* Dkt. 188:2.)

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[1] "Potentially hazardous food" is a defined term under Wisconsin law: food that "requires temperature control" for safety and that can "support rapid and progressive growth of infectious or toxicogenic microorganisms." Wis. Stat. §§ 97.27(1)(dm), 97.29(1)(hm), 97.30(1)(bm); Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B) (definition of "[p]otentially hazardous food").

State officials in 2017 elected not to appeal the *Kivirist* court's ruling relating to baked goods.

In 2021, Plaintiffs filed a motion to find DATCP in contempt on the 2017 injunction, based on their disagreement regarding DATCP's interpretation of the injunction and enforcement of existing retail-food licensing laws. The circuit court denied the contempt motion and clarified its previous orders as prohibiting application of Wisconsin's retail-food licensing requirements to any food, provided "the food is (1) homemade, (2) shelf stable, and (3) has been baked in an oven." (*Kivirist* Dkt. 218:2.)

B. Claims and litigation in this case.

At the same time the *Kivirist* plaintiffs moved for contempt in that case, they also filed this separate lawsuit,[2] seeking relief not limited to baked goods. (*See* R. 3.)

1. Plaintiffs alleged the retail-food statutes and regulations are unconstitutional and sought an exemption for unbaked, "not potentially hazardous" foods.

Plaintiffs alleged that just as it is irrational to require licensure for the production and sale of "not potentially hazardous" *baked goods*, as held in *Kivirist,* it is equally irrational to require licensure for *unbaked* goods, such as energy bars, candies, granola, Rice Krispie Treats, dried soup mixes, and dehydrated vegetables, among others. (R. 3 ¶¶ 70, 80, 88, 99, 107, 116.)

Plaintiffs characterized the licensing, inspection, and commercial-kitchen requirements as imposing a "ban" on the "the sale of most shelf-stable homemade foods." (R. 3 ¶¶ 1,

[2] Plaintiffs in the current case include additional individuals as well as the Wisconsin Cottage Food Association. (R. 3.)

17–26.) They claimed this "ban" violates due process and equal protection because it is not "necessary to achieve, narrowly tailored to, reasonably related to, or rationally related to any compelling, substantial, or legitimate governmental interest." (R. 3 ¶¶ 130, 141–53.)

They sought a new licensing exemption, based on their theory that the foods they wish to sell are "just as safe as, if not safer than, the foods" sold by nonprofits under the limited exemptions and the specific foods exempted by statute or rule. (R. 3 ¶¶ 146, 152.) They sought an injunction "prohibiting [DATCP] from enforcing the licensing requirements . . . as well as the statutes and regulations governing such licensees . . . against Plaintiffs and other persons producing and selling shelf-stable homemade foods directly to consumers." (R. 3:33.)

2. DATCP moved to dismiss, arguing that Wisconsin's retail-food laws serve multiple, legitimate legislative purposes and easily satisfy rational-basis review.

DATCP moved to dismiss on the ground that the challenged laws are rationally related to legitimate state interests in promoting public health, safety, and welfare, and thus easily pass rational-basis review. (*See generally* R. 20, 28.) DATCP argued that the constitutionality of the generally applicable licensing laws is not affected by the Legislature's decision not to enact an exemption covering them or their so-called "not potentially hazardous foods." (*See generally* R. 20, 28.) DATCP pointed out multiple legitimate bases on which the Legislature may have passed the food laws, and there is no basis to require "proof" that the Legislature's chosen scheme applies perfectly to Plaintiffs' proposed foods. (*See, e.g.* R. 28:11–14.)

The circuit court denied the motion to dismiss. (R. 32, 37.) Despite DATCP's enumeration of multiple conceivable bases to sustain the challenged laws, the circuit court believed that dismissing the case at the pleadings stage "would essentially render the rational basis test" toothless, affording no meaningful review of the legitimacy of the challenged laws. (R. 32:27.)

3. The parties proceeded to discovery and Plaintiffs conducted numerous depositions of DATCP employees, seeking their opinions about the challenged laws.

Having rejected Defendants' proffered rational bases and denied the motion to dismiss, the court set a schedule and the parties proceeded to conduct discovery.

Plaintiffs deposed half a dozen current and former DATCP employees, seeking their opinions about the relative safety of exempted foods versus the foods Plaintiffs wanted to prepare and sell and whether the Legislature's policy choices to exempt certain foods but not others "make any sense." (R. 83:14 (Tr. 50:22–51:4); 84:17–18, 29 (Tr. 61:21–62:17, 67:13–68:19, 111:20–112:24); *see also, e.g,* 85:10, 28–29, 31–32; 86:19; 87:18; 88:14, 18; 95:17.) DATCP employees explained their discomfort making these comparisons because, as one former employee explained, the Legislature did not "compare [the exemptions] directly" but, rather, "consider[ed] facts or risk levels at the time of the law" and determined they "can accept . . . a risk in some situations, and they haven't in others." (R. 85:28–29 (Tr. 108:20–110:6).) And "since the [L]egislature has the power to make those regulations," another employee explained, DATCP has "to work within those confines." (R. 83:18 (Tr. 66:12–22).)

The parties also named experts and exchanged reports. (R. 66; 91.) Defendants' expert, James Kaplanek, manager of DATCP's Retail Food and Recreational Program Section, explained how the licensing, inspection, and food safety regulations at issue protect the public by preventing the sale of adulterated or misbranded food. (R. 66.)

In Kaplanek's opinion, allowing the unregulated sale of "not-potentially hazardous foods" presents significant administrative problems and could increase the risk of adulterated or misbranded foods. (R. 66:3–4.) He explained that the term "not-potentially hazardous" does not mean a food is "safe" across the board. "Potentially hazardous" refers only to microbiological risks and does not address other serious food safety concerns such as allergen or norovirus contamination resulting from improper food handling and labeling. And unlicensed producers may incorrectly assess whether a food is "not-potentially hazardous," with the result being that they sell food that is actually, or potentially, "hazardous." (R. 66:3–4.)

Plaintiffs' expert acknowledged this risk, recognizing that there are many "borderline" foods—for example, smoked fish, cocktail syrups, beef jerky—whose hazardousness cannot be known without a laboratory assessment. (R. 89:20 (Tr. 73:22–76:8).)

4. The circuit court granted summary judgment for Plaintiffs, holding that Wisconsin's retail-food laws are unconstitutional as to Plaintiffs and "similarly situated" individuals.

