STATE OF WISCONSIN
SUPREME COURT

No. 2023-AP-367

WISCONSIN COTTAGE FOOD ASSOCIATION, MARK RADL, STACY BEDUHN, STEPH ZINK[1], KRISS MARION, LISA KIVIRIST, DELA ENDS and PAULA RADL,

Plaintiffs–Respondents-Petitioners,

v.

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

Defendants–Appellants-Respondents.

Petition for Review of the Decision of the Court of Appeals, District I, Filed on May 30, 2023, Court of Appeals No. 2023-AP-367

PETITION FOR REVIEW

Isaiah M. Richie (SBN 1106573)
SCHLOEMER LAW FIRM SC
143 S. Main Street, 3rd Floor
West Bend, WI 53095
Tel: (262) 334-3471
Fax: (262) 334-9193
Email: isaiah@schloemerlaw.com

Justin Pearson
(FL Bar No. 597791)*
INSTITUTE FOR JUSTICE
2 S. Biscayne Blvd., Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601

[1] As of July 14, 2022, Steph Zink has withdrawn from this case.

Email: jpearson@ij.org

Suranjan Sen
(TN Bar No. 038830)*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
Email: ssen@ij.org

*Admitted *Pro Hac Vice*

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PETITION

Plaintiffs-Respondents-Petitioners, Wisconsin Cottage Food Association, Mark Radl, Paula Radl, Stacy Beduhn, Kriss Marion, Lisa Kivirist, and Dela Ends petition this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the order of the Wisconsin Court of Appeals, District I, entering a stay pending appeal that was filed on May 30, 2023, in *Wisconsin Cottage Food Association, et al. v. Wisconsin Department of Agriculture, Trade and Consumer Protection, et al.*, Appeal No. 2023-AP-367, because it meets the criteria for review set forth in Wis. Stat. § 809.62(1r).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1. Whether *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), created a *per se* rule whereby the government is always deemed to have made a strong showing that it is likely to succeed on the merits in any case where the government is seeking a stay pending appeal of a decision that a law is unconstitutional.

The circuit court answered no, but the court of appeals answered yes.

Issue 2. Whether it is an erroneous exercise of discretion for a court to rely on the case's factual record instead of the government's mere allegations when determining whether the government has met its burden to show irreparable injury where the government is seeking a stay pending appeal of a decision that a law is unconstitutional.

The circuit court answered no, but the court of appeals answered yes.

Issue 3. Whether financial harm can constitute "substantial" harm to a non-movant when determining whether to enter a stay pending appeal.

The circuit court answered no, and the court of appeals also answered no.

Issue 4. When is it proper for a court to enter a stay pending appeal after the status quo has already changed?

The circuit court did not reach this question because it denied the stay on other grounds. The court of appeals answered that the government's delay (and resulting change in status quo) did not prevent the court from entering a stay to reinstate the previous status quo.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This petition meets the criteria for review for four reasons. First, a decision by this Court will help develop, clarify, and harmonize the law. Second, the questions presented are not factual in nature but rather are questions of law of the type that are likely to recur. Third, the questions presented include a novel question, the resolution of which will have a statewide impact. And fourth, the court of appeals' decision is in conflict with another court of appeals' decision.

First, this case presents a crucial opportunity for this court to develop, clarify, and harmonize the law. Wis. Stat.

§ 809.62(1r)(c). Parties often seek stays pending appeal in the courts below. But for practical reasons, these issues rarely reach this Court. As a result, there is a dearth of precedent from this Court on the issues presented here. The result is widespread confusion.

Take this case as an example. The circuit court found that the government failed to meet its burdens under three of the test's four prongs.[2] The court of appeals, on the other hand, found that the government met its burdens under all four prongs and did so by such a wide margin that it was an erroneous exercise of discretion[3] for the circuit court to find otherwise.

This confusion extends to the test's individual prongs. For example, much of the argument below focused on one solitary sentence in *Gudenschwager*: "Since regularly enacted statutes are presumed to be constitutional, we conclude that, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits

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[2] The test for a stay pending appeal asks whether the moving party:

(i) makes a strong showing that it is likely to succeed on the merits of the appeal;
(ii) shows that, unless a stay is granted, it will suffer irreparable injury;
(iii) shows that no substantial harm will come to other interested parties; and
(iv) shows that a stay will do no harm to the public interest.

Gudenschwager, 191 Wis. 2d at 440 (citation omitted).

[3] The erroneous exercise of discretion standard requires the court of appeals to affirm the circuit court as long as the circuit court:

(i) examined the relevant facts;
(ii) applied a proper standard of law; and
(iii) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

See Gudenschwager, 191 Wis. 2d at 440 (citation omitted).

of Judge Wolfe's finding that chapter 980 is unconstitutional." 191 Wis. 2d at 441 (internal citation omitted).

Did this one sentence implicitly create a *per se* rule mandating that the government always meets this prong regardless of its own admissions? Can it really be true that the government can make express admissions defeating its own arguments and then turn around and automatically be deemed to have a strong likelihood of success on the merits? Or did this sentence only apply to the facts in *Gudenschwager*? Or does it apply to a subset of cases with similar levels of irreparable harm (and therefore similar burdens) as in *Gudenschwager*? No one knows because this Court has not had the opportunity to say until now. Regardless of the answer, it should come from this Court.

Second, these questions are not factual in nature but are questions of law that are likely to recur. Wis. Stat. § 809.62(1r)(c)(3). The first three questions ask whether the factual record matters when determining whether to grant a stay. The circuit court said it does. The court of appeals said it does not. Indeed, the court of appeals even noted the circuit court's factual findings while reversing the ruling as a matter of law.

