STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP000367

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

Plaintiffs–Respondents,

v.

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

Defendants–Appellants.

Appeal from Decisions and Orders Granting Summary Judgment and Denying a Stay, Entered in the Lafayette Circuit Court, the Honorable Rhonda L. Lanford, Presiding

BRIEF OF PLAINTIFFS-RESPONDENTS

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INTRODUCTION

Thousands of Wisconsinites wish to support their families by selling homemade "not-potentially hazardous" foods. Thousands more wish to purchase and enjoy these local foods. It is undisputed that these common, homemade foods—which include fudges, candies, roasted coffee beans, dried goods, and the like—pose exceedingly low food-safety risks because of their physical properties. Indeed, the government calls them "not-potentially hazardous" because they are the very safest category of food. In other words, Appellants' own designated representative, expert, and officers admitted under oath that the homemade foods at issue here are as safe as any other food item sold in Wisconsin today. Moreover, it is even undisputed that the homemade foods at issue here are *substantially safer* than many food items sold in Wisconsin today, especially if those other foods were prepared in commercial kitchens (which are subject to large amounts of moisture and heavy traffic). That is why most states across the nation allow these same homemade foods to be sold without incident.

But in Wisconsin, unless you fit within one of the challenged law's (the "Ban's") many exemptions, selling even one piece of homemade fudge to your neighbor would expose you to six months' imprisonment. It is undisputed that these exemptions cover homemade food sales that are materially identical to the homemade food sales at issue here. It is even undisputed that these exemptions cover *literally* identical homemade food sales to

the homemade food sales at issue here—based on who the seller is or what the seller intends to do with the profits.

The Ban's distinctions are so ridiculously irrational that they are *admittedly nonsensical*. Appellants' own designated representative, expert, and officers repeatedly testified at length that each of the Ban's distinctions between Respondents' homemade foods and the exempted homemade foods "doesn't make any sense." Moreover, the undisputed facts also demonstrate that the sole reason this admittedly nonsensical law continues to exist is for an *illegitimate* purpose—protecting powerful special interests from local competition at the expense of ordinary Wisconsinites.

The circuit court observed this admission-filled record and concluded that the *admittedly nonsensical distinctions* between which homemade, not-potentially hazardous foods could and could not lawfully be sold were irrational and therefore violated the Wisconsin Constitution's guarantee of equal protection. The court then noted that those same undisputed facts required enjoining the application of these laws to Respondents as a remedy. The circuit court's judgment should be affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication is warranted here, considering that this is "a case of substantial and continuing public interest." Wis. Stat. § 809.23(1)(a). *See also id.* § 809.22.

STATEMENT OF THE CASE

I. RESPONDENTS ARE THOUSANDS OF HOME-BASED FOOD PRODUCERS WHO WISH TO SUPPORT THEMSELVES AND THEIR FAMILIES BY SELLING NOT-POTENTIALLY HAZARDOUS FOODS.

Respondents are thousands of ordinary Wisconsinites. These are moms, farmers, and community pillars. And all are banned from selling their undisputedly low-risk homemade foods to willing consumers simply because they find themselves on the wrong side of the Ban's admittedly nonsensical distinctions.

A. The Wisconsin Cottage Food Association

The Wisconsin Cottage Food Association ("WCFA") is an unincorporated, nonprofit organization that exists to support those who sell (or wish to sell) their safe, homemade foods within Wisconsin. (R. 77 ¶ 4.) WCFA's growing membership currently includes several thousand people. (R. 140 ¶ 4.) Nearly all of WCFA's members—like most cottage-food producers—are women.[2]

B. Stacy Beduhn

Stacy Beduhn is a wife and mother who loves making desserts. (R. 78 ¶¶ 3, 7.) Stacy used to run a daycare, but she had to close it because of the COVID-19 pandemic. (*Id.* ¶ 4.) As a result,

[2] *See* Jennifer McDonald, Institute for Justice, *Flour Power* (Dec. 2017), https://ij.org/report/cottage-foods-survey/ (88% of home-based food sellers identify as female).

she started selling not-potentially hazardous baked goods from her home. (*Id.* ¶ 5.) Stacy has developed a loyal customer base that, especially since the pandemic, feels more comfortable purchasing from her than visiting a crowded retail store. (*Id.* ¶ 6.) And at the same time, she appreciates that her home business allows her to spend more time with her family. (*Id.* ¶ 7.)

Many of Stacy's customers would request not-potentially hazardous desserts that are not baked (such as Rice Krispies treats) without realizing that it would be a crime for Stacy to provide them. (*Id.* ¶ 8.) Because of the Ban, Stacy's customers miss out on such treats, and Stacy's family loses significant income. (*Id.* ¶ 11)

C. Kriss Marion

Kriss Marion is a grandmother, wife, farmer, entrepreneur, and baker. (R. 77 ¶ 8.) Since the pandemic, Kriss has closed her bed & breakfast and has turned part of her property into a private campground. (*Id.* ¶ 9.)

Kriss used to (legally) provide her bed & breakfast guests with not-potentially hazardous foods like her homemade candy, dried goods, and energy bars. (*Id.* ¶¶ 10–11.) But now that her guests sleep outside instead of inside, Kriss would risk prison or fines if she provided those exact same foods as part of their campground fee. (*Id.* ¶ 12.)

D. Lisa Kivirist

Lisa Kivirist, like her friend Kriss, plays many roles. (R. 74 ¶ 8.) Also like Kriss, Lisa would use her home as a bed & breakfast

for guests, but she has had to close those operations since the pandemic. (*Ibid.*)

Lisa has received many requests from friends and neighbors to buy her homemade foods, including not-potentially hazardous foods like Lisa's fried fritters, candies, baking mixes, and dried pastas. (*Id.* ¶ 9.) Lisa, however, must decline: Although she could sell these foods to B&B guests as part of a single breakfast (or if they were baked instead of fried), selling them otherwise would risk imprisonment. (*Id.* ¶¶ 10, 12.)

E. Dela Ends

Dela Ends, like her friends Kriss and Lisa, runs her own farm. (R. 76 ¶ 8.) During the pandemic, Dela had to end her homesteading classes. (*Id.* ¶ 9.) Venues that used to buy produce from Dela closed, and Dela had to suspend her farm's community supported agriculture ("CSA") operations. (*Ibid.*) Meanwhile, Dela's husband has taken a job based in Washington, D.C. (*Id.* ¶ 10.) With Dela's grown children increasingly unable to help with the farm, Dela is often alone and overwhelmed. (*Ibid.*)

Dela and her family have previously made volunteer trips to Senegal to construct and provide training on solar food dehydrators, which preserve food by drying them. (*Id.* ¶ 12.) Dela would like to sell her homemade, dried foods—foods like soup mixes, tea mixes, dehydrated vegetables and produce, and herb mixes—to supplement her income. (*Id.* ¶ 11.) She may freely sell such foods to fundraise for a charitable cause—perhaps to support her efforts in Senegal. (*Id.* ¶ 13.) But should she sell the same foods

to support *herself*, then she would risk imprisonment. (*Ibid.*)

F. Mark and Paula Radl

Mark and Paula Radl love coffee—in particular, they love roasting their own coffee beans. (R. 75 ¶¶ 3–4; R. 79 ¶¶ 3–4.) A friend who sells honey and maple syrup suggested that they sell their roasted coffee. (R. 75 ¶ 3; R. 79 ¶ 3.) The Radls loved the idea; accordingly, they paid thousands of dollars for a premium coffee bean roaster in their home. (R. 75 ¶ 4; R. 79 ¶ 4.)