The court granted summary judgment for Plaintiffs. The court concluded that because Plaintiffs' foods are "as safe or safer than exempted foods," Wisconsin's retail-food laws are "irrational and arbitrary" and thus "unconstitutional as

applied to [Plaintiffs] and others similarly situated." (R. 122:12, 22, A-App. 440, 450.)

The court's conclusion that Plaintiffs' foods are "safe" rested in large part on its inference that a shelf-stable food presents *no* food-safety dangers—i.e., that if a food is "not-potentially hazardous," it is "safe." (R. 122:14, *see also* R. 122:11–14.) The Court cited DATCP testimony for this proposition (*see, e.g.*, R. 122:14, *see also* R. 122:11–14), but no witness testified that foods that are not "potentially hazardous" are categorically "safe." DATCP produced evidence directly to the contrary, showing that aside from whether a food is "potentially hazardous," multiple risks may render the food unsafe, such as whether it is contaminated with allergens, pathogens, adulterants, or was made in unsanitary conditions. (*See, e.g.*, R. 69 ¶¶ 18–41; R. 67:5, 22–23; R. 129 ¶¶ 7–8.)

The circuit court's decision relied heavily on the decision in *Kivirist*, holding that that decision was "[e]specially relevant" to the constitutional analysis in this case. (R. 122:13, A-App 441.)

The court enjoined DATCP from enforcing Wisconsin's retail-food laws, including multiple statutes and two entire chapters of the administrative code, "against the Plaintiffs and all other similarly-situated individuals." (R. 122:27–28, A-App 445–456.)

5. DATCP appealed and sought a stay of the injunction.

Following the circuit court's injunction of multiple statutes and administrative code provisions, DATCP filed this appeal and sought a stay of the injunction. (*See* R. 124–29.) The circuit court denied the stay. (R. 165:14–19.)

DATCP then moved this Court for a stay pending appeal, which this Court granted.

STANDARD OF REVIEW

The constitutionality of statutes and administrative rules is a question of law that appellate courts review *de novo*. *Porter v. State*, 2018 WI 79, ¶ 28, 382 Wis. 2d 697, 913 N.W.2d 842.

SUMMARY OF THE ARGUMENT

Plaintiffs' challenge to Wisconsin's retail-food laws should have been dismissed at the threshold. In light of the strong presumption of constitutionality of statutes and administrative rules, the laws must be upheld if there is any conceivable basis on which the Legislature reasonably might have enacted the laws.

Multiple, conceivable bases exist on which the Legislature might have enacted Wisconsin's retail food laws. The laws serve the state's general interests in consumer protection and promoting confidence in foods sold in the state by requiring those who sell foods to receive training in safe food handling, preparation and storage; to use appropriate facilities to prepare foods; and to undergo inspections of those food-production facilities, among other requirements.

Specific food-safety considerations provide further support for the laws. The Legislature might reasonably have concluded that the licensing, training, inspection, and facilities requirements help minimize consumers' exposure to allergens, adulterants, or contaminants in foods (for example, THC added to candies), and to food-borne pathogens or illnesses.

In light of these conceivable bases for the food laws, Plaintiffs' challenge should have been dismissed. Discovery and summary judgment were improper, since legislative choices are never subject to post-hoc fact-finding on rational-basis review of a statute's constitutionality.

The circuit court's decision granting judgment for Plaintiffs' was plagued with multiple errors. The court was incorrect to analyze whether Plaintiffs are "similarly situated" to *anyone*, since that type of analysis is reserved for constitutional challenges to specific governmental conduct, not challenges to statutes or rules.

More broadly, the circuit court's reference to the various exemptions from the retail-food laws also was incorrect. Those exemptions are irrelevant to Plaintiffs' constitutional challenge, which instead pertains exclusively to the generally applicable retail-food laws. Those generally applicable laws do not lose their constitutionality as a result of the Legislature creating some limited carve-outs for the benefit of nonprofit groups and sellers of certain types of foods (e.g., honey, popcorn, fresh vegetables, maple syrup). Such "scope of coverage" challenges to legislative line-drawing are beyond the judicial role. Even if the exemptions were relevant to the constitutional inquiry, the Legislature's decisions to provide limited, beneficial treatment for nonprofits and sellers of specific foods easily pass constitutional muster.

The circuit court also erred in relying on the previous circuit court decision in *Kivirist*. That decision was not precedential or preclusive and has no bearing on the question presented here: whether the challenged retail-food laws are constitutional.

Separately, even if this Court would ultimately disagree that the laws are constitutional, the circuit court's injunction is unlawful and must be reversed. It wrongly usurps the legislative role by effectively enacting a new exemption from the retail-food laws for "Plaintiffs and all other similarly situated individuals."

The injunction also is improper because it does not provide any clear delineation of the conduct enjoined. The court enjoined DATCP from enforcing two lengthy statutes

and two entire chapters of the administrative code, but failed to define, among others, (1) the class of "similarly situated" individuals that are included in the injunction, (2) the types of "homemade" foods that are covered, and (3) the circumstances under which covered foods may be delivered and sold to consumers. These multiple vague terms further compel reversal of the injunction. Finally, all else aside, the injunction wrongly enjoins application of a statute that is not at issue in this case.

The judgment below should be reversed and Plaintiffs' complaint dismissed.

ARGUMENT

I. Wisconsin's retail-food laws easily pass rational-basis review.

A. On rational-basis review, statutes and administrative rules are presumed constitutional and must be upheld if there is any conceivable basis to do so.

A plaintiff faces a "notoriously heavy legal lift" when asserting a constitutional challenge to statutes or administrative rules that do not implicate fundamental rights or draw suspect classifications. *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017); *accord Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 58, 383 Wis. 2d 1, 37, 914 N.W.2d 678, 695. Courts "indulge[ ] every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [the court] must resolve that doubt in favor of constitutionality." *Porter*, 382 Wis. 2d 697, ¶ 29. This strong presumption is based on the recognition that "the judiciary is not positioned to make the economic, social, and political decisions" that underlie legislative enactments and administrative rules. *Id.* ¶ 29 (citation omitted). Once the parties or court identify a

conceivable, legitimate basis that *might have* motivated the Legislature to pass the challenged laws, the constitutional inquiry is complete and "the court *must assume* the legislature passed the act on that basis." *Blake v. Jossart*, 2016 WI 57, ¶ 32, 370 Wis. 2d 1, 884 N.W.2d 484 (emphasis added) (citation omitted).