Nor is the fourth question factual in nature either. It is undisputed that Wisconsinites began selling these homemade foods in reliance on the circuit court's decision well before the government filed its motion for a stay (let alone when the court of appeals eventually entered the stay). The question is merely whether entering a stay in that situation to reinstate the previous status quo was improper as a matter of law.

Third, the questions include a novel one, the resolution of which will have tremendous statewide impact. Wis. Stat. § 809.62(1r)(c)(2). This Court has never addressed whether a stay can be entered after the status quo has changed. Considering this Court's statements that the reason to enter a stay is to preserve the status quo, *see Waity v. LeMahieu*, 2022 WI 6, ¶ 49, 400 Wis. 2d. 356, 966 N.W.2d 263 (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)), it may therefore be improper for a court to enter a stay that alters the status quo rather than preserving it. But this Court has not had the opportunity to say so, and the courts below will not be receptive to this novel argument until the Court addresses it.

To say that the resolution of this novel question would have a statewide impact is an understatement. Petitioners are thousands of ordinary Wisconsinites across the state—working moms, single dads, widowed grandmothers, entrepreneurial teens, recent immigrants, the list goes on—who seek nothing more than to support themselves and their families by selling homemade, "*not-potentially hazardous*" foods— foods like fudges, Rice Krispies treats, hard candies, dried spices, and roasted coffee beans—that they already make and enjoy in their own home kitchens. It is undisputed that these homemade, not-potentially hazardous foods are sold in most other states throughout the United States every day without incident. Nor is this surprising, as the government expressly admitted that these homemade, not-potentially hazardous foods are as safe as or safer than any other food item sold in Wisconsin today.

For five months after the circuit court's ruling, Wisconsinites were able to support themselves and their families the same way that Americans in other states have enjoyed for years. These included not only Petitioners but also countless other non-Petitioners throughout the state, due in part to the widespread media coverage of the circuit court's decision.[4] These homemade food sellers relied on the circuit court's ruling that the law in question violated equal protection. Their reliance began during the 62 days the government waited after the circuit court's decision before filing its motion for a stay pending appeal. And their reliance continued up until the court of appeals entered the stay. Despite the fact that, unsurprisingly, no harm was caused during these five months of sales (nor has any harm ever been caused by these types of sales), thousands of Wisconsinites are now forced to stop supporting themselves and their families in this admittedly safe manner.

Fourth, this case created a conflict with another court of appeals regarding the second question presented. Wis. Stat. § 809.62(1r)(d). Here, the court of appeals expressly held that the government's *allegations* allowed it to meet its burden to show

[4] *See, e.g.*, Associated Press, *Judge: People can sell candy, cakes, cookies without a license* (Dec. 31, 2022), https://apnews.com/article/wisconsin-state-government-lawsuits-3b2e7f1d6ac827d3e196aa991faf7ee1; Daniela Prizont-Cado, *Wisconsinites can sell more than baked goods from home, judge rules* CBS 58 (Jan. 2, 2023), https://www.cbs58.com/news/wisconsinites-can-sell-more-than-baked-goods-from-home-judge-rules; Rhonda Foxx, *Wisconsin circuit court clears way to sell unbaked goods from home; cottage food association victorious in selling baked goods from home also*, WKOW 27 (ABC) (Jan. 6, 2023), https://www.wkow.com/townnews/law/wisconsin-circuit-court-clears-way-to-sell-unbaked-goods-from-home-cottage-food-association-victorious/article_d1609598-8d5a-11ed-a1eb-1bb53b2aa823.html.

irreparable harm despite evidence in the record and Respondents' own admissions to the contrary. This ruling is in direct conflict with another court of appeals' ruling in *Madison Teachers, Inc. v. Walker*, Appeal No. 2012-AP-2067 (Wis. Ct. App.) (Order, Mar. 12, 2013). There, the court of appeals rejected a similar argument and expressly held that "an *alleged* irreparable injury must be evaluated in terms of the *proof submitted* on its substantiality and probability." *Id.* at 10 (emphasis added). This direct conflict between the appellate districts calls for this Court's resolution.

STATEMENT OF THE CASE

The underlying case is a challenge to one application of Wisconsin's exception-filled food-licensing requirements. Specifically, Petitioners challenged Wisconsin's unusual ban (the "Ban") on selling homemade, "not potentially hazardous" foods.[5] It is undisputed that the Ban supposedly exists "for the purpose of protecting public health and safety." Wis. Admin. Code ATCP § 75.01(2). Yet Respondents expressly admit that the Ban "doesn't make any sense" as a matter of public health and safety. This is because the banned foods are exceedingly low risk and are as safe or safer than every other exempted food (and there is a long list of exempted foods). This admission-filled factual record is why the circuit court found that the Ban violated equal protection, and it is

[5] Wisconsinites are required to obtain a retail-food-establishment license before they may conduct any direct sale of food they produce (unless they are covered by an exemption). Wis. Stat. § 97.30(2)(a). The licensing requirement bans home-based food sales by requiring that the food be prepared in an off-site, commercial kitchen instead of a home kitchen. *See* Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B) ("Food prepared in a private home may not be used or offered for human consumption in a food establishment." (capitalizations omitted)); Wis. Admin. Code ATCP ch. 75 App. 4-3.

also why the circuit court denied the government's motion for a stay pending appeal.

Despite Respondents' remarkable number of outcome-determinative, express admissions, the court of appeals reversed the circuit court's denial of a stay pending appeal—based on the government's wildly speculative allegations of theoretical harm and the fact that the underlying case is a constitutional challenge.

I. WISCONSIN ARBITRARILY PREVENTS PETITIONERS FROM SELLING THEIR SAFE FOODS WHILE ALLOWING NUMEROUS OTHERS TO SELL THEIRS.