The Radls were shocked when their local health department told them that selling homemade roasted coffee beans for profit is illegal in Wisconsin. R. 75 ¶ 5; R. 79 ¶ 5.) Thus, Mark and Paula's expensive, high-quality coffee roaster sits largely unused. (R. 75 ¶ 8; R. 79 ¶ 8.)

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

A. Appellants prevent sales of undisputedly low-risk foods.

Foods that are not "potentially hazardous" (also known as "shelf stable") pose extremely low food-safety risk. *See* Wis. Stat. § 97.30(bm) (defining "potentially hazardous food"). These foods "can be stored at ambient temperature without posing any microbiological safety issues." (R. 89:57; R. 84:15.) Unlike potentially hazardous foods, these foods 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.)

It is usually apparent that a given food is not-potentially hazardous. Indeed, every one of the foods that the named Respondents wish to sell "are definitely not potentially hazardous and wouldn't require a product assessment." (R. 89:73–74. *See also id.* at 67 ("[A]ll of us that go grocery shopping, you know, it's kind of clear to understand what the shelf stable foods are.").) And should a producer be unsure, she may pay a small fee to have her food tested by any number of food labs throughout Wisconsin. (R. 92:7.)

Moreover, it is undisputed that there is a "lower risk involved in [these] types of foods" even when homemade. (R. 83:47.) 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 Appellants admit, most states allow home-based producers to sell these same homemade foods to consumers every day across the United States—without a single known food-safety incident. (R. 84:59, 116.)

Yet in Wisconsin, selling undisputedly low-risk 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 Appellants' retail food licensing requirements categorically prohibit homemade food sales, including even not-potentially hazardous foods. *See* Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B). Thus, unless exempted, Wisconsinites may not

lawfully use their home kitchens to support themselves like they could in most other states but instead must 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 for small producers. (*See* R. 75 ¶ 7.) Moreover, many rural Wisconsinites, including some Respondents, 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—*increases* food-safety risks. (R. 89:84–85.) In other words, the homemade versions of these foods pose *even less* food-safety risk than the commercially produced ones. (*Id.* at 83–84.) Thus, Appellants are preventing thousands of Wisconsinites from supporting themselves and their families with sales of ubiquitous, exceedingly low-risk foods for no legitimate reason.

B. The Ban arbitrarily exempts other homemade food sellers.

While preventing Respondents from selling their extremely low-risk homemade foods, the Ban exempts countless other homemade food sellers. It is undisputed that those sales are either materially identical to or riskier than Respondents'. In the words of Appellants' own designated representative and expert, each of these distinctions "doesn't make any sense." (R. 83:51; R. 84:62.)

And there are many exemptions. Some sellers are exempt

from licensure 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).[3] None of these foods is safer than Respondents' and, to the contrary, many of them post risks not found in Respondents' banned foods. (R. 83:22–23, 45–47, 51.)

Some sellers are exempt from licensure based on who they are or what they plan to do with their proceeds. *See* Wis. Stat. § 97.30(2)(b)(1)(c). One exemption allows taverns to serve

[3] In 2017, the *Kivirist* case resulted in a ruling that the Ban on sales of homemade not-potentially hazardous goods that are baked (as opposed to the non-baked goods at issue here) violated both substantive due process and equal protection, and Appellants chose not to appeal that ruling. (*See* R. 122:13.) It is undisputed that, in Appellants' view, the *Kivirist* foods are identical to the foods at issue here, and it is also undisputed that the *Kivirist* foods have been sold throughout Wisconsin for the last six years without incident. For equal-protection purposes, it is irrelevant that the baked-goods exemption results from a judicial order. *Shelley v. Kraemer*, 334 U.S. 1, 15 (1948) ("[J]udicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment[.]").

"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 even potentially hazardous foods—if prepared as part of a "breakfast" in an owner-occupied bed-and-breakfast. 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); (R. 85:94; R. 86:27–28.)

Although Appellants' regulations supposedly limit these 501(c) groups to twelve days of sales per year, Appellants' representatives candidly admit that they do not actually enforce this limit.[4] (R. 86:49.) In fact, enforcement would be a practical impossibility—in part because these "organizations [] have multiple non-profit organizations within their larger structure," allowing them in effect to operate lawfully year-round. (R. 87:50. *See also* R. 86:28–29 (discussing Wisconsin's rotating, unlicensed bratwurst stands).) As the record shows, an exempted entity might sell more than $800,000 of foods annually (and including even

[4] "The Equal Protection Clause . . . applies de facto as well as de jure[.]" *Gilmore v. City of Montgomery*, 417 U.S. 556, 565 (1974).

potentially hazardous foods)—a far greater volume than any home-based producer could hope to achieve. (R. 88:41.)

Finally, Appellants exempt unlimited food sales that are *literally identical* to Respondents'—so long as the seller intends to support someone else's family instead of her own. Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B). Appellants have expressly admitted that these foods pose precisely the same (low) risks as Respondents'—which makes sense, considering that "[t]here's no difference between the two." (R. 84:104.)

III. PROCEDURAL HISTORY

In February 2021, Respondents filed this lawsuit asserting that the Ban violates the Wisconsin Constitution's guarantees of substantive due process and equal protection. (R. 3.) Respondents sought declaratory and injunctive relief. (R. 3:33.) Appellants filed a motion to dismiss, which the circuit court denied. (R. 19; R. 32.)

Discovery revealed that the material facts are not in dispute. Respondents' expert, Dr. Catherine Donnelly, is a prominent food scientist with more than three decades of academic, research, and field experience. (*See* R. 89:11; R. 90.) To quote Appellants' expert, Dr. Donnelly is "highly respected" and has conducted "[v]ery extensive research." (R. 83:17.) In fact, Appellants' expert does not "disagree with any of the scientific information" presented in Respondents' expert report. (R. 83:55.)

Moreover, Appellants' own designated representative, expert, and officers testified to an extraordinary number of facts. These admitted facts include that:

1. The purpose of these laws is public health and safety. (R. 84:116–17.)
2. The homemade foods at issue in this case are as safe or safer than any other food item sold in Wisconsin today by anyone. (R. 83:47.)
3. Because the homemade foods at issue are "generally considered safe," most states allow their unlicensed sale. (R. 84:27, 59, 116.)
4. Appellants cannot point to a single food-safety incident resulting from those sales. (R. 84:116.)
5. All "not-potentially hazardous" foods present very low food-safety risk. (R. 84:55–56.)
6. All "not-potentially hazardous" foods are "equally safe." (R. 84:55–56.)
7. While preventing Respondents' sales, the Ban exempts many other sales of homemade, materially identical, "not-potentially hazardous" foods. (R. 84:59–62; 116.)
8. In fact, the Ban's exemptions even allow the unlicensed sales of "potentially hazardous" homemade foods (which pose greater food-safety risks than "not-potentially hazardous" homemade foods). (R. 84:61.)
9. Respondents' foods pose no greater risk than any of the exempted food categories. (R. 84:112.)
10. In the government's view, "[t]here's no difference" between the exempted foods and Respondents' foods. (R. 84:104.)