This means where rational-basis review applies, no fact-finding or discovery is appropriate regarding the legitimacy of a law. *See Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1055 (7th Cir. 2018) ("Outside the realm of 'heightened scrutiny' there is . . . never a role for evidentiary proceedings." (quoting *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995)). A "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also Mayo*, 383 Wis. 2d 1, ¶ 40 (relying on *Beach Commc'ns*). So while the challenger bears the burden "to negative any reasonably conceivable state of facts that could provide a rational basis for the [challenged laws]," *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 (2001), they "must carry that burden by resorting to logic rather than to discovery," *Johnson v. Bredesen*, 579 F. Supp. 2d 1044, 1054 (M.D. Tenn. 2008). This is true even where a challenger asserts that the legislature passed a law with some sort of improper motive. Once a conceivable rational basis is identified, the inquiry stops; suggestions of "alleged illicit legislative motive" are irrelevant on rationality review. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968).

The Supreme Court's opinion in *Beach Communications, Inc.*, 508 U.S. at 315–16, provides especially useful guidance for assessing challenges to legislative line-drawing.[3] The Court rejected a challenge to administrative rules that imposed differing licensing requirements on cable TV providers based on the number of housing units the providers were servicing. *See id.* at 310–11. The Court emphasized that courts must be especially deferential to laws where "the legislature must necessarily engage in a process of line-drawing," such as determining which regulated entities should receive beneficial treatment. *Id.* at 315 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). Because such line-drawing inevitably means that litigants with "an almost equally strong claim to favored treatment [will] be placed on different sides of the line," deciding where the line is best drawn "is a matter for legislative, rather than judicial, consideration." *Fritz,* 449 U.S. at 179. Because "the legislature must be allowed leeway to approach a perceived problem incrementally," such "scope-of-coverage" challenges are "virtually unreviewable." *Beach Commc'ns,* 508 U.S. at 316.

When analyzing equal-protection challenges to statutes, Wisconsin courts have at times applied a five-step analysis in considering the facial equal protection challenges to statutes.[4] *Mayo*, 383 Wis. 2d 1, ¶ 42; *see also Porter*, 382

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[3] Wisconsin courts recognize that the equal-protection and due-process provisions of the state and federal constitutions are analogous. *See, e.g.*, *State v. Smith*, 2010 WI 16, ¶ 12, 323 Wis. 2d 377, 780 N.W.2d 90; *Mayo*, 383 Wis. 2d 1, ¶ 41.

[4] Under the five-factor formulation of the test, a statutory classification will be upheld as long as:

> (1) All classification[s] [are] based upon substantial distinctions which make one class really different from another.

Wis. 2d 697, ¶¶ 34–35. This test is simply an "analytical tool" to assess the "basic question . . . whether there is a reasonable basis to justify the classification." *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986). Because the basic question is the same, many cases do not address the five-factor inquiry at all, instead simply assessing whether a conceivable, rational basis supports the challenged law. *See*, *e.g.*, *In re Commitment of Burgess*, 2003 WI 71, ¶ 10, 262 Wis. 2d 354, 665 N.W.2d 124.

B. Multiple legitimate, conceivable rationales support the Legislature's decision to enact Wisconsin's food laws.

This case should have been dismissed on the pleadings, based on the multiple conceivable bases supporting Wisconsin's retail-food laws. *Cf. Mayo*, 383 Wis. 2d 1, ¶¶ 40–49. And while this case never should have proceeded past the pleadings, the summary-judgment record only

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> (2) The classification adopted [are] germane to the purpose of the law.
>
> (3) The classification [are] be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within a class.]
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class [are] so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Mayo, 383 Wis. 2d 1, ¶ 42 (quoting *Aicher v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 613 N.W.2d 849).

confirms the multiple, conceivable bases on which the Legislature might have relied when enacting the food laws.[5]

1. Wisconsin's retail-food laws conceivably serve legislative goals of protecting consumers, promoting food safety, and promoting consumer confidence.

As Plaintiffs conceded below, Wisconsin's retail-food laws—the licensure requirement, facilities specifications, and training and inspection requirements—make sense for "a factory that produces millions of cookies." (R. 24:25 (Plaintiffs' brief in opposition to motion to dismiss)). As a constitutional matter, the laws are equally reasonable as applied to individuals like Plaintiffs, who want to sell foods to Wisconsinites in unlimited amounts for profit. Plaintiffs' "scope of coverage" challenge thus should have been rejected.

Courts have "routinely held" that health, safety, and welfare laws like these are rational. *Minerva Dairy, Inc.*, 905 F.3d at 1053; *see also Porter*, 382 Wis. 2d 697, ¶ 41. Particularly relevant is *Minerva Dairy*, in which the Seventh Circuit upheld Wisconsin's butter-grading laws against equal protection and due process challenges remarkably similar to Plaintiffs' challenge here. *See Minerva Dairy, Inc.*, 905 F.3d at 1055–57. The challengers asserted that the grading law violated equal protection because while grading for butter is mandatory, it is voluntary for some other commodities (e.g., honey, cheese, maple syrup). *See id.* The court rejected this

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[5] The circuit court did not separately address Plaintiffs' due process claim. (*See* R. 122:22.) Because "[t]he analysis under both the due process and equal protection clauses is largely the same," *Mayo*, 383 Wis. 2d 1, ¶ 39 (quoting *State v. Quintana*, 2008 WI 33, ¶ 78, 308 Wis. 2d 615, 748 N.W.2d 447), if this Court agrees that the challenged laws satisfy rational-basis review, no separate due-process inquiry is necessary.

claim, holding that "even if mandatory grading of [the other commodities] would similarly advance consumer protection and promote commerce, the Equal Protection Clause allows the State to regulate one step at a time, addressing itself to the phase of the problem which seems most acute." *Id.* at 1057 (citation omitted). Equal protection, the court held, "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

Equally compelling are the supreme court's recent analyses in *Mayo* and *Porter*.

In *Mayo*, the court considered whether the statutory noneconomic damage cap for victims of medical malpractice violated either equal protection or due process. 383 Wis. 2d 1, ¶ 1. The court first expressly overruled a more searching "rational basis with teeth" approach that had been suggested in an earlier Wisconsin case. *Id.* ¶¶ 31–32. Then, applying straightforward rational-basis, the court easily rejected the challenge, holding that the damage cap was constitutional on its face and as applied to the plaintiffs. *Id.* ¶¶ 2, 32. The court acknowledged that "any cap, by its very nature, will limit the amount that some people will be able to recover," but that the Legislature's line-drawing nonetheless reflected a "rational policy choice." *Id.* ¶¶ 49, 54.