A. Respondents ban the sales of undisputedly low-risk foods.

Foods that are "not potentially hazardous" are extremely safe. *See* Wis. Stat. § 97.30(bm) (defining "potentially hazardous food"). These foods are colloquially known as "shelf stable" because they do not need to be refrigerated; they "can be stored at ambient temperature without posing any microbiological safety issues." (R. 89:57; *see also* R. 84:15.) Unlike potentially hazardous foods, a piece of fudge can be left out on the counter for weeks; it "might taste a little stale, but in no way does that jeopardize the safety of that product." (R. 89:57.) Thus, Respondents' own designated representative testified that these foods "are generally considered safe" and are the safest category of food. (R. 84:27.) Moreover, as Respondents' own expert testified, if two foods are "considered non-potentially hazardous, they would be equally safe." (R. 84:55–56.)

Respondents also admit that the "lower risk involved in [these] types of foods" holds true regardless of whether the foods

are homemade. (R. 83:47.) Indeed, these "are foods that individuals routinely make in their own homes and are regularly consumed and enjoyed without causing foodborne illness." (R. 91 ¶ 15.) That is precisely why, as Respondents also admit, most states allow home-based producers to sell these homemade foods to consumers and these sales happen every day across the United States without incident. (R. 84:59, 116.)

Yet in Wisconsin, selling even one piece of undisputedly safe fudge to your neighbor would expose you to $1,000 in fines and six months' imprisonment per sale—"for the first offense." Wis. Stat. § 97.72. Why? Because Respondents' retail food licensing requirements categorically prohibit homemade food sales. *See* Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B) Thus, unless exempted, Wisconsinites may not use their home kitchens to support themselves like they could in most other states but must instead gain access to a separate, commercial-grade kitchen.

That burden is both massive and arbitrary. Buying or building a commercial-grade kitchen can cost tens of thousands of dollars, and renting also tends to be cost prohibitive. (*See* R. 75 ¶ 7) Moreover, many rural Wisconsinites, including some Petitioners, do not live near any available commercial-grade kitchens. (*See, e.g.*, R. 74 ¶ 14) Meanwhile, a commercial-grade kitchen—often shared with other producers and subject to large amounts of moisture—likely *increases* food-safety risks under these circumstances. (R. 89:84–85.) In other words, the homemade versions of these foods are actually *safer* than the commercially produced ones. (*See ibid.*). Thus, due to the Ban, thousands of

Wisconsinites are effectively prevented from supporting themselves and their families with sales of ubiquitous, safe foods for no legitimate reason.

B. The Ban arbitrarily exempts other food sellers.

While preventing Petitioners from selling their safe homemade foods, Respondents allow countless others to sell homemade foods that are undisputedly equally or less safe. Indeed, Respondents expressly admitted that Petitioners' food is as safe or safer than all the exempted foods (*see* R. 83:51; *see also id.* at 22–23, 45–47), and that Petitioners' food is as safe or safer than every food item sold in Wisconsin today by anyone, (R. 83:47).

Some sellers are exempt based on the foods they sell. Wisconsinites producing and selling high-acid home-canned foods, cider, eggs (from up to 150 hens at a time), raw poultry (up to 1,000 birds per year), unprocessed fruits and vegetables, not-potentially hazardous home-baked goods, honey, maple syrup, sorghum syrup, and popcorn may sell their foods directly to consumers—without needing to obtain any kind of license or commercial-grade kitchen. *See* Wis. Stat. § 97.28 (eggs); *id.* § 97.29(2)(b)(2) (canned goods); *id.* § 97.30(2)(b)(1)(b) (honey, cider, maple syrup, and fresh fruits and vegetables); *id.* § 97.30(2)(b)(1)(d) (popcorn); *id.* § 97.42(11) (raw poultry); Wis. Admin. Code ATCP § 75.063(5) (sorghum syrup); *Kivirist v. DATCP*, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.) (Order, Feb. 26, 2018) (not-potentially hazardous home-baked goods). It is undisputed that none of these foods is safer than Petitioners' and, to the contrary, many of them are less safe than Petitioners'. (*See* R. 83:51; *see also id.* at 22–23, 45–47.)

The Ban also exempts sellers based on who they are or what

they plan to do with the proceeds. *See* Wis. Stat. § 97.30(2)(b)(1)(c). One exemption allows taverns to serve "popcorn, cheese, crackers, pretzels, cold sausage, cured fish, or bread and butter" without obtaining any food license. Wis. Admin. Code ATCP § 75.04(35)(a). Another allows unlicensed sales of any homemade food, including potentially hazardous foods—if prepared as part of a "breakfast" in an owner-occupied bed-and-breakfast establishment. Wis. Admin. Code ATCP § 75.04(35)(d). Yet another exemption allows unlicensed sales of any food, if sold by a church cafe or a concession stand for youth sporting events (though, inexplicably, not for youth non-sporting events like spelling bees). Wis. Admin. Code ATCP § 75.04; (R. 84:18; R. 86:24, 54–55). And another allows 501(c) nonprofit organizations to sell any food, at any volume, at unlimited locations across the state—all without using a commercial kitchen. *See* Wis. Admin. Code ATCP § 75.063(6). (*See also* R. 85:94, 133; R. 86:27–28.) Again, Respondents expressly admitted that these exempted foods are no safer, and in many cases present greater food-safety risks, than the homemade foods Petitioners wish to sell. (*See* R. 83:51; *see also* R. 83:51 at 22–23, 45–47.)

Perhaps most arbitrarily, the Ban exempts sales of *exactly* the same homemade foods Petitioners wish to sell and prepared *exactly* the same way Petitioners prepare them—so long as the proceeds are given away. This exemption covers homemade foods sold to benefit a charitable cause such as at a bake sale. Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B). Given that this exemption is based entirely on what the sellers will do with the

proceeds and allows the exact same homemade foods that Petitioners wish to sell made in the exact same manner that Petitioners wish to make them, it is not surprising that Respondents have also expressly admitted that these foods are no safer than Petitioners'. (*See* R. 85:118, 120.)