11. None of the Ban's exemptions has caused any known health or safety incident. (84:116.)
12. This includes the materially identical *Kivirist*[5] homemade baked goods, which have been allowed for six years without incident. (R. 84:29, 55–56.)
13. It "doesn't make any sense" to prevent Respondents' homemade food sales while allowing any of the exempted homemade food sales. (R. 83:51; 84:62.)
14. Accordingly, Appellants themselves submitted to the Wisconsin State Assembly an official "proposal for legislative action" that would allow increased sales of homemade, not-potentially hazardous foods. (R. 84:42–43, 70–77; R. 98.)
15. Appellants were required to list any health and safety concerns in Appellants' official "proposal for legislative action." (R. 84:45.)
16. Appellants' official "proposal for legislative action" did not list any health and safety concerns because there were none. (R. 84:45.)
17. Appellants' proposed legislative reform was opposed by powerful business associations seeking to insulate themselves from local competition posed by ordinary home-based sellers. (R. 84:50; R. 85:120.)
18. The anticompetitive lobbying from these groups was the "only stumbling block" to passing the reform. (R.

[5] *See supra* n.3.

85:56.)

19. The reform never passed, as it was never afforded a vote in the Wisconsin Assembly—though it passed the Senate unanimously on three occasions. (R. 85:56.)

20. The same powerful associations that oppose this reform utilize existing licensure exemptions to raise money—which they then use to lobby against allowing anyone else an exemption. (R. 84:132.)

21. For example, the nonprofit arm of the Wisconsin Bakers Association conducts massive amounts of unlicensed, potentially hazardous food sales every year at the Wisconsin State Fair. (R. 85:96.)

22. The Wisconsin Bakers Association earns approximately $800,000 every year from those sales alone. (R. 88:43.)

23. Appellants' officers are consequently placed in the frustrating position of being compelled to enforce a Ban that "doesn't make any sense" to them. (R. 83:51, 68.)

Observing this admission-filled factual record, the circuit court granted Respondents' equal-protection claim for three independent reasons. First, the circuit court ruled that it is irrational to allow sales of statutorily enumerated homemade foods (for example, popcorn) yet not others (for example, roasted coffee beans). (R. 122:14, 20–21.) Second, the court ruled that it is irrational to categorically prevent Respondents' food sales solely

because they wish to support their own families and not someone else's. (R. 122:14–15, 21–22.) Third, the court ruled that it is irrational to distinguish between the exempted *Kivirist* baked goods and Respondents' materially identical non-baked goods. (R. 122:15, 22.)

Because the circuit court's remedy for the equal-protection violations fully provided Respondents' requested relief, the court did not reach Respondents' due-process claim.[6] (R. 122:22.)

Appellants timely appealed. (R. 124.) Appellants also moved to stay the circuit court's order pending appeal. (R. 127.) The circuit court denied that motion. (R. 162.) This Court subsequently entered a stay pending appeal. *WCFA v. DATCP*, Case No. 2023AP000367 (Order, May 30, 2023). During the five months that the circuit court's judgment was in effect before it was stayed by this Court, there were no known resulting food-safety issues. *Id.* at 4. This is, of course, unsurprising considering that there have been no incidents resulting from the six years of materially identical sales since *Kivirist*, (R. 84:29, 55–56), nor from the literally identical sales that occur every day across the United States. (R. 84:116.)

[6] Appellants suggest that "if this Court agrees that the challenged laws satisfy rational-basis review, no separate due-process inquiry is necessary." Gov't Br. 31 n.5. That is not accurate; the Wisconsin Supreme Court has considered these as separate, though related, doctrines. *See State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis.2d 203, 214 (1982) ("[E]ven if we were to find sec. 90-25.1(2) constitutional, sec. 90-25.1(3) is violative of the equal protection clause.").

SUMMARY OF THE ARGUMENT

Appellants' arguments are mistaken, and the circuit court's judgment should be affirmed. The reasons fall within three categories.

First, the circuit court properly applied the rational basis test. The government may not enforce distinctions that are not rationally connected to a legitimate purpose. As noted by the circuit court, Appellants' own express admissions showed the Ban's distinctions to be irrational.

Moreover, the undisputed facts also demonstrate that the Ban solely serves an *illegitimate* purpose—special-interest favoritism at the expense of the public. Accordingly, although the circuit court was able to rule for Respondents without reaching this particular argument, if this Court were to disagree with the circuit court's analysis, then the relevant Wisconsin Supreme Court precedent would direct this Court to receive the government's post-hoc justifications "with skepticism."

Second, Appellants' alternative arguments are similarly mistaken. Courts can indeed review this type of challenge, and this is true regardless of whether the government labels the disparate treatment as an "exemption." This is because equal-protection analysis looks to substance, not merely form. Moreover, Appellants are wrong that the circuit court gave the earlier *Kivirist* ruling "preclusive effect." To the contrary, the circuit court expressly explained that it was doing no such thing.

Third, Appellants' arguments regarding the circuit court's injunction are meritless. The circuit court enjoined an application of a statute pursuant to a declaration of unconstitutionality; there is nothing remotely novel about that. Appellants' additional assertion that the order is "vague" is defeated by the fact that Appellants themselves used these supposedly "vague" terms throughout this case. This is likely why Appellants never filed a motion for clarification. Finally, the circuit court's order properly applies to all Code sections that would otherwise disparately restrict Respondents' food sales.

ARGUMENT

I. Respondents Proved Their Equal-Protection Claim.

The circuit court was correct to rule in favor of Respondents, as each step of the analysis supports the circuit court's conclusion. First, the Wisconsin Constitution prohibits irrationally disparate treatment. Second, although the circuit court did not reach this point, the Wisconsin Supreme Court has explained that these types of cases involving special-interest legislation require courts to treat the government's post hoc rationales with "skepticism." Third, the Ban's disparate treatment creates distinct classes. Fourth, with or without the required "skepticism," the Ban's admittedly nonsensically disparate treatment of the distinct classes is irrational.

A. The Wisconsin Constitution Prohibits Subjecting Similarly Situated Groups to Disparate Treatment Without a Legitimate, Rational Basis.

Article 1, Section 1 of the Wisconsin Constitution guarantees Wisconsinites' right to equal protection under the law. In challenges like this one, Wisconsin courts will find disparate governmental treatment unconstitutional if it lacks a rational connection to a legitimate purpose. *See Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 23, 332 Wis. 2d 85, 796 N.W.2d 717. *See also State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 209–11, 313 N.W.2d 805 (1982) ("[U]nder the rational-basis test, the court should ask, first, what the purposes of the statute are.").

Not just "any rationale" will do, "regardless of how remote, fanciful or speculative the rationale may be." *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 103, 387 N.W.2d 254 (1986). *See also Blake v. Jossart*, 2016 WI 57, ¶ 31, 370 Wis. 2d 1, 884 N.W.2d 484 (*citing Milwaukee Brewers*). "To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable" in its real-world application. *Ibid*.

B. This Court Must View Appellants' Post-Hoc Justifications with "Skepticism."

Although the circuit court did not reach this point because it found the Ban's distinctions to be irrational regardless, (R. 122:4), it is important to recognize that the government may not use its

police power to protect politically connected interests from local competition. *See Grand Bazaar,* 105 Wis. 2d at 209–11; *State ex rel. Week v. Wis. State Bd. of Exam'rs,* 252 Wis. 32, 36, 30 N.W.2d 187 (1947) ("We conclude here the state was acting for the benefit of the [business] association primarily, which is not within the legitimate exercise of police power."). As a result, when a law appears to further special interests, Wisconsin courts must view any post-hoc, supposedly non-protectionist rationales "with some skepticism," notwithstanding ordinary principles of rational-basis review. *See Grand Bazaar,* 105 Wis. 2d at 211.