In *Porter*, the court applied the same straightforward rational-basis standard in rejecting equal protection and due process challenges to laws that prohibited joint ownership or operation of a cemetery and a funeral home. *Porter*, 382 Wis. 2d 697, ¶¶ 2, 7. The court confirmed that in assessing these constitutional questions, there was no need for "a fact-finding hearing" as doing so "would improperly elevate a so-called factual determination . . . as dispositive of the question of the anti-combination laws' constitutionality." *Id.* ¶ 50 n.15 (quoting *Porter v. State*, 2017 WI App 65, ¶ 48, 378 Wis. 2d 117, 902 N.W.2d 566).

The analyses of the economic and consumer-protection laws in *Mayo*, *Porter*, and *Minerva Dairy* illustrate why Plaintiffs' challenge to the similar retail-food laws should have been dismissed. The only relevant inquiry is whether the challenged laws—that is, the general laws governing retail-food establishments—are conceivably rational, including as applied to Plaintiffs. Just as the laws in those cases were upheld on conceivable bases related to consumer protection, safety, and welfare, so too should Wisconsin's retail-food laws have been upheld. Plaintiffs' challenge should have been dismissed on the pleadings.

2. Wisconsin's food laws also may be sustained as a reasonable approach to minimizing specific risks like adulteration, misbranding, or contamination by allergens and foodborne illnesses, and adulterants like THC.

In addition to the general legislative purposes of consumer protection, food safety, and promoting consumer confidence, multiple specific rationales support the retail-food laws. These include preventing or minimizing contamination from allergens, foodborne bacteria, norovirus, and adulterants like THC. (*See* R. 67:13–16.)

First, the Legislature conceivably might have enacted Wisconsin's retail-food licensing framework to minimize the risk that Wisconsinites could be exposed to allergens. Eggs, wheat, milk, soy, peanut, tree nuts, fish, and shellfish are common food allergens. Wis. Admin. Code ATCP ch. 75 App. 3-101.11. Some of these allergens—nuts, for example—may be added to shelf-stable foods with inadequate warning to consumers. A licensed retail-food-establishment producer must demonstrate knowledge of major food allergens and how they are being controlled. *Id*. App. 2-102.11(C)(9). A licensed producer must clean and sanitize food contact surfaces to

prevent allergen cross-contamination, and list major food allergens that are ingredients on packaged food labels. *Id.* App. 3-602.11, 4-6–4-7. (*See also* R. 67:12–16.)

Plaintiffs' proposed foods illustrate well the type of concern. They wish to sell chocolate confections, candy bars, energy bars, fudge, and other foods that regularly do—or could—include allergens like nuts, eggs, or milk. The Legislature reasonably might have concluded that sale of these allergen-likely foods—along with all others—should be subject to licensing, training, and inspection to minimize the risks of allergen exposure.

Second, in enacting the food laws, the Legislature reasonably might have sought to minimize contamination or adulteration of foods, including from ingredients such as unlawful levels of THC or novel supplements like CBD.

Licensed producers must keep track of and list certain ingredients, knowing that their licensing and inspection will involve review of such ingredients. *See* Wis. Admin. Code ATCP ch. 75 App. 2-102.11(C)(9), 3-602.11. In contrast, unlicensed producers are not bound to do so. Consumers eating those unlicensed foods might not know that they contain adulterants like THC or, even if known, the psychoactive effects might be unexpected. This could result in illness, hospitalization, or worse. (*See* R. 67:14–15; R. 129 ¶ 16; R. 159 ¶¶ 2–8.)

DATCP has received several complaints about the sale of not-potentially hazardous foods that contained undeclared, intoxicating levels of THC. (R. 129 ¶ 16.) These include peanut butter cups, snack bars, cakes, lollipops, and other candies—the same types of foods that could be sold without a license under the circuit court's injunction. (*See* R. 159 ¶¶ 3–8.) In multiple instances, these THC-containing foods were sold to or consumed by minors, who were either not aware what they were consuming or unaware of the

quantities, requiring hospitalization in at least two reported cases. (*See* R. 159 ¶¶ 3–8.)

Given that DATCP regularly identifies food-safety violations at *regulated* facilities, it is even more likely that unlicensed producers—who will be assessing food safety on their own without any oversight or required training—will engage in practices resulting in unsafe foods. These risks further illustrate that Wisconsin's retail-food licensing laws might reasonably have been enacted to minimize illnesses and harm from contamination or adulteration of foods by substances like THC.

Third, the Legislature reasonably might have concluded the food laws' licensing, training, and inspection requirements help minimize the risk of transmission of norovirus, food borne illness, and illness from foods not properly prepared. This rationale is again evident in how the retail-food laws work.

Licensed food establishments must meet requirements for cleanliness, hygiene, and health, as well as for safe handling and storage of food. Wis. Admin. Code ATCP ch. 75 App. 2-1–2-4, 3-1–3-8, 4-6–4-7. Compliance is verified during inspections, where operators also must demonstrate familiarity with food safety principles, such as the relationship between foodborne disease and personal hygiene. *See* Wis. Admin. Code ATCP § 75.01(3). *Id*. App. 2-102.11.

Unlicensed home kitchens are not subject to these rules, and their cooking and cleaning practices are never subject to inspection. In addition, home cooks are likely to use their kitchens and utensils to prepare both potentially hazardous and non-hazardous foods, further increasing the risk of cross-contamination. (*See* R. 66:4; *see also* R. 54:8, 28 (Tr. 30:25–31:7, 111:12–16).)

Furthermore, unlicensed home cooks are less likely to be able to determine whether the foods they are producing are

truly not "potentially hazardous." *See* Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B) (a "[p]otentially hazardous food" is a food that "requires temperature control" for safety). Determining whether a product can be stored without time/temperature control can be very involved and requires assessing the minimum pH and water activity of a food. (R. 66:4.) For many foods, pH and water activity are not apparent so a product assessment through laboratory analysis is necessary. (R. 66:4.).) A product assessment considers other factors to assess the extent to which pathogenic microbes can multiply in the food. (*Id.*) If a retail food establishment is licensed, product assessments are required to provide evidence that a food can be stored safely without refrigeration. (R. 66:4.).)