II. THIS CASE WAS A SEQUEL.

It is worth noting that this case is related to an earlier case that Respondents elected not to appeal. In 2016, three Petitioners challenged Wisconsin's then-ban of homemade, not potentially hazardous, *baked* goods (as opposed to the homemade, not potentially hazardous, *non-baked* goods at issue in the present case). *See Kivirist v. DATCP*, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.). In *Kivirist*, the circuit court held in May 2017 that Wisconsin's then-ban on homemade, not potentially hazardous baked goods violated both substantive due process and equal protection. *Ibid*. Respondents decided not to appeal that ruling, which is not at issue here other than the resulting distinction between the *Kivirist* foods (which are lawful to sell) and the foods at issue in the present case (which have not been lawful to sell except for the five months between the circuit court's decision in December 2022 and the court of appeals' entry of the stay in May 2023).

During the present case, Respondents admitted that there have been no incidents involving the *Kivirist* goods during the six years since the *Kivirist* ruling. (R. 84:29, 116.) Respondents also admitted that the homemade foods at issue in this case are "equally safe" as the homemade foods covered by the *Kivirist*

ruling. (R. 84:55–56.)

III. PROCEDURAL HISTORY

A. The circuit court granted Petitioners' requested relief based on Respondents' factual admissions.

In February 2021, Petitioners filed this lawsuit alleging that the Ban violates the Wisconsin Constitution's guarantees of substantive due process and equal protection. (R. 3.) Specifically, Petitioners argued that the Ban imposes an irrational and unjustifiable burden, and that it also results in disparate treatment between Petitioners and others similarly situated without a rational basis for the distinctions. (R. 3:26–32, ¶¶ 123–58.) Petitioners sought declaratory and injunctive relief. (R. 3:33.)

During the depositions, Respondents' designated representative and expert expressly admitted an extraordinary number of key facts. And any events that predated their knowledge were testified to by their predecessors. The circuit court relied on this astounding list of admitted facts in denying the government's motion for a stay, but the court of appeals held that it was an erroneous exercise of discretion for the circuit court to do so. The list of admitted facts includes that:

1. The Ban's purpose is public safety. (R. 84:116–17.) *See also* Wis. Admin. Code ATCP § 75.01(2).
2. The homemade food at issue in this case is as safe or safer than any other food item sold in Wisconsin today by anyone. (R. 83:47.)
3. The homemade food at issue in this case is classified by the government as "not potentially hazardous," which is the safest category of food. (R. 84:27.)

4. "Not potentially hazardous" food is classified as such because its moisture content level is so low as to be hostile to microbiological growth. In other words, even if you were to leave this food out on the counter, you could still eat it. The food may eventually go "stale, but in no way does that jeopardize the safety of that product." (R. 89:57.)
5. The homemade food at issue in this case is "generally considered safe." (R. 84:27.)
6. All "not potentially hazardous" foods are equally safe. (R. 84:55–56.)
7. The Ban exempts many other sellers of homemade, "not potentially hazardous" foods. (R. 84:62.)
8. The Ban also exempts many sellers of homemade, less-safe foods. (R. 84:61.)
9. Petitioners' foods are as safe or safer than all the exempted foods. (R. 84:112.)
10. None of the Ban's exemptions have caused any health or safety incidents. (*See* R. 83:32. *See also* R. 84:116.)
11. From the government's perspective, Petitioners' foods are identical to some of the exempted foods. (R. 84:59, 116.)
12. The precise thing that Petitioners seek to do here (and were able to do for five months, until the court of appeals issued the stay) is already allowed in most other U.S. states. (R. 84:59, 116.)
13. Respondents are not aware of any problems being

caused by these exact-same types of sales in the states where they are allowed. (R. 84:116.)

14. From the government's perspective, the distinctions drawn by the Ban between which homemade foods can and cannot be sold do not "make any sense." (R. 83:51.)
15. One of the distinctions drawn by the Ban is between Petitioners' homemade foods, which cannot be sold, and other types of homemade, statutorily exempted foods, which can be sold. (R. 84:62.)
16. For example, homemade popcorn is statutorily exempted from the Ban while home-roasted coffee beans are not, even though the processes for both often use the same or similar equipment. (R. 84:62.)
17. Petitioners' foods are as safe or safer than all of the homemade, statutorily exempted foods sold pursuant to this particular distinction. (R. 84:113.)
18. From the government's perspective, this particular distinction does not "make any sense." (R. 84:62.)
19. Another distinction drawn by the Ban is between Petitioners' sales of homemade foods and statutorily exempted sellers selling the exact same types of homemade foods that Petitioners would sell if allowed to do so. (R. 84:62–64.)
20. For example, nonprofit groups lawfully sell the same types of homemade foods that Petitioners would sell if Petitioners were allowed to do so. (R. 84:62–64.)
21. These homemade foods are just as safe or safer when

Petitioners make them as when the statutorily exempted sellers make these same homemade foods. (R. 84:113.)

22. From the government's perspective, this particular distinction does not "make any sense." (R. 84:61–62.)

23. Another distinction drawn by the Ban is between Petitioners' sales of homemade foods and the sales of homemade, baked foods that have been legal for the six years since the *Kivirist* decision. (R. 84:28–29.)

24. Petitioners' homemade foods at issue in this case are equally low risk as the homemade foods covered by the *Kivirist* decision. (R. 84:55–56.)

25. There have been no known problems caused by the sales of the homemade foods covered by the *Kivirist* ruling during the six years since its issuance. (R. 84:29.)