In *Grand Bazaar*, the Wisconsin Supreme Court employed rational-basis scrutiny to invalidate a liquor-license requirement. *Id*. at 212. Before addressing (and rejecting) the government's proffered rationales for the law, the Court found that "[t]he record supports the conclusion that the ordinance was supported by special interest groups as an anti-competitive measure to keep large retail stores out of the retail liquor business." *Id*. at 209–10. In such circumstances, "the Court should receive *with some skepticism* post hoc hypotheses about legislative purpose." *Id*. at 211 (emphasis added). Indeed, it is "common sense to weigh more critically a legislative result produced by a small, selfish and powerful group than a statute resulting from a broad public demand." *Id*. at 211 n.6. The Court even noted that if courts were to accept the government's proffered rationales "without question" in cases like this, "a similar ordinance might be passed *to protect bakeries* and butcher shops, if the necessary political influence

exists." *Id*. at 213 n.7 (emphasis added). That is what is going on here.

The evidence of special-interest influence in this case exceeds that of *Grand Bazaar*. Here, not only is it *undisputed* that special-interest groups support the continued prohibition on Respondents' food sales—the evidence also suggests that pressure from these groups is the *only* reason it exists.

As Appellants' own designated representative, expert, and officers explained under oath, groups like the Wisconsin Bakers Association feel they are "significantly threatened" by homemade food sellers and regularly lobby against any effort to allow homemade food sales. (R. 85:53, 57–58.) They have directly influenced legislators, including the Speaker (who owns an exempted popcorn business), who singlehandedly prevented the Assembly from conducting a vote on cottage-food reform that had passed the Senate unanimously three times. (R. 85:56–57; R. 94.) As Appellants' administrator at the time wrote, "the only stumbling block [to homemade-food reform] has been the assembly speaker and arguments by food business associations." (R. 85:56.)

None of this is a secret. (*See, e.g.*, R. 85:123 ("[F]actors other than public health at the time of statutes being passed may have been considered."); R. 87:31 ("I do not think there is a significant public health risk [from homemade foods]. [Question:] So you suggested that they be legalized across the board? [Answer:] Yes, but I do not have that authority."); R. 88:65–66 (describing exemptions as likely "politically" motivated); R. 86:77 ("I believe

this exemption [] is here because the tavern league has a good lobby."); R. 95:119–120 (contrasting "food science" with "political science").) As the *Kivirist* court observed of this scheme, "[t]he level of special interest influence here[] . . . is undeniable." *Kivirist v. DATCP*, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.) (Oral Opinion, May 31, 2017), at 12.

To be sure, the circuit court here felt no need to consider these particular facts because Respondents' claim prevails regardless. (R. 122:4.) Indeed, as described throughout the following sections of this brief, the Ban's distinctions cannot be justified under any legitimate rationale, including post-hoc ones. Nevertheless, as the circuit court below noted, the undisputed "involvement of special interest groups would only further support" Respondents' claim. (R. 122:4.)

C. The Ban Creates Disparate Treatment.

Before determining the rationality of disparate treatment, courts must first determine whether there is, in fact, disparate treatment. For facial challenges, the disparity will usually be obvious. *See, e.g.*, *Monarch Bev. Co., Inc. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2018) ("[T]he classification appears in the text of the statute itself."). For as-applied challenges, however, "it may not be clear that the challenged governmental action entails any classification at all." *Ibid*. Therefore, in these cases, challengers "[i]dentify[] a similarly situated comparator [as] a way to show that disparate treatment in fact has occurred." *Ibid*. This allows courts then to determine the merits (*i.e.*, whether the disparate

treatment is rational). *See, e.g.*, *Metro. Assocs.*, 2011 WI 20, ¶ 23 (proceeding to merits because statute "created a distinct classification" to be afforded "significantly different [treatment] from all others similarly situated.").

Respondents easily meet this threshold. The Ban's various exemptions create a distinct class: food producers who may lawfully sell their homemade products directly to consumers without any license. (*See* R. 84:19–20; R. 85:94; R. 86:43.) Meanwhile, the Ban prevents Respondents from selling their homemade foods. (*See* R. 84:16–18.) As Appellants admit, "[c]ertainly none of the exemptions applies to Plaintiffs." Gov'tGov't Br. 43. (*See also* R. 67:32 (Gov't Mot. for Summ. J.) (acknowledging that "someone similarly situated to Plaintiffs would [include] another person seeking to sell shelf-stable homemade food products directly to consumers").)

Courts routinely find people who sell (or wish to sell) similar items or services to be similarly situated. In *Grand Bazaar*, the Wisconsin Supreme Court considered the constitutionality of a licensure requirement "which, in effect, prohibited grocery stores [but not liquor stores] from selling liquor." 105 Wis. 2d at 209. In holding that disparity "a denial of equal protection," the Court necessarily found that the threshold was met—*i.e.*, that grocery-store operators and liquor-store operators were similarly situated. *See id*. at 212.

Federal courts are no different. In *Merrifield*, for instance, California had a general licensing scheme for pest controllers—but

it exempted pest controllers dealing with bats, raccoons, skunks, squirrels, bees, and wasps, while continuing to require the license for pest controllers dealing with other vertebrate pests (such as mice, rats, and pigeons). *Merrifield v. Lockyer*, 547 F.3d 978, 981–82 (9th Cir. 2008). The Ninth Circuit found that the exempted pest controllers were similarly situated to the unexempted pest controllers, even though they dealt with different animals. *Id.* at 990–92.

This aspect of the analysis does not change because a subset of the Ban's exempted food sellers intend to give away their profits. Respondents do not claim that their for-profit *revenues* are similarly situated to nonprofit revenues—they do not, for example, seek a tax exemption. *Cf. Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App. 25, ¶ 1, 289 Wis. 2d 498, 710 N.W.2d 701. It is well-settled that the State may distinguish between classes in multiple ways, some of which (though not all) violate equal protection. *See, e.g.*, *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 79, 362 N.W.2d 104 (1985) ("[One] distinction between [the classes] in the two statutes has a rational basis; however, the same rational foundation is not present when considering [certain other] requirements . . . in the one and not the other statute."). *See also Nankin v. Village of Shorewood*, 2001 WI 92, ¶¶ 40–41, 245 Wis. 2d 86, 630 N.W.2d 141. After all, "a legislature has much more leeway in granting exemptions in taxation measures than it does in regulatory measures under its police power without running athwart the equal-protection of the

laws." *Wis. Dep't of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 625, 279 N.W.2d 213 (1979) (citation omitted). Thus, even if the government may permissibly distinguish between for-profit and nonprofit actors in *some* contexts (such as taxation), it does not follow that it may do so in *all* contexts (such as for supposedly public safety laws like the one at issue here). This is why, for example, people working for nonprofit groups still need to follow the speed limit and stop at red lights.

D. The Ban's Disparate Treatment Lacks a Rational Basis.

After identifying disparate treatment, courts reach the heart of the inquiry: "whether a rational basis exists for the significantly different treatment." *Metro. Assocs.*, 2011 WI 20, ¶ 23. Wisconsin's equal-protection analysis utilizes a distinct, five-prong inquiry. Failing *even one* of these prongs means that the law's disparate application is unconstitutional. *Id.* ¶ 64. Most relevant to this case are prongs 1, 2, and 5, which require that:

> (1) "All classification[s] must be based upon substantial distinctions which make one class really different from another";
>
> (2) "The classification adopted must be germane to the purpose of the law";
>
> (5) "The characteristics of each class should be 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."

Ibid.

Here, the Ban's disparate treatment between Respondents and the exempt class cannot satisfy *any* of these three prongs, let alone all of them. Moreover, although one irrational distinction alone would have been sufficient to support the circuit court's judgment, the Ban's failures apply to all three of the judgment's bases.[7]

1. The disparate treatment is not "based upon substantial distinctions which make one class really different from another."