Minimizing these risks provides yet another conceivable basis on which to sustain the licensing, training, inspection, and facilities requirements.

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In light of the multiple, conceivable bases on which the Legislature might have enacted Wisconsin's retail-food laws, Plaintiffs' challenge should have been dismissed on the pleadings.

C. The circuit court's errors confirm that reversal is required.

In denying the motion to dismiss and then in granting summary judgment for Plaintiffs, the circuit court committed three fundamental errors, each of which independently supports reversal. First, the court misapplied rational-basis review, applying an incorrect, heightened scrutiny of the Legislature's enactments and refusing to consider multiple conceivable bases for the food laws, and then improperly engaging in fact-finding about the perceived "safety" of Plaintiffs' foods. Second, the court improperly analyzed Plaintiffs' challenge by comparing Plaintiffs to nonprofits and

other food sellers who are exempt from licensure, rather than reviewing the licensing laws themselves. And finally, the circuit court gave improper weight to the *Kivirist* decision, a non-precedential and non-preclusive decision involving different claims and different parties.

1. The circuit court applied an incorrect, heightened version of rational-basis review and refused to consider multiple rational bases for the laws.

In denying the motion to dismiss, the circuit court sought to add "bite" or teeth" into rational basis review. The court's analysis directly conflicts with the supreme court's recent decision in *Mayo*, where the court expressly rejected "rational basis with teeth." *See Mayo*, 383 Wis. 2d 1, ¶¶ 32, 40–41.

The court's error was manifest in its oral decision denying the motion to dismiss, where the court struggled not to say that it was adding "teeth" or "bite" into its rational-basis review. (*See* R. 32 (Tr. 27:20–22).) The court stated its view that to dismiss the case "on the pleadings would essentially render the rational basis test itself – the rational basis test would have no – no party could reasonably access review of the law under the position stated by the defendant in this case." (R. 32 (Tr. 27:12–16).) The court felt that rational-basis simply could not mean that "your only review was filing a complaint and if the court could come up with some idea of why the law was passed then the case is over." (R. 32 (Tr. 27:19–22).) Instead, the court believed that "the parties should have the opportunity to bring their case to this court in the form of a summary judgment motion." (R. 32 (Tr. 27:23–25).)

Precedent makes amply clear that rational basis review is neither searching nor demanding—simply identifying a conceivable legitimate basis for the laws ends the inquiry.

Mayo, 383 Wis. 2d 1, ¶¶ 31–32, 40–41. The court's refusal to apply that clear precedent confirms that its judgment must be reversed.

The circuit court similarly erred in refusing to consider the multiple, conceivable bases for Wisconsin's laws. Instead, the circuit court declared that it "cannot contemplate *any legal basis* for enacting these regulations" other than the court's own conception of "food safety" as limited to food borne illness. (R. 122:21.)

The court's error was further compounded by allowing discovery about legislative purposes for the law, and then purporting to conduct fact-finding about various witnesses' *beliefs* about the reasonableness of regulating Plaintiffs' foods, and whether Plaintiffs' foods are "safe" as compared to other foods. *See supra*, Statement of the Case § II.B.3.

"[A] legislative choice *is not subject to courtroom fact-finding*." *Beach Commc'ns*, 508 U.S. at 315 (emphasis added); *see also Porter*, 382 Wis. 2d 697, ¶ 50 n.15. The court's extensive factual analysis about the reasonableness of regulating one food versus another (R. 122:10–15, 18–22) should be rejected on this basis alone.

In addition to being legally impermissible, the court's factual premise about the "safety" of Plaintiffs' foods is clearly erroneous.

During discovery, a DATCP witness testified that if two foods are both "not potentially hazardous," they would be equally safe. (R. 89:15 (Tr. 55:25–56:1). Plaintiffs latched onto that statement, characterizing this testimony as suggesting that foods are *categorically* "safe" as long as they are "not potentially hazardous." (*See* R. 143:7–8). The circuit court adopted Plaintiffs' reasoning about "not potentially hazardous" foods being synonymous with safe for all purposes, and then based much of its analysis on its conclusion that because Plaintiffs' foods are "as safe as" foods

that are exempted from licensing, the food laws are irrational as applied to Plaintiffs. (*See* R. 122:10–22.)

No witness testified that foods that are not "potentially hazardous" are categorically "safe." DATCP produced evidence directly to the contrary, showing that aside from whether a food is "potentially hazardous" (i.e., whether it requires time/temperature control), multiple factors may render a food "unsafe," such as whether it is contaminated with allergens, pathogens, adulterants, or was made in unsanitary conditions. (*See, e.g.*, R. 69 ¶¶ 18–41; R. 67:5, 14–15, 22–23; R. 129 ¶¶ 9–17.) Plaintiffs' evidence also did not show that "not potentially hazardous foods" are categorically "safe." Instead, it compared the safety risks of two not potentially hazardous foods and opined that they face equal risks for allergens, contamination, adulterants, and misbranding. They did not claim that the additional risks don't exist (*see, e.g.*, R. 82:69–76), as the circuit court seemed to find.

The court's fact-finding yet further confirms that its constitutional analysis of the retail-food laws was fatally flawed.

2. The circuit court erred in comparing Plaintiffs to statutory exemptions rather than assessing the constitutionality of the laws the Plaintiffs challenged.

Another fundamental error in the circuit court's analysis was its focus on the *exemptions* from those laws, rather than whether the licensing, training, and inspections laws *themselves* are constitutional. (*See* R. 122:18–22.) The cases on which the court relied do not support that approach; its "similarly situated" analysis has no application in this type of statutory challenge; and, in any event, its analysis of the exemptions in relation to Plaintiffs' claims was flawed.

a. The circuit court's cited cases do not support its exemptions-focused approach.

As support for its exemptions-focused approach, the circuit court cited *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982) and *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141. (*See* R. 122:18.) Neither supports the court's approach or holding.