26. From the government's perspective, this particular distinction between the homemade, not potentially hazardous, baked foods covered by the *Kivirist* ruling and the homemade, not potentially hazardous, non-baked foods at issue in this case "does[n't] make [any] sense." (R. 84:108–09.)

27. Wisconsin has numerous other laws regulating the health and safety of food, and this lawsuit is not challenging any of those health and safety laws. (R. 84:28–29.)

28. Because the Ban does not make any sense,

Respondents proposed legislation in the Wisconsin State Assembly to reform the Ban to allow more sales of homemade, not potentially hazardous foods, and Respondents' lobbyist referred to the bill as "ours." (R. 84:70–77. *See also* R. 98.)

29. Respondents submitted an official "proposal for legislative action" in the Wisconsin State Assembly to allow more sales of homemade, not potentially hazardous foods. (R. 84:42–43.)
30. Respondents were required to list any health and safety concerns in Respondents' official "proposal for legislative action." (R. 84:45.)
31. Respondents' official "proposal for legislative action" did not list any health and safety concerns because there were none. (R. 84:45.)
32. Respondents' proposed legislative reform was opposed by powerful business associations seeking to insulate themselves from competition posed by home-based sellers. (R. 84:50. *See also* R. 85:120.)
33. The anticompetitive lobbying from these groups was the "only stumbling block" to passing the reform. (R. 85:56.)
34. The reform never passed, as it was never afforded a vote in the Wisconsin Assembly (though it passed the Senate three times unanimously). (R. 85:56.)
35. The same powerful associations that opposed the reform are themselves exempted from the Ban, and

they use the profits from these exempted sales to lobby in favor of maintaining the Ban—insofar as it applies to people like Petitioners. (R. 84:132.)

36. For example, the Wisconsin Bakers Association uses the nonprofit exemption every year for the Association's sales at the Wisconsin State Fair. (R. 85:96.)

37. The Wisconsin Bakers Association earns approximately $800,000 every year from the sales made pursuant to this exemption. (R. 88:43.)

38. The Wisconsin Bakers Association uses proceeds from these license-exempted sales to oppose legislative reform that would allow others to conduct license-exempted sales. (R. 85:101–02.)

39. Given that such reform efforts have failed, Respondents' employees are compelled to continue enforcing the Ban despite themselves realizing that the Ban "doesn't make any sense" as a matter of food safety. (R. 83:51, 68.)

Observing this undisputed factual record, the circuit court ruled against the Ban on equal protection grounds for three independent reasons. First, the circuit court ruled that the Ban's disparate treatment of statutorily allowed homemade foods (for example, popcorn) and similarly situated yet banned homemade foods (for example, roasted coffee beans) violated equal protection. (R. 122:14, 20–21.) Second, the court ruled that the Ban's disparate treatment of statutorily exempted sellers (for example, nonprofit

groups) and similarly situated Petitioners wishing to sell the exact same types of homemade foods also violated equal protection. (R. 122:14–15, 21–22.) Third, the court ruled that the Ban's disparate treatment of homemade, not potentially hazardous, baked foods (in other words, the foods allowed to be sold after *Kivirist*) and the similarly situated foods at issue in this lawsuit violated equal protection. (R. 122:15, 22.)

In crafting a remedy for the equal-protection violations, the circuit court contemplated whether to extend the licensing exemptions to Petitioners or to withdraw the exemptions from the favored classes. (R. 122:26.) The court found that extending the exemptions would "not cause any or at most minimal disruption to the statutory scheme." (R. 122:27.) As the court noted, the State has "already carved out exemptions to the statutory requirements and regulations for certain classes of people making the exact same foods" as Petitioners. (R. 122:27.) And for six years, Respondents have been allowing for-profit sales of not-potentially hazardous home-baked goods—materially identical to Petitioners' foods—without a single known adverse incident. (*See* R. 122:27.) Thus, the circuit court granted Petitioners' requested relief. (R. 122:27–28.)

Because the circuit court's remedy for the equal-protection violations provided the full relief sought by Petitioners, the court did not reach Petitioners' substantive due process claim. (R. 122:22.)

B. The circuit court denied Respondents' motion based on Respondents' own factual admissions.

Two months later, Respondents filed their notice of appeal and their motion asking the circuit court to stay its order pending

appeal. (R. 124–29.) Ignoring their own factual admissions that undergirded the circuit court's decision, Respondents asserted that they met the test's first prong because there is a strong likelihood that they will succeed on appeal—based solely on the presumption of constitutionality afforded to legislation. (R. 126:13.) Relatedly, Respondents again ignored their own express admissions and asserted that allowing the circuit court's decision to continue to stand while the case was on appeal could harm public safety. (R. 126:15–20.)

Respondents alleged three kinds of supposedly irreparable harms:

(1) Respondents claimed that allowing the Petitioners to sell their homemade foods in the same manner as the exempted sellers risked food safety. (R. 126:15). They claimed this despite having admitted that none of the asserted, theoretical harms had ever occurred with any of the materially identical exempted foods or even with any of the *less-safe* exempted foods.

(2) Respondents asserted that, absent a stay, there would be "confusion" based on the meaning of certain words in the circuit court's decision. For example, Respondents suggested that the term "homemade" was ambiguous—because, in dictionaries, the term "homemade" also includes tertiary definitions in addition to its primary, common definition used by the circuit court. (R. 126:20–21). Yet Respondents never before seemed confused by the meaning of "homemade" throughout this entire litigation, nor did Respondents file a motion for clarification.

(3) Finally, Respondents asserted that their employees whose job it is to answer questions from the public would need to "take[] time" to answer the public's questions about the circuit court's decision. (R. 126:24). Yet Respondents are already statutorily charged with answering these types of questions (R. 126:24), and Respondents never alleged that doing so would require spending any extra money or that a stay would reduce the number of questions from the public.