Appellants expressly admitted that, when it comes to the exempted foods and Respondents' banned foods, "[t]here's no difference between the two." (R. 84:104.) Indeed, in the government's own view, these groups are so similar that distinguishing between them "doesn't make any sense." (R. 83:51.) Respondents are categorically prevented from conducting their homemade food sales, yet some of the exempted classes may sell *precisely* the same homemade foods that Respondents wish to sell. (*See* R. 85:118, 120)

Moreover, there is no "substantial distinction" between Respondents and sellers of exempted enumerated foods. Not-potentially hazardous foods pose exceedingly low risks, and—as

[7] These were the irrationally disparate treatment between: (i) the exempted homemade foods and Respondents' homemade foods; (ii) the exempted sellers selling the exact same homemade foods that Respondents wish to sell and Respondents; and (iii) the exempted homemade non-potentially hazardous baked goods (the *Kivirist* goods) and Respondents' homemade non-potentially hazardous non-baked goods. (R. 122:14–15, 21–22.)

Appellants' own expert explained—if any two given foods are "considered non-potentially hazardous, they would be equally safe."[8] (R. 84:55–56.) Therefore, there is no "substantial distinction" between Respondents' foods and the exempted foods.

2. The disparate treatment is "not germane" to the purposes of the food-safety laws.

There is no legitimate rationale that would justify categorically preventing Respondents from selling their foods while allowing unlicensed sales of materially identical (or less-safe) foods. Indeed, as Appellants' own designated representative and expert witness repeatedly testified, the disparate treatment in this case "doesn't make any sense." (R. 83:51. *See also id*. at 22–23, 45–46, 68.)

Despite the testimony of their own designated representative, expert, and officers, Appellants have attempted to justify this admittedly nonsensical disparity by hypothesizing highly unlikely food-safety concerns. Such supposed concerns include foodborne illness, allergens, and THC adulteration. Gov't Br. 33–36. Yet, as the circuit court again noted in its judgment, it is undisputed that the exempted foods pose "the exact same food safety concerns" (or worse). (R. 122:21.) Accordingly, such concerns cannot justify the challenged disparate treatment.

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[8] Appellants suggest that the circuit court took this statement to mean that "'not potentially hazardous' foods . . . [are categorically] safe for all purposes." Gov't Br. at 38. That suggestion is patently false. In truth, the circuit court merely acknowledged Appellants' admission that Respondents' "foods are categorically *as safe or safer* than exempted foods." (R. 122:12 (emphasis added).)

Nankin is on point. 2001 WI 92. There, a law granted residents in less-populous counties extra protections for property tax assessments. *Id.* ¶ 1. Residents from more populous counties argued that the resulting "disparate treatment" violated equal protection. *Id.* ¶ 6. In response, the government argued that the law preserved judicial resources. *Id.* ¶ 37. The Wisconsin Supreme Court rejected that rationale, finding that "judicial workload and timely resolution of property assessments are concerns of all counties." *Id.* ¶ 38. Crucially, the "populous counties d[id] not present any special problems or concerns" that would justify the disparity. *Id.* ¶ 41. *See also Grand Bazaar Liquors*, 105 Wis. 2d at 213 (finding that there was no reason to suspect that grocery stores would be less likely to enforce alcohol laws than liquor stores).

The same is true here. As both sides' experts agree, there is no "special problem[] or concern[]" that would justify preventing Respondents' food sales while allowing the exempted classes' sales. Such disparity "doesn't make any sense" because there is no risk that could apply to the former but not the latter. (R. 83:50–51; R. 84:30; R. 91 ¶ 36.) In fact, Respondents' food sales would present *less risk* than many exempted sales. (R. 84:61.)

At any rate, these concerns are, at most, "remote, fanciful or speculative." *See Milwaukee Brewers*, 130 Wis. 2d at 103. The exempted homemade foods include those that are materially (or even literally) identical to Respondents', yet Appellants cannot name even one food-safety incident linked to these sales (including in the six years since *Kivirist*) (R. 84:29, 116.) Nor is there even

one example of anyone falling ill from the identical homemade food sales that happen every day across the nation. (R. 84:116.)

None of this should be surprising. Both experts agreed that these foods pose exceedingly low risk. Moreover, both experts agreed that, for retail sales (*i.e.*, direct-to-consumer), it is expected that consumers with significant food allergies would be aware of their condition[9] and ask the seller "question[s] about what's in their food product." (R. 83:39.) That is precisely why even *licensed* commercial retailers are not required to label their food. *See* Wis. Admin. Code ATCP ch.75 App. 3-602.11(D). (*See also* R. 83:39 ("[Meals are] not required to have a label[.]").) And as for ingredients like THC—it beggars belief that someone would be willing to violate drug trafficking laws but not the Ban on homemade food sales. *See Merrifield*, 547 F.3d at 991 ("[The government] cannot hope to survive *rational* basis review by resorting to irrationality.")

Appellants therefore muse that maybe the challenged disparate treatment suggests a rationale other than food safety:

(1) Appellants suggest that "'unlike for-profit entities, nonprofit organizations do not generally accumulate large earnings' and do 'not normally have the kind of money [that for-profit organizations have] to cover expenses' such as licensing fees." Govt Br. 45–46 (quoting *Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App. 107, ¶ 18, 235 Wis. 2d 103, 612

[9] If the consumer is not aware of her allergy, even an ingredient labeling requirement would be of no use.

N.W.2d 332 (holding that it is rational to limit nonprofits' liability from suit)).

(2) Appellants suppose that an exemption for "few-ingredient" foods is "easier to administer than other exemptions." Gov't Br. 46.

(3) Appellants imagine that there might be a "historical pedigree" peculiar to the exempted foods. Gov't Br. 46.

But Appellants' musings have already been defeated by their own admissions, as well as by the law itself. Appellants' designated representative testified that the purpose of these laws is food safety. (R. 84:116–17.) And Appellants have *no authority* to enforce these laws for any purpose *other* than "for the purpose of protecting public health and safety." Wis. Admin. Code ATCP § 75.01(2).

To the contrary, Appellants' own designated representative, expert, and officers explained that the Ban's distinctions exist for one solitary reason, and it is a constitutionally illegitimate one. (*See, e.g.*, R. 86:77 ("I believe this exemption [] is here because the tavern league has a good lobby.")) "When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Grand Bazaar*, 105 Wis.2d at 211 n.6 (citation omitted).

Even so, it is not enough that "the legislature had a rationale. . . . The test is whether the rationale is rational." *Milwaukee Brewers*, 130 Wis.2d at 103. In other words, even if Appellants had not already defeated their own arguments through

their own admissions (and they have), their post-hoc rationales would have failed regardless.

First, Appellants' new, financial-resources rationale would only apply to a subset of the distinctions, and it overlooks the fact that Respondents also do not have the financial resources to afford a commercial kitchen. (*See* R. 75 ¶ 7.) Moreover, the disparate treatment caused by this subset of distinctions is not merely that nonprofits are saved from certain general expenses relating to their revenues, such as a tax break or a "licensing fee" waiver. Instead, nonprofit sellers may sell the *exact* same foods as Respondents', prepared in the *exact* same manner, whereas Respondents would face up to six months' imprisonment for even one such sale. *See* Wis. Stat. § 97.72. The *only* difference is that Respondents need to support their own families instead of someone else's. The State's police powers cannot rationally penalize them for that. *See Nankin*, 2001 WI 92, ¶¶ 40–41 (finding that, notwithstanding other cases, the government's distinction is not rational "[i]n this case"). *See also Moebius Printing*, 89 Wis. 2d at 625; *Grand Bazaar*, 105 Wis.2d at 218.