Grand Bazaar cuts against the circuit court's analysis, highlighting the distinction between a court striking down explicit, discriminatory statutory language and the type of judicial lawmaking reflected in the injunction in this case. In *Grand Bazaar*, the plaintiff challenged an ordinance that, *on its face*, discriminatorily targeted businesses like theirs. After finding that there was no legitimate explanation for the ordinance's treatment of the plaintiff, the court struck that provision. *See Grand Bazaar Liquors, Inc.*, 105 Wis. 2d at 209–10, 214. In contrast to this case, the plaintiff in *Grand Bazaar* did not ask the court to craft a new licensing exemption, and the court appropriately did not do so. *See id.*

Similarly, in *Nankin*, the Legislature granted a benefit in the form of a special procedure by which residents of some counties could challenge tax assessments—allowing de novo review of the assessment, in addition to the standard review by certiorari—but then excluded those who live in counties greater than 500,000 (i.e., Milwaukee County) from the benefit of proceeding by de novo review. *See* 245 Wis. 2d 86, ¶¶ 11–15. "[I]n enacting § 74.37(6), the legislature created a distinct classification of citizens, that is, owners of property located in counties with a population of 500,000 people or more. The parties do not dispute that the statute created this classification." *Id.* ¶ 13.

To remedy this explicit (and irrational) legislative classification, the supreme court simply held unconstitutional the statute that the plaintiff challenged—the one denying de novo review to property owners in Milwaukee County—and severed that provision. *See id.* ¶¶ 47–51. The effect of invalidating that explicitly discriminatory provision was that all property owners were then subject to the same procedures for judicial review. *See id.*

Here, the retail-food laws do not impose on Plaintiffs any express discriminatory classification like the ones struck down in *Grand Bazaar* or *Nankin*. Whereas the provisions struck down in those cases applied explicitly and directly to the challengers as a statutorily identified group—which those courts found to be arbitrary targeting of the burdened groups—the laws that Plaintiffs challenged here apply *to everyone*. This is why the circuit court had to *invent a class* consisting of "Plaintiffs and all similarly situated individuals" when enjoining the multiple retail-food laws. (R. 122:27–29.) Because no statute or rule explicitly burdens Plaintiffs differently from all other entities regulated under the retail-food laws, neither *Grand Bazaar*, nor *Nankin*, nor any other precedent supports the court's novel approach to statutory revision.

b. The "similarly situated" analysis is not proper in a challenge to the text of statutes or rules like this one.

The circuit court's "similarly situated" analysis was also wrong. That framework applies in a so-called "class-of-one" challenge in which a "plaintiff doesn't challenge a statute or ordinance but argues instead that a public official (or group of officials) has treated him differently than other persons similarly situated for an illegitimate or irrational reason." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017). Whereas a class-of-one case *requires* a "similarly

situated" comparator to assess whether a government official's actions are unconstitutionally arbitrary, there is no need for comparators in a statutory classification case like this because "the classification appears in the text of the statute itself." *Id.* at 682.

This is not a class-of-one case. Plaintiffs don't challenge discriminatory enforcement of the food laws; they point to no instance of enforcement against them at all. Rather, their challenge is based on the retail-food laws *as written*, claiming the Legislature's policy choice not to extend an exemption to "cottage food" producers is unconstitutionally irrational in light of the exemptions for others. (*See* R. 24:32 (Plaintiffs' response to motion to dismiss, "Plaintiffs seek effectively to extend the State's exemption to all homemade, shelf-stable food sellers").

In a challenge to the laws as written and not how they were applied in a specific circumstance, a "similarly situated" type of comparison invites precisely the sort of second-guessing of legislative line-drawing that is strictly forbidden on rational-basis review. *See Monarch Beverage*, 861 F.3d at 681–82; *Beach Commc'ns*, 508 U.S. at 315–16; *Mayo*, 383 Wis. 2d 1, ¶¶ 36–41, 43–55.

The circuit court's reliance on this theory to enjoin the statutes was legal error.

c. The exemptions are irrelevant to the constitutionality of the food laws, but even if relevant, the lines drawn by the exemptions are reasonable.

Even broader than its erroneous "similarly situated analysis," the circuit court erred in considering the exemptions *at all*. (*See* R. 122:19–22.) The judicial task on rational-basis review is not to determine whether the Legislature drew the line at precisely the correct point, but

only to assess whether the Legislature's *overall statutory scheme* is reasonable. *Beach Commc'ns, Inc.*, 508 U.S. at 315–16; *Mayo*, 383 Wis. 2d 1, ¶¶ 36–41. It is therefore irrelevant for Plaintiffs' challenge to the food laws whether other exemptions exist.

The circuit court's erroneous reliance on the exemptions is evident in its decision, in which it held that the retail-food law failed under three of the five steps of Wisconsin's five-part test for equal-protection challenges.[6] (R. 122:19–22.) For example, under the first question of the five-part test, the court held that "the classifications are not based on substantial distinctions."[7] (R. 122:19–20 (citing *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 64, 332 Wis. 2d 85, 796 N.W.2d 717).) The court did not explain what "classification" applies to Plaintiffs, and Plaintiffs never explained how the statutes and rules they challenge (*see* R. 3:33), impose any "classification" applicable specifically to them. (*See, e.g.*, R. 82:62).

Wisconsin's food laws do not impose any "classification" specific to Plaintiffs. Certainly none of the exemptions applies to Plaintiffs, so the exemptions cannot be the "classification" that is unconstitutionally burdening them. Likewise, the general retail-food laws they *do* challenge (*see* R. 3:33) treat them exactly the same as nearly every other Wisconsinite who wants to sell food at retail for profit—they must obtain a license and follow laws relating to training, inspection, and facilities.

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[6] The court did not address factors three and four in the five-part test, and Plaintiffs effectively conceded that they are satisfied. (R. 122:20–22; 82:56–60.)

[7] While DATCP maintains that the five-step test is a poor fit in this case based on the nature of Plaintiffs' claims, as explained in the text, the food laws satisfy either formulation of the rational-basis test.

The circuit court was evidently convinced that the *exemptions* from the general retail-food laws are the relevant "classifications." (*See* R. 122:20.) That is incorrect. The precedents could not be clearer that the focus of any equal protection challenge is on the law *actually challenged*; "scope of coverage" challenges to *the absence of a law* are "virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns, Inc.*, 508 U.S. at 315–16. And as a matter of common sense, the circuit court's approach would create a one-way ratchet under which the Legislature's enactment of one exemption from a generally-applicable regulatory regime would open the door to claims of unequal treatment by anyone who remains subject to the law. That is not how equal-protection analysis proceeds. *See, e.g.*, *Mayo*, 383 Wis. 2d 1, ¶¶ 40, 44.