Meanwhile, Respondents claimed, *no* substantial harm would result from a stay. (R. 126:25.) That was despite evidence showing that people across Wisconsin, including but undoubtedly not limited to some Petitioners, had already begun selling these foods pursuant to the circuit court's December decision. (*See, e.g.*, R. 149)

Finally, Respondents asserted that these considerations, combined with the general interest in seeing laws followed, meant that a stay would be in the public interest. (R. 126:26–28.)

The circuit court denied Respondents' motion, finding that they failed to meet their burdens for multiple reasons. First, Respondents had not made a strong showing that they were likely to succeed on appeal—because, based on "[t]he undisputed facts in this record," "reasonable judges" would agree that the admittedly nonsensically disparate treatment in this case lacks a rational basis. (R. 165:16.) Indeed, it was undisputed that the exempted food sales present the same (or greater) risks, and "[e]ven Defendants' expert repeatedly testified that the distinctions between [those sales and Petitioners'] do not make any sense." (R.

165:17.) While noting the burdens here and "tak[ing] very seriously [the burden to be met for] constitutional challenges to legislation, *given the factual record before* [the court], [the court did] not find that respondents have a likelihood of success on the merits." (R. 165:17 (emphasis added).)

As for Respondents' alleged irreparable harms, the circuit court chose to rely on the undisputed factual record instead of Respondents' unsupported, wildly speculative assertions. In the circuit court's words: "[t]his record is devoid of any proof that any person has been physically harmed or sickened by the sale of foods that are subject to this lawsuit." (R. 165:18–19.)

The circuit court then found that the only harm absent a stay that Respondents could potentially assert would be financial harm, which the court stated is not generally considered to be irreparable harm in this context. (R. 165:15, 18.) Therefore, the circuit found that Respondents had not shown a substantial risk of irreparable harm. (R. 165:18.)

Looking toward the other side of the ledger, the circuit court found that financial damages to non-movants cannot constitute substantial harm either. The court did this by mistakenly conflating irreparable harm and substantial harm and then ruling as a matter of law that financial damages do not qualify: "The petitioners claim that they will lose money if a stay is granted is also not terribly persuasive in this analysis because many cases in the stay analysis have indicated that monetary harm is not generally a harm—an irreparable harm in a decision to grant a stay." (R. 165:14–15.)

Finally, as to the public interest of granting a stay, the circuit court "agree[d] with both sides" in that the public has a right to be free from unconstitutionally arbitrary restriction, yet the public also has a right to see its duly enacted laws executed. (R. 165:15.) Thus, the court found that "in weighing [the public] interest for a stay, the weight is substantially equal"—meaning that Respondents once again did not carry their burden on that factor either. (R. 165:15.)

C. The court of appeals reversed the denial and entered the stay.

Respondents appealed the circuit court's stay denial to the court of appeals, which held that the circuit court had erroneously exercised its discretion.

As to whether Respondents made a "strong showing" of likelihood of success on appeal, the court of appeals held that the circuit court had erred by relying on the factual record. According to the court of appeals, this Court's decision in *Gudenschwager* mandated that, regardless of the record, courts must necessarily conclude that this prong of the analysis has been met anytime the government is seeking a stay pending appeal of a ruling that a law is unconstitutional. *WCFA v. DATCP*, Appeal No. 2023-AP-367 (Wis. Ct. App.) (Order, May 30, 2023) [hereinafter "*WCFA* Order"], at 3.

As to whether Respondents met their burden to show a substantial risk of irreparable harm absent a stay, the court of appeals noted that Respondents had "not identified any actual harm that ha[d] occurred due to the sale of the foods at issue since the circuit court entered its decision" *five months* earlier. *Id*. at 4.

And the court of appeals also acknowledged the circuit court's factual finding that, despite the fact that these same sales occur every day throughout most of the United States, no one had been "harmed by the sale of the foods that are the subject of this ruling." *Ibid*. Nonetheless, the court of appeals held that Respondents had met their burden because Respondents had made "*allegations* that the injunction posed a risk to public health." *Ibid*. (emphasis added).

Moreover, the court of appeals found that the circuit court should not have "dismiss[ed] . . . as insubstantial" Respondents' assertion that they would suffer "irreparable harm" from having to "take time" to answer the public's questions—because "concern for expenditures of public resources is a valid consideration." *Ibid*. Because Respondents *alleged* an irreparable injury absent a stay, the appellate court found, "the potential for such injuries 'must weigh in favor of the movant' seeking the stay." *Id*. at 5.

Yet, after finding that the Respondents' *alleged* financial harm constituted irreparable harm, the court of appeals did not apply similar logic to the issue of whether Petitioners' *actual* financial harms could constitute substantial harm. Instead, the court of appeals left that aspect of the circuit court's ruling untouched. *Ibid*.

Finally, the court of appeals found that the public interest favors the government as a matter of law in these cases. *Id*. at 6. Although the court included a caveat for constitutional considerations, the court's holding that the government automatically met the test's first prong meant that the government

also automatically met this fourth prong. *See ibid*. The court of appeals therefore reversed the circuit court and entered the stay. *Ibid*.

ARGUMENT

All four issues presented merit this Court's review.

Issue 1. Whether *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), created a *per se* rule whereby the government is always deemed to have made a strong showing that it is likely to succeed on the merits in any case where the government is seeking a stay pending appeal of a decision that a law is unconstitutional.

Nearly three decades ago, this Court stayed pending appeal an order enjoining a statute's operation—where the practical effect otherwise would have been the release of violent, convicted sexual predators. *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995). While doing so, this Court discussed the various stay factors relevant to determining whether the movant has met its burden. *Id*. at 440. The first is that "the moving party[] . . . makes a strong showing that it is likely to succeed on the merits of the appeal." *Ibid*. In a single sentence, this Court stated that that factor was met in that case—because "regularly enacted statutes are presumed to be constitutional." *Id*. at 441.