Second, Appellants' administrability rationale for "few-ingredient" foods is also clearly wrong. For example, home-roasted coffee beans are banned despite *possessing only one ingredient*, while countless multi-ingredient products are exempted.[10] Moreover, many of the distinctions drawn by the Ban's exemptions are between two different sellers of *literally the exact same food*

[10] *See supra* Statement Pt. II.

items with the exact same number of ingredients—based solely on how the seller intends to use the proceeds. *See* Wis. Admin. Code ATCP ch.75 App. 1-201.10(B). (*See also* R. 85:118.) The number of ingredients clearly has nothing to do with it.

If anything, it is *more* difficult from an administrative standpoint to arbitrarily distinguish between sellers in this way than to allow the consistent treatment sought by Respondents. Indeed, Appellants' previous administrator testified that the administrative efficiency that could be gained from a more-consistent approach was one of the reasons why Appellants themselves proposed legislative reform to extend the exemptions to people like Respondents. (*See* R. 85:39, 45.)

Third, when a law is as riddled with exceptions as the Ban is, it defies logic to contend that there is a "historical pedigree" associated with each one. Indeed, the Ban has at least 17 different, scattershot exemptions. Do Appellants really contend that sorghum syrup has more of a historical pedigree than coffee beans or fudge? And Appellants also overlook the fact that the distinction between the homemade baked goods (which can be lawfully sold) and homemade non-baked goods (which are banned) has existed for merely six years. *See supra* n.3.

Moreover, even if, *arguendo*, a historical pedigree were somehow to exist for all 17 exemptions, the controlling Wisconsin Supreme Court precedent shows that this still would not render the Ban's distinctions rational. For example, liquor in Wisconsin was traditionally sold in liquor stores, but that did not stop the

Wisconsin Supreme Court from vindicating grocery store owners' rights to equal treatment, including protection against grandfather clauses. *Grand Bazaar*, 105 Wis.2d at 205, 216. Regardless, the wildly unsupported notion that all these exempted foods have "historical pedigrees" not found in, say, homemade fudge, is exactly the kind of fanciful reasoning that the Wisconsin Supreme Court has already rejected. *See Grand Bazaar*, 105 Wis.2d at 213.

3. Respondents are not "so far different from" exempted food producers "as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation."

Finally, there is no benefit to the public in treating Respondents differently from the exempted food producers.

Respondents are *thousands* of ordinary Wisconsinites who would support their families by selling undisputedly low-risk, ubiquitous, homemade foods to their communities. (*See* R. 140 ¶ 4.) As the recent pandemic demonstrated, many people need the flexibility to work from home, and Respondents cannot afford the arbitrary expense of a commercial kitchen. Categorically preventing them from supporting their families (and depriving their communities of their desired, local food purchases), while allowing others to sell the very same (or less-safe) homemade foods does not rationally further the public good.

Appellants' entire response to this is that "[b]y enacting the

exemptions that it did, and not others, the Legislature[11] has already conducted the conclusive analysis of which laws best benefit the public." Gov't Br. 44–45. Of course, Appellants' response ignores that Appellants themselves have previously proposed legislation that would reform these laws. (R. 84:42–43, 70–77; R. 98.) Regardless, such circular reasoning is clearly wrong, as the controlling caselaw shows that statutes passed by the Legislature can indeed fail this prong. *See, e.g.*, *Metro. Assocs.*, 2011 WI 20, ¶ 73 ("[Act 86] also fails to satisfy the fifth criteria of the rational basis test.").

II. Appellants' Alternative Arguments Also Fail.

A. Equal-protection claims are not limited to either facial attacks on statutory language or "class-of-one" claims.

Throughout their brief, Appellants note that Respondents are not mounting a facial challenge. *See, e.g.*, Gov't Br. 43 ("Wisconsin's food laws do not impose any 'classification' specific to Plaintiffs."). According to Appellants, this meant that "the circuit court had to invent a class consisting of 'Plaintiffs and all similarly situated individuals.'" *Id.* at 41. That is because, according to Appellants, equal-protection challenges are limited to only two varieties: facial challenges against "explicitly discriminatory provision[s]" and "class-of-one" challenges. *Id.* at 41–42. In other words, Appellants have changed their position from what they told

[11] Yet, many of the Ban's exemptions are found in agency regulations. *See, e.g.*, Wis. Admin. Code ATCP § 75.063(6) (nonprofit exemption).

the court below about hybrid challenges, (*see* R. 20:11) (Gov't Mot. to Dismiss)), and are now taking the new and remarkable position that hybrid challenges are not allowed. In support, Appellants cite a single case. Gov't Br. 41 (citing *Monarch Bev. Co.*, 861 F.3d at 682).

That case, in fact, cuts completely against Appellants' position. As the Seventh Circuit explained, "[t]he class-of-one label is somewhat misleading because what distinguishes these cases isn't necessarily the fact that the plaintiff is the only one harmed." *Monarch Beverage Co.*, 861 F.3d at 682 n.2. Indeed, "the number of individuals in a class is immaterial for equal protection analysis." *Id.* at 682 (citation omitted). What matters is that the challenger can "[i]dentify[] a similarly situated comparator [as] a way to show that disparate treatment in fact has occurred," so that the court may then review the rationality of that treatment. *Id.* at 682. It is beyond dispute that Respondents have done that here. Gov't Br. 43 ("Certainly none of the exemptions applies to Plaintiffs[.]").

Appellants' change in position is especially surprising considering that the Wisconsin Supreme Court has been quite clear on this point. *See Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶¶ 27–29, 60, 376 Wis.2d 147, 897 N.W.2d 384; *State v. Konrath*, 218 Wis.2d 290, 304 n.13, 577 N.W.2d 601 (1998) ("[W]hen a court holds a statute unconstitutional as applied to

particular facts, the state may enforce the statute in different circumstances.").[12]

As Appellants themselves recognized when arguing to the court below, (*see* R. 20:11), it is entirely irrelevant whether the Ban applies "explicitly and directly to the challengers as a statutorily identified group." Gov't Br. 41. Given that this is a hybrid challenge, this Court must analyze the constitutionality of applying the Ban to Respondents while not applying it to the many exempted classes. It makes no difference whether the law might be applied to some other third party.[13]

B. Equal protection looks to substance, not merely form.

Next, Appellants claim that the government can insulate laws from equal-protection review by labeling disparate treatment as "exemptions." Gov't Br. 44. Appellants are clearly mistaken as

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[12] Other courts have been similarly clear. *See, e.g.*, *Merrifield*, 547 F.3d at 992; *Craigmiles v. Giles*, 312 F.3d 220, 222–23 (6th Cir. 2002 (affirming injunction of state funeral director licensing scheme "insofar as it bars nonlicensed funeral directors from the retail sale of caskets" and noting that injunction did not "enjoin the operation of the entire Act, its application to other parties, or even to the plaintiffs if their business activities changed"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 224, 227 (5th Cir. 2013) (affirming injunction of district court of funeral director licensing scheme as applied to selling caskets); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015) (enjoining application of cosmetology license just to those threading eyebrows).

[13] Appellants erroneously suggest that Respondents conceded below that the challenged laws in this case "make sense for 'a factory that produces millions of cookies.'" Gov't Br. 31. But Respondents made no such concession. That discussion of Respondents' response to Appellants' motion to dismiss merely clarified what this case is—and is not—about. This is a case about homemade foods; the constitutionality of applying these laws to giant factories is not at issue.

a matter of constitutional doctrine. As the U.S. Supreme Court has explained:

> The Equal Protection Clause . . . proscribe[s] . . . state action 'of every kind' that operates to deny any citizen the equal protection of the laws. This proscription on state action applies *de facto* as well as *de jure*[.]