The circuit court also erred in its analysis of the second of the five factors, holding that "the classifications are not germane to the purpose of the law: food safety." (R. 122:20–21.) In addition to the flawed analysis of "classifications" just discussed, the court's analysis of this factor also suffers another flaw previously discussed; namely, improperly focusing on an unduly narrow view of "food safety" and refusing to "contemplate" any of the other conceivable bases for the laws. (R. 122:20–21; *see also supra* Arg. § I.B.) Moreover, nothing in the circuit court's analysis of this factor demonstrates why the exemptions are relevant to the constitutional analysis.

Next, the circuit court erred in holding that "there is no public benefit in treating Plaintiffs differently than the exempted food producers." (R. 122:21.) By enacting the exemptions that it did, and not others, the Legislature has already conducted the conclusive analysis of which laws best benefit the public. That line-drawing exercise is *exclusively* for the Legislature, and the circuit court was incorrect to attempt

to revise the boundaries of the retail-food law. *Cf. Beach Commc'ns, Inc.*, 508 U.S. at 315–16; *Mayo*, 383 Wis. 2d 1, ¶¶ 40–53.

Moreover, even if the exemptions were somehow relevant to the five-factor inquiry, there are "substantial distinctions" that make the exempted sellers "really different from another class"—namely, entities like Plaintiffs who wish to engage in unlimited, for-profit sales of a wide variety of so-called "not potentially hazardous" foods. *Cf. Metro. Assocs.*, 332 Wis. 2d 85, ¶ 64. Each of the existing exemptions represents a policy decision by the Legislature, which conceivably sought to balance the general desire to maintain the retail-food licensing regime with the desire to provide *limited* benefits to certain food producers without sweeping so broadly as to nullify the overall purposes and goals of the licensing requirements. This is evident in the text and structure of the exemptions, which are narrowly crafted to cover specific, easily identified, and typically single-ingredient foods—popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods—or specified categories of sellers, namely religious, charitable, or non-profit organizations, under limited circumstances.[8]

For religious, charitable, and other nonprofit entities, the "substantial distinction" is their nonprofit status. Different treatment for nonprofit entities has consistently survived rational-basis review. *See, e.g.*, *Szarzynski v. YMCA, Camp Minikani*, 184 Wis. 2d 875, 888, 517 N.W.2d 135 (1994); *see also Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶ 34, 289 Wis. 2d 498, 710 N.W.2d 701. The Legislature thus could have reasonably concluded that, "unlike for-profit entities, nonprofit organizations do not generally accumulate large earnings and

[8] *See, e.g.*, Wis. Stat. § 97.30(2)(b)1.b., .d.; Wis. Admin. Code ATCP § 75.063(5)–(7), 75.04(21), (28), (35)(g).

do "not normally have the kind of money [that for-profit organizations have] to cover expenses" such as licensing fees. *Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶ 18, 235 Wis. 2d 103, 612 N.W.2d 332 (citation omitted).

The Legislature also reasonably could have determined that "substantial distinctions" justify different treatment for the specific exempted foods, such as honey, popcorn, fresh fruits, and vegetables, or maple syrup. *See* Wis. Stat. § 97.30(2)(b)1.a.–b., d.; Wis. Admin. Code ATCP § 75.063(5). The Legislature might have concluded that the "historical pedigree" of these foods in Wisconsin's agricultural economy and heritage supported different treatment. *Cf. Minerva Dairy, Inc.*, 905 F.3d at 1054. Or the Legislature might have concluded that exempting these single-ingredient (or few-ingredient) foods would be easier to administer than other exemptions, or that not subjecting these foods to the same licensing requirements pose lower risks to public health than would other foods. *Cf. Lamers Dairy Inc. v. U.S. Dep't of Agric.*, 379 F.3d 466, 476 (7th Cir. 2004) (acknowledging rationality of "incremental regulation" as allowing government to maintain a comprehensive regulatory scheme while enacting stepwise alterations or exemptions from that scheme). At bottom, the Legislature's decision to craft these exemptions but not others is a reasonable balance between providing some benefit to identified categories of food sellers while generally maintaining the retail-food laws structure to further the various, conceivable objectives discussed above.

Thus, while DATCP maintains that the exemptions are irrelevant to the constitutional inquiry in this case, even if this Court found the exemptions relevant, the Legislature reasonably enacted the exemptions that it did—and no others. Plaintiffs thus failed to carry the "very heavy burden" of "overcoming the presumption of constitutionality" applicable to the retail-food law, and the circuit court's grant of summary judgment in their favor must be reversed. *Mayo*, 383 Wis. 2d

1, ¶ 55 (quoting *League of Women Voters v. Walker*, 2014 WI 97, ¶ 17, 357 Wis. 2d 360, 851 N.W.2d 302).

3. The circuit court gave improper binding effect to *Kivirist*, a non-precedential case involving different parties and claims.

The circuit court also erred by viewing *Kivirist* as a constraint on its decision, invoking irrelevant "fairness" concerns and the supposed preclusive effect of a previous administration's decision not to appeal in *Kivirist*. The court's reliance on *Kivirist* further confirms that the court's rational-basis review was flawed.

Kivirist was a trial court decision involving different plaintiffs and different constitutional claims. *Kivirist* is not precedential, *see Marlowe v. IDS Prop. Cas. Ins. Co.*, 2013 WI 29, 346 Wis. 2d 450, 828 N.W.2d 812, or even "authority upon which [a] court may base its decision." *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993).

Kivirist also has no preclusive effect, even though the case was not appealed. (R. 122:2, 13.) The circuit court seemed to view *Kivirist* as somehow preclusive on DATCP, but issue preclusion like what the circuit court seemed to envision is inapplicable to government agencies. *See Gould v. Dep't of Health & Soc. Servs.*, 216 Wis. 2d 356, 368–70, 576 N.W.2d 292 (Ct. App. 1998). This is because applying preclusion "against the government would thwart the development of important questions of law by freezing the first final decisions on a particular legal issue," and because "the government would be forced to abandon its policy of balancing many factors in deciding whether to appeal adverse rulings, leading to appeals of every adverse decision." *Id.* at 368–69; *see also United States v. Mendoza*, 464 U.S. 154, 159–60 (1984); *Teriaca v. Milwaukee Emps. Ret. Sys./Annuity*

& Pension Bd., 2003 WI App 145, ¶ 15, 265 Wis. 2d 829, 667 N.W.2d 791 (extending *Gould*).