This Court also explained that movants' burden on this factor is "inversely proportional" to the risk of harm that would result absent a stay—meaning that the greater risk of harm absent a stay, the lower the movant's burden (and vice versa). *Waity v. LeMahieu*, 2022 WI 6, ¶ 54, 400 Wis. 2d. 356, 966 N.W.2d 263

(quoting *Gudenschwager*, 191 Wis. 2d at 441). In other words, the reason the government so easily met its burden in *Gudenschwager* is because of the enormous risks associated with releasing dangerous sexual criminals. *See Gudenschwager*, 191 Wis. 2d at 442. A case at the complete opposite end of the harm spectrum—such as this one—should require a far stronger showing of likelihood of success on appeal.

Nevertheless, the court of appeals read this Court's precedent as establishing a *per se* rule—regardless of the factual record. The court found that, because this case "involves a ruling that certain Wisconsin statutes and regulations are unconstitutional," courts "necessarily must conclude that the [government] made a strong showing of likely success on appeal." *WCFA* Order, at 3 (citing *Gudenschwager*, 191 Wis. 2d at 441). According to the court of appeals, it was therefore an erroneous exercise of discretion for the circuit court to rely on the factual record—including the government's case-dispositive admissions—and "conclud[e] otherwise." *Ibid*. But a case about releasing violent sexual predators is hardly comparable to a case about selling homemade Rice Krispies treats and therefore imposes different burdens on the movant. *See ibid*.

Although this issue frequently arises in the courts below, this Court has not yet had the opportunity to provide clarification regarding the breadth of *Gudenschwager*'s holding as to the stay analysis's first prong. Until now. Therefore, review should be granted. *See* Wis. Stat. § 809.62(1r)(c).

Issue 2. Whether it is an erroneous exercise of discretion for a court to rely on the case's factual record when determining whether the government has met its burden to show irreparable injury where the government is seeking a stay pending appeal of a decision that a law is unconstitutional.

The stay analysis's second prong asks "whether the movant shows that, unless a stay is granted, it will suffer irreparable injury." *Waity*, 2022 WI 6, ¶ 49. This Court's precedents suggest that courts should look to the factual record—and not just blindly accept the government's allegations. For example, in *Gudenschwager*, this Court relied on the factual record. *See Gudenschwager*, 191 Wis. 2d at 442 ("Dr. Snyder said the risk of Gudenschwager's reoffending upon release would be substantially reduced only if Gudenschwager were placed in a residential sexual offender program."). Those facts led this Court to conclude that a stay was warranted. *Id*. at 443–44 ("[W]e reiterate that under the appropriate circumstances trial courts have the authority to release persons pending appeal. *Under the facts of this case, however*, releasing Gudenschwager pending appeal is not appropriate at the present time." (emphasis added)).

Likewise, in previous cases, the courts of appeals have recognized that the irreparable harm analysis requires consulting the factual record. In the courts' words, "the degree of irreparable injury resulting from voiding legislation varies widely depending on the legislation at issue." *Madison Teachers*, at 10. That is why "an *alleged* irreparable injury must be evaluated in terms of the

proof submitted on its substantiality and probability," even "when legislation is declared unconstitutional." *Ibid.* (emphases added). It is, after all, the *movant*'s burden to show harm (and not merely allege it). *See Gudenschwager*, 191 Wis. 2d at 440.

In this case, however, the court of appeals held that circuit courts must *ignore* the factual record when determining the risks of harm absent a stay. Like the circuit court, the appellate court acknowledged that the government had failed to provide a single "concrete example[] of anyone actually being harmed by the sale of the foods that are the subject of this ruling," notwithstanding the admitted fact that these sales take place across the country. *WCFA* Order, at 4. The appellate court further acknowledged that there was no evidence of any harm arising from the circuit court's order during the five months it was in force. *Ibid*. Yet the appellate court concluded that the circuit court had erroneously exercised its discretion by relying on these undisputed facts. Instead, the court of appeals found that the government's mere allegations of harm were enough to meet its burden, regardless of the record. *Ibid*. Thus, so long as the court of appeals' decision stands, the government automatically meets its burden for this prong, too—so long as it alleges harm (which it always will).

This issue demands the Court's attention for three reasons. First, this Court has never suggested that a consideration of harms absent a stay requires accepting the government's allegations; if that is the rule, this Court should clarify and explain the basis for it. Wis. Stat. § 809.62(1r)(c). Second, this issue will recur every time a statute is enjoined. *Ibid*. Third, the decision below conflicts

with another court of appeals' precedent stating that there must be "proof submitted on [an asserted injury's] substantiality and probability," even when a statute has been enjoined. *Madison Teachers*, at 10. *See also* Wis. Stat. § 809.62(1r)(d).

Issue 3. Whether financial harm can constitute "substantial" harm to a non-movant when determining whether to enter a stay pending appeal.

The stay analysis's third prong is whether the moving party has shown that "no substantial harm will come to other interested parties." *Gudenschwager*, 191 Wis. 2d at 440. "Substantial harm" is a broader category than "irreparable injury." *See ibid*. Typically, "substantial harm" can include financial losses (which are generally not considered "irreparable"). *See Scullian v. Wis. Power & Light Co.*, 237 Wis. 2d 498, 518 (Wis. Ct. App. 2000) (limiting breadth of stay to avoid financial harm to farm).