Gilmore, 417 U.S. at 565; *see also Merrifield*, 547 F.3d at 992 ("Here, the government has undercut its own rational basis for the licensing scheme by *excluding Merrifield from the exemption*." (emphasis added)).

The same holds true in Wisconsin, where the Wisconsin Supreme Court has similarly rejected the notion that equal protection "is limited to form and not substance." *Grand Bazaar*, 105 Wis.2d at 209. Instead, what matters is whether there is a "rational basis for this *disparate treatment*." *Nankin*, 2001 WI 92. ¶ 6 (emphasis added). In the Wisconsin Supreme Court's words, the government has limited "leeway in *granting exemptions* . . . in regulatory measures under its police power without running athwart the equal-protection of the laws." *Moebius Printing*, 89 Wis. 2d at 625 (emphasis added).

It is thus completely beside the point that, on their face, "the laws that Plaintiffs challenged here apply to everyone." Gov't Br. 41 (emphasis omitted). The licensing requirements in *Grand Bazaar* also applied "to everyone"—that is, to any Milwaukeean wanting to sell liquor. Nevertheless, it was irrational, "in effect, [to] prohibit[] grocery stores from selling liquor" but not liquor stores. *Grand Bazaar*, 105 Wis.2d at 205. Likewise, this case is not

about "the absence of a law," Gov't Br. 44 (emphasis omitted), but about the Ban's irrationally "disparate treatment" of Respondents compared to the exempted classes. *Nankin*, 2001 WI 92, ¶ 6. This is well-settled equal-protection doctrine; the circuit court did not err by applying it.

Even so, Appellants suggest, "the legislature must be allowed leeway to approach a perceived problem incrementally." Gov't Br. 44 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315–16). And it is true that the government is allowed to take incremental steps as part of a long-term, multi-step plan. But there is no such ongoing, multi-step plan here. (R. 83:51; R. 84:62.) To the contrary, "the record in this case" demonstrates that the application of these laws to Respondents addresses a "'problem' . . . not noticed or indicated to exist." *Grand Bazaar*, 105 Wis.2d at 214. And, in any event, whatever "leeway" the State has here is nevertheless subject to Wisconsin's multifactor equal-protection test. *Id*. at 209. *See also Moebius Printing*, 89 Wis. 2d at 625.

C. Rational-basis review is not a rubber stamp.

A consistent theme of Appellants' brief is the misguided notion that "rational basis" is a euphemism for "the government wins." Appellants assert that "second-guessing of legislative line-drawing [] is *strictly forbidden* on rational-basis review"—even for a challenge invoking equal protection. Gov't Br. 42 (emphasis added). According to Appellants, facts do not matter. *See* Gov't Br. 38 (claiming that the circuit court erred "by allowing discovery" in this case). Indeed, Appellants view rational-basis challenges to

legislation as *per se* unviable. *Id.* at 44. That has never been the law.

On the contrary, rational-basis review "allows the court to probe beneath the claims of the government to determine if the constitutional requirement of some rationality . . . has been met." *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 132, 532 N.W.2d 432, 437 (1995) (quotation marks omitted). As a result, plaintiffs may develop the record to meet their burden to show that a law's application is irrational. *See, e.g.*, *Grand Bazaar*, 105 Wis. 2d at 209 ("Our review of the record in this case requires us to accept the plaintiff's position."). And Plaintiffs can win—both in Wisconsin[14] and in courts across the country.[15]

In fact, the Wisconsin Supreme Court has explicitly (and unanimously) stated that courts exercising rational-basis review

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[14] *See, e.g.*, *Grand Bazaar*, 105 Wis. 2d 203 (liquor license requirement violated both due process and equal protection); *Metro. Assocs.*, 2011 WI 20 (no rational basis for significantly different treatment of taxpayers in opt-out municipalities); *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780 (zoning ordinance violated substantive due process); *Nankin*, 2001 WI 92 (different tax review procedures across towns according to population violated equal protection); *Watts*, 122 Wis. 2d 65 (statute classifying different procedures for continued protective placement of individuals violated equal protection).

[15] *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 689 (1985); *St. Joseph Abbey*, 712 F.3d 215 (5th Cir. 2013); *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012); *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009); *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95 (3d Cir. 2008); *Merrifield*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles*, 312 F.3d 220 (6th Cir. 2002); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662 (4th Cir. 1989); *Wiliams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *Ranschburg v. Toan*, 709 F.2d 1207 (8th Cir. 1983).

"should not blindly rubber stamp legislation." *Grand Bazaar*, 105 Wis.2d at 218. To be sure, the question is not whether the challenged application of the law is the *best* approach to achieving a given objective—but it must be *rational* in application, not "remote, fanciful or speculative." *Milwaukee Brewers*, 130 Wis. 2d at 103. Otherwise, the very "concept of equal protection [would not] be meaningful." *Ibid*. *See also Grand Bazaar*, 105 Wis.2d at 213.

Mayo did not alter this standard. In that case, the Court reviewed a statutory cap on noneconomic medical malpractice damages. *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678. The challenged law was materially identical to another statute that the Court had previously struck down (in *Ferdon*[16]) as irrationally burdening malpractice victims. *Id*. ¶ 11. The *Mayo* Court upheld the statute (and overruled *Ferdon*)—not because "facts are irrelevant" but because *Ferdon ignored* facts that made the law's operation rational. *Id*. ¶ 31 ("The [*Ferdon*] majority did not consider that part of the legislative plan that guaranteed 100 percent payment of all other damages, a benefit that no other tort carries."). The Court then explained at great length how the challenged scheme evinced the legislature's deliberate, rational policy choice. *Id*. ¶¶ 46–49.

Porter, too, did not alter Wisconsin's rational basis test. In that case (issued the same day as *Mayo*), the Court reviewed a law preventing the same person from owning both a funeral home and

[16] *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

a cemetery. *Porter v. State*, 2018 WI 79, 382 Wis. 2d 697, 913 N.W.2d 842. The plaintiff asserted that he had raised a factual "issue warranting a trial." *Id.* ¶ 50 n.15. But the Court noted that "the State's expert . . . explained at length how the anti-combination laws advanced [] legitimate government interests" and that this explanation was "without contradiction." *Id.* ¶ 19, 42. The *Porter* plaintiff's failure to create a disputed issue of material fact regarding the key issue meant that there was no need "for a fact-finding hearing" to resolve *other* disputed facts. *Id.* ¶ 50 n.15.

Even in the federal cases that undergird the bulk of Appellants' brief, facts still mattered. In *Beach Communications*,[17] the U.S. Supreme Court upheld a Cable Act provision that distinguished between separately owned and commonly owned buildings. The Court explained the various reasons why Congress might rationally have made this distinction. 508 U.S. at 317–20. The challengers failed to negate those rationales—not because the factual record is irrelevant in these cases, but because the proffered evidence there proved only that it is "arguable" whether that law in fact furthered those rationales. *Id.* at 320. Had the challengers developed a stronger record, the outcome might have been different. *See supra* n.15.

The same holds true for *Minerva Dairy*,[18] which stands for the opposite proposition claimed by Appellants. There, dairy

[17] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).