The circuit court also erred in relying on *Kivirist* to inject equitable notions of "fairness and justice" into its constitutional analysis. (*See* R. 122:24–27.) After relying on *Kivirist* to find a constitutional violation, the court held that the alleged violation should be remedied by extending the *Kivirist* injunction to Plaintiffs and others like them, because Plaintiffs are "similarly situated to the Kivirist plaintiffs." (R. 122:22, 26.)

That "similarly situated" analysis was flawed from the start, but even assuming it were appropriate to compare different "*legislative* classifications," the judicial injunction in *Kivirist* has no role to play in that analysis. It simply makes no sense to examine whether a "legislative classification" is unconstitutionally irrational by looking to a *judicial* classification that altered the statutory scheme, particularly one that has no precedential or preclusive effect. DATCP is aware of no authority that supports such an approach.

The circuit court's heavy reliance on *Kivirist* infected its entire analysis, and provides yet another reason to reverse.

II. The circuit court's injunction is fatally flawed in multiple respects and requires reversal even independent of the merits analysis.

Even if this Court were to disagree with the preceding analysis, reversal would be warranted because the circuit court's injunction is fatally flawed in three respects.

First and most fundamentally, the court usurped the legislative task and engaged in policymaking by effectively enacting "judicial legislation"—a new exemption to the statutory scheme. *See Rusk Farm Drainage Dist. v. Indus. Comm'n*, 186 Wis. 232, 202 N.W. 204, 205 (1925). The court acknowledged as much, recognizing that its decision about the

proper remedy amounted to "determining whether to extend or withdraw" benefits of the food-licensing laws. (R. 122:26.) The court was incorrect to undertake this task, as statutory modification "must be obtained through legislative, not judicial, action," even where the statute works in ways some find "undesirable." *Stockbridge Sch. Dist. v. DPI Sch. Dist. Boundary Appeal Bd.*, 202 Wis. 2d 214, 229, 550 N.W.2d 96 (1996); *see also Scholberg v. Itnyre*, 264 Wis. 211, 215, 58 N.W.2d 698, 700 (1953) (recognizing that "creation of new rights is" for the legislature, and "a function which the courts should not usurp").

As support, the court cited *Sessions v. Morales-Santana*, 582 U.S. 47, 75 (2017), but that decision cannot sustain the policymaking injunction in this case. (R. 122:26–27.) *Morales-Santana* involved a "gender-based distinction" in the laws governing when men and women were eligible for U.S. citizenship, and involved the "heightened scrutiny" applicable to gender-based classifications. *See* 582 U.S. at 57, 76. The decision has no application to rational-basis review.

And even upon finding a constitutional error under heightened scrutiny, *Morales-Santana* expressly rejected the challengers' urging to extend the challenged exemption's special treatment, holding that doing so "would render the special treatment Congress prescribed in [an exemption for mothers] the general rule, no longer an exception." *Id.* at 77.

Second, the injunction is impermissibly vague and provides no meaningful guidance to Wisconsin consumers, producers, and regulators. To be enforceable, injunctions "must be specific as to the prohibited acts and conduct in order for the person being enjoined to know what conduct must be avoided." *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 24, 312 Wis. 2d 435, 752 N.W.2d 359; *see also Bachowski v. Salamone*, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987)

(reversing injunction because "[t]he enjoined conduct [was] described too broadly").

The injunction here fails that test, neglecting to define multiple necessary provisions. For example, while the circuit court's decision refers to "homemade" foods (R. 122:3), that term is not defined in statutes, administrative rules, or the injunction itself. The dictionary definition of "homemade" is not limited to foods actually made in a residence, but rather includes foods made "in the home, on the premises, *or by one's own efforts*." *See Homemade*, Merriam-Webster, https://www.merriam-webster.com/dictionary/homemade (last visited May 31, 2023) (emphasis added); (*see also* R. 129 ¶ 5). This undefined term has the potential to confuse producers and consumers into thinking that any food made by "one's own efforts" would be exempted from the regulations covered by the injunction. The practical effect would be that the injunction, by its terms, would hardly be limited at all, and producers of varying sizes and capacities could avail themselves of it. (*See* R. 129 ¶¶ 3–5, 24.)

The order also does not define the term "directly," while stating that "sellers of homemade, not-potentially hazardous foods . . . can sell these items *directly to* friends, neighbors and other consumers." (R. 122:3 (emphasis added).) While "directly" is not defined in statute or rules, DATCP has historically interpreted "direct sales" to include mail order sales, and delivery service sales such as UberEats and DoorDash in addition to face-to-face sales. (*See* R. 129 ¶ 6); *see also* Wis. Admin. Code ATCP § 75.04(32) (defining "[r]etail" food sales to mean "selling food or food products *directly to* any consumer") (emphasis added). Consumers who use these services may assume the food they ordered was produced in a licensed facility and may not have access to complete information about ingredients and allergens. This creates an additional risk that consumers will inadvertently consume unsafe or adulterated food. (R. 129 ¶ 25.)

Further uncertainty flows from the injunction's extension to all individuals who are "similarly situated" to the Plaintiffs. (*See* R. 122:27–28.) Plaintiffs seek to prepare and sell a wide array of foods, with the only unifying characteristic being that, *if they are made correctly*, the foods would not require time/temperature control. (*See* R. 107:17–20.) Neither DATCP, food producers, nor the consuming public will be able to determine who is "similar" to the Plaintiffs for purposes of the injunction. (*See* R. 129 ¶ 23.) This sort of built-in uncertainty is impermissible in an injunction, and provides an independent basis for reversal.

Third and all else aside, the injunction extends to a statute with no bearing on this case. The order enjoins DATCP "from enforcing Wisconsin's *food processing plant* . . . licensing requirements set forth at Wis. Stat. § 97.29(2)(a)." (R. 122:27.) A "food processing plant" is "any place used primarily for food processing, *where the processed food is not intended to be sold or distributed directly to a consumer*." Wis. Stat. § 97.29(1)(h) (emphasis added). Plaintiffs' self-proclaimed class, however, only includes individuals who wish to produce and sell "shelf-stable homemade foods *directly to consumers*." (R. 3:33 (emphasis added).) Plaintiffs did not seek relief as to the food-processing statutes (*See* R. 3:33), and this component of the injunction must be struck.

CONCLUSION

The decision below should be reversed and Plaintiffs' challenge to Wisconsin's retail-food licensing laws should be dismissed. Alternatively, even if this Court were to conclude that the circuit court's constitutional analysis was correct, the injunction should be vacated.

Dated this 1st day of June 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,526 words.

Dated this 1st day of June 2023.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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