Nevertheless, the circuit court found that, as a matter of law, financial loss inflicted upon thousands of ordinary Wisconsinites was not "substantial harm" for the purposes of a stay pending appeal. (R. 165:15). The circuit court did this while conflating substantial harm and irreparable injury. *See ibid.* ("[M]onetary harm is not generally . . . an irreparable harm in a decision to grant a stay."). And the court of appeals left this aspect of the circuit court's order untouched. *WCFA* Order, at 5.

This Court should grant review of this issue for at least two reasons. First, review is warranted because the financial harms arising from the stay are indeed "substantial" and also impact thousands of people across Wisconsin. Wis. Stat. § 809.62(1r)(c)(2)

(review warranted if decision carries "statewide impact").[6] Many are working moms who, on the heels of a devastating pandemic and global inflation, need options to support their families. (R. 149:2, R. 150:2–3.) Indeed, 88% of homemade food sellers are women.[7] The lower courts incorrectly disregarded their substantial harm as a matter of law.

Second, review is warranted to resolve the lower courts' confusion regarding how the "risk of irreparable harm absent a stay" under the test's second prong differs from "no substantial harm arising from a stay" under the test's third prong. As noted above, both lower courts in this case confused these two factors to one degree or another. That is not altogether surprising—a different court of appeals has stated its view that this is all really a single balancing test of harms. *See Madison Teachers*, at 17. But that is not how this Court has articulated the test. *See Waity*, 2022 WI 6, ¶ 49. Therefore, this Court should grant review to clarify which of these inconsistent approaches is correct. *See* Wis. Stat. § 809.62(1r)(d).

Issue 4. When is it proper for a court to enter a stay pending appeal after the status quo has already changed?

Typically, a party seeking a stay pending appeal moves immediately. *See, e.g.*, *Waity*, 2022 WI 6, ¶ 14 (government filed stay motion day after order entered); *Gudenschwager*, 191 Wis. 2d at 437–38 (same). But not always. Sometimes, as in this case, the

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[6] Indeed, this case's impact was so broad that non-party Wisconsinites attended the stay hearing to learn whether they could continue to support themselves by selling these homemade items. (R. 165:2–3.)

[7] Jennifer McDonald, Institute for Justice, *Flour Power* (Dec. 2017), https://ij.org/report/cottage-foods-survey/.

movant waits months before filing their motion for a stay, during which time the status quo changes as the non-movants rely on the underlying order.

This leads to a novel question never before addressed by this Court: When is it proper for a court to enter a stay that alters the current status quo by reinstating the prior one? After all, this Court has stated that the purpose of a stay is "to preserve the status quo." *Waity*, 2022 WI 6, ¶ 49 (quoting *Werner*, 80 Wis. 2d at 520). *See also Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331, 143 N.W.2d 13 (1966) ("[A] stay [pending appeal] should be granted when necessary to preserve the status quo."). And this view is common across other jurisdictions as well. *See, e.g.*, *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995) ("The purpose of a stay is simply to preserve the status quo.").

The case at hand presents the perfect vehicle to address this novel question. Petitioner Wisconsin Cottage Food Association has thousands of members, and that does not even count the countless other Wisconsinites who saw the statewide media coverage of the circuit court's decision. *See supra* n.3. Yet, unlike in *Waity* and *Gudenschwager*, the government did not file their motion the day after the ruling. Nor did the government file their motion a few days after that. Instead, the government waited *62 days* before seeking a stay. And by the time the court of appeals entered the stay, five months had elapsed. By entering a stay at that point, long after the status quo had changed, the issuance of the stay "work[ed] against the status quo" rather than preserved it. *See Carpenters Fringe Benefit Funds of Ill. v. Royal Builders, Inc.*,

Case No. 05-C-1731, 2008 WL 4876856, at *3 (N.D. Ill. June 6, 2008).

This is the Court's first opportunity to address this novel issue. *See* Wis. Stat. § 809.62(1r)(c). Moreover, the issue is "likely to recur" the next time the government drags its feet seeking to stay an order pending appeal, only to subject the people of Wisconsin to unfair whiplash. *Ibid*. This Court should grant review to help provide Wisconsinites stability in this area of the law.

CONCLUSION

For the reasons presented above, Petitioners respectfully request that the Court grant their petition and undertake a review of the court of appeals' order entering a stay pending review.

Dated this 28th day of June 2023.

Respectfully submitted,

Electronically signed by:

/s/ Isaiah M. Richie
Isaiah M. Richie (SBN 1106573)
SCHLOEMER LAW FIRM SC
143 S. Main Street, 3rd Floor
West Bend, WI 53095
Tel: (262) 334-3471
Fax: (262) 334-9193
Email: isaiah@schloemerlaw.com

Justin Pearson
(FL Bar No. 597791)*
INSTITUTE FOR JUSTICE
2 S. Biscayne Blvd., Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: jpearson@ij.org

Suranjan Sen
(TN Bar No. 038830)*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320

Fax: (703) 682-9321
Email: ssen@ij.org

*Admitted *Pro Hac Vice*

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this petition, excluding the appendix, conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (8g) as to form, pagination, and certification for a petition produced with a proportional serif font. The length of this petition complies with Wis. Stat. § 809.62(4)(b) and is 7,939 words.

Dated this 28th day of June 2023.

Electronically signed by:

/s/ Isaiah M. Richie
Isaiah M. Richie (SBN 1106573)
SCHLOEMER LAW FIRM SC

CERTIFICATE OF EFILE/SERVICE

I hereby certify that this petition, and accompanying appendix, were separately filed with the Clerk of Court using the Wisconsin Supreme Court's Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that the parties have consented to participation in the e-filing pilot program and the Clerk has approved the parties' request.

Dated this 28th day of June 2023.

Electronically signed by:

/s/ Isaiah M. Richie
Isaiah M. Richie (SBN 1106573)
SCHLOEMER LAW FIRM SC