[18] *Minera Dairy, Inc. v. Harsdorf*, 905 F.3d 1047 (7th Cir. 2018).

manufacturers challenged a requirement that butter sellers provide consumers with additional information pursuant to a butter-grading system. 905 F.3d at 1050–53. To support their equal-protection claim, the challengers there asserted "that the law irrationally discriminates between butter and other similarly situated commodities." *Id*. at 1056. That claim failed because "the Department presented at least some evidence that butter is materially different than other commodities." *Id*. at 1057. Rather than ignore the record, the Seventh Circuit ruled the way it did *because of the record*. *Ibid*. Under that factual record, the challengers there had simply failed to prove their claims.

In this case, it is beyond reasonable dispute that Appellants are arbitrarily preventing Respondents from selling their foods while allowing materially identical food sales. And it is disingenuous at best to cast aside a record filled with *express admissions from Appellants' own designated representative and expert* as merely evincing "various witnesses' *beliefs* about the reasonableness of regulating [Respondents]' foods, and whether [Respondents]' foods are 'safe' as compared to other foods." Gov't Br. 38. Given this record, the circuit court did not engage in "courtroom fact-finding" but merely observed that the material facts were not in dispute. (R. 122:4 ("The facts set forth below are supported by the uncontested affidavits and undisputed facts filed in this matter, which the Court has reviewed in their entirety.")).

At bottom, Appellants fault the circuit court for observing their own express admissions and then following the law. They

think the circuit court should have blindly rubber stamped the Ban regardless of the record. But that is not how the test works. *See Grand Bazaar*, 105 Wis.2d at 218 ("[W]e should not blindly rubber stamp legislation enacted under the guise of the city's police power . . . .").

Indeed, if Appellants' approach were to be followed, no rational-basis challenge could ever succeed. Yet they do. *See supra* n.14, 15. And if ever there were a case where one should succeed, it is here, where Appellants' own designated representative, expert, and officers expressly explained under oath that each of the Ban's distinctions "doesn't make any sense." (R. 83:51; R. 84:62.)

D. The circuit court expressly explained that it was *not* giving *Kivirist* preclusive effect.

Next, Appellants erroneously suggest that the circuit court granted *Kivirist* "preclusive effect." Gov't Br. 47. Appellants are mistaken. The circuit court expressly explained that *Kivirist* "is not [binding] precedent" and that "[n]o one has argued that it's the law of the case." (R. 32:3 (transcript from motion-to-dismiss hearing).) Instead, the circuit court merely recognized that the foods covered by the *Kivirist* ruling were being treated differently than the foods at issue here, despite Appellants' express admission that, in the government's view, those foods are "the same thing." (R. 84: 55–56, 62.) There was nothing improper about the circuit court doing so.

III. The Circuit Court's Injunction was Proper.

Finally, Appellants suggest that the circuit court's injunction was "fatally flawed"—notwithstanding the merits. Gov't

Br. 48. They claim that the injunction (1) "usurped the legislative task and engaged in policymaking"; (2) "is impermissibly vague"; and (3) "extends to a statute with no bearing on this case." *Id*. at 48–49, 51. These arguments are incorrect.

First, it is not even remotely novel for a court to prevent a statute's application pursuant to a declaration of unconstitutionality.[19] *See, e.g.*, *In re Visitation of A.A.L.*, 2019 WI 57, ¶ 42, 387 Wis.2d 1, 927 NW.2d 486 (concluding that a "[s]tatute is unconstitutional as applied"). That is what the circuit court did when it "enjoin[ed] [Appellants] from enforcing [certain] licensing requirements" against Respondents. (R.122:27 (capitalization omitted).) Its injunction does not somehow become erroneous just because it "effectively [] extend[s] the State's [licensing] exemption[s] to all homemade, shelf-stable food sellers." Gov't Br. 42. On the contrary, when "the right invoked is that to equal treatment,[20] the appropriate remedy is a mandate of equal treatment, a result that can be accomplished . . . *by extension of benefits to the excluded class*." *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017) (emphasis added) (brackets and quotation marks omitted)).[21]

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[19] For the contrary position, Appellants quote an inapplicable *statutory interpretation* case. *See* Gov't Br. 49 (quoting *Stockbridge Sch. Dist. v. DPI Sch. Dist. Boundary Appeal Bd.*, 202 Wis.2d 214, 229, 550 N.W.2d 96 (1996)).

[20] Appellants suggest that Respondents seek "new rights." Gov't Br. 49 (citation omitted). Yet there is nothing "new" about the right to equal protection.

[21] Appellants assert that *Morales-Santana* "has no application to rational-basis review" because it involved a "gender-based classification," Gov't Br. 49, but

The circuit court properly determined that this case's undisputed facts required granting Respondents' requested relief. The court noted that "the legislature has already carved out exemptions to the statutory requirements and regulations for certain classes of people making the exact same [or riskier] foods" as Respondents. (R. 122:27.) Moreover, the court observed that Appellants have been allowing sales of materially identical baked goods pursuant to *Kivirist* for six years—without any resulting problems. (*Ibid.*) Indeed, Respondents' food sales pose exceedingly remote risks and take place across the country without incident. (*See id.* at 11.) Given these uncontested facts, it would be unreasonable to remedy the equal-protection violation by *withdrawing* the licensing exemptions. *See Nankin*, 2001 WI 92, ¶ 51 ("grant[ing] Nankin's request for a permanent injunction to allow him" to invoke statutory procedures previously available only to the favored class).

Second, Appellants cannot defeat the circuit court's injunction by feigning confusion over its meaning. According to Appellants, the injunction's supposedly "vague" terms are (1) "homemade," (2) "directly," and (3) "similarly situated." Gov't Br. 50–51. Both sides used these terms throughout this case, and Appellants showed no sign of confusion—until they lost at summary judgment. (*See, e.g.*, R. 67:32 (Gov't Mot. for Summ. J.) (acknowledging that "someone *similarly situated* to Plaintiffs

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they do not (and cannot) explain why the level of judicial scrutiny on the merits would affect the remedies once a constitutional violation is found.

would [include] another person seeking to sell shelf-stable *homemade* food products *directly* to consumers") (emphases added).)

Any genuine need for clarity concerning the meaning of these terms would call for clarifying the order, not reversing it. *See, e.g.*, *Kenosha Hosp. & Med. Ctr. v. Garcia*, 2004 WI 137 (granting motion for clarification). And Appellants have already shown themselves capable of requesting clarification when they think it is required. *See, e.g.*, *Kivirist v. DATCP*, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.) (mot. for clarification or reconsideration, June 19, 2017). Yet Appellants filed no such motion in this case.

The obvious reason is that the injunction is not vague. The circuit court made crystal clear that it was, in effect, extending the exemption arising from *Kivirist* for homemade, not-potentially hazardous baked foods to now include their non-baked counterparts. (R. 122:27 ("The only difference between the *Kivirist* plaintiffs and Plaintiffs here is whether the food is baked or not baked.").) Should the public need any further guidance, Appellants may easily modify their website to clarify that these foods no longer must be "baked."[22]

Third, Appellants are incorrect that Wis. Stat. § 97.29(2) does not "bear[] on this case." That section is relevant because it arbitrarily limits sales of not-potentially hazardous "retail food products that the person prepares and cans at home." Specifically,

[22] https://datcp.wi.gov/Pages/Licenses_Permits/HomeBakers.aspx

that section would prevent home-based sellers from earning more than "$5,000 per year" from their food sales. Wis. Stat. § 97.29(2)(b)(2). It is of no consequence that this particular "retail" provision happens to be found in a statute that otherwise governs wholesalers. *See Gilmore*, 417 U.S. at 565 ("The Equal Protection Clause . . . applies de facto as well as de jure[.]").

CONCLUSION

For the foregoing reasons, the decision and order below should be affirmed.

Dated this 2nd day of August 2023.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,896 words.

Dated this 2nd day of August 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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