STATE OF WISCONSIN

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

DISTRICT I

Case No. 2023AP0367

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

This case is about whether Wisconsin's retail-food laws are rational. These are laws that require licensing and inspection for producers who wish to sell food directly to the public. The rationality of these laws cannot reasonably be questioned. (*See* Opening Br. 28–36.)

And Plaintiffs don't. They never confront head-on whether the identified, conceivable bases for the retail-food laws are sufficient to sustain the laws. Rather, they incorrectly frame the inquiry as focusing on their invented "Ban" (which does not exist in statute or rules yet apparently covers exactly the foods Plaintiffs want to sell), urging the court to review the retail-food laws with "skepticism," and arguing that there is no rational reason for the Legislature's decision not to grant an exemption for "Plaintiffs and all similarly situated individuals." (Respondents' Br. 28–43.)

This is not how rational basis review proceeds.

On rational-basis review, courts will uphold challenged laws if there is any reasonable basis to do so, and will not second-guess legislative line-drawing through fact-finding or any other form of heightened scrutiny.

The circuit court's order and injunction failed to hew to these standards, and Plaintiffs provide no viable reason to sustain the decision below. The judgment should be reversed.

I. With no textually identified class, Plaintiffs' challenge to the invented "Ban" fails to state a viable equal-protection claim.

Plaintiffs' theory (and the judgment below) rests on the premise that a "Ban" unconstitutionally treats them differently from others. (*See* Respondents' Br. 18–20, 31–43.) But there is no such "Ban"—no statute or rule targets "Plaintiffs and all similarly-situated individuals." (R. 122:27–28). Without a statute or rule that defines the class

to which Plaintiffs supposedly belong, their constitutional challenge to statutes and rules does not even get off the ground.

This is illustrated in every case Plaintiffs cite, including *Grand Bazaar*, *Nankin*, *Metropolitan Associates*, and *Merrifield*, among others. (*See, e.g.* Respondents' Br. 28–32, 38–39, 46–49, 52.) In each, the challengers pointed to textual classifications that explicitly singled them out for unfavorable treatment. *See, e.g.*, *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209–10, 214, 313 N.W.2d 805 (1982); *Nankin v. Village of Shorewood*, 2001 WI 92, ¶¶ 11–15, 47–51, 245 Wis. 2d 86, 630 N.W.2d 141; (*See also* Opening Br. 40–41.) And in each case in which the court held statutes unconstitutional, the relief was simply to declare the challenged provisions unenforceable. *See, e.g.*, *Nankin*, 245 Wis. 2d 86, ¶¶ 45–51.

One of Plaintiffs' principal cases illustrates this point well. (*See* Respondents' Br. 32–38, 45–48 (discussing *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008)).) The plaintiff in *Merrifield*, a pest controller, challenged a statute that imposed increased licensing requirements on him relative to his competitors, by exempting them from certain licensing requirements even though they dealt with the same pests using the same control-methods. *See id.* at 981–82. In granting the plaintiff's requested relief—invalidating the textual exemptions—the court acknowledged that the only reason it could do so was that the legislature had enacted language specifically "singling out" the plaintiff for unfavorable treatment. *See id.* at 991. It was that "singling out" that the *Merrifield* court held was arbitrary and irrational, and thus violative of equal protection. *See id.* at 991–92.

Here, far from "singling out" Plaintiffs, the retail-food laws treat them exactly the same as nearly everyone else in Wisconsin who wishes to sell food directly to the public—they must obtain a license and follow the retail-food laws.

Plaintiffs try to bolster their theory by casting their claims as a "hybrid" challenge, arguing that this label authorizes the type of non-textual challenge they bring. (*See* Respondents' Br. 43–47.) But simply labeling a challenge a "hybrid" does not excuse the requirement to challenge actual text. This is clear from the principal case on which Plaintiffs rely, which involved a challenge to statutes governing the disciplinary authority of the Crime Victims Rights Board as to a statutorily identified class. *See Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶¶ 27–29, 376 Wis. 2d 147, 897 N.W.2d 384. With no textually identified class, Plaintiffs don't even state a hybrid claim, nor did they prove that application of the laws would be unconstitutional in every instance, as is required even for a hybrid challenge. *See id.* ¶ 29.

At other points, Plaintiffs characterize theirs as an "as applied" challenge, citing *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017). (*See, e.g.*, Respondents' Br. 31–32.) But *Monarch* directly refutes the sort of atextual challenge they bring. The *Monarch* court wasn't explaining how to bring an "as applied" challenge to statutes. Rather, the court was explaining why the plaintiff in that case was wrong to rely on the "as applied" framework when bringing its challenge to state statutes, since such a challenge requires the challenger to point to a "classification [that] appears *in the text of the statute itself*." *Monarch*, 861 F.3d at 682 (emphasis added). *Monarch* illustrates precisely why Plaintiffs' challenge to the invented "Ban" fails.

With no discriminatory language in Wisconsin's retail-food laws and no precedent supporting Plaintiffs' challenge to the invented "Ban," Plaintiffs' claims should have been dismissed at the outset.

II. Plaintiffs offer no meaningful response to the rationality of Wisconsin's retail-food laws.

Because Plaintiffs focus on the alleged irrationality of the Legislature's not granting them an exemption from the retail-food laws, they sidestep the actual threshold question: whether the generally applicable retail-food laws are conceivably rational.

The conceivable bases for those laws are sufficient to sustain them (*see* Opening Br. 30–36), and even Plaintiffs have effectively conceded that the laws are rational. (*See* Respondents' Br. 16–20, 34–43; *see also* R. 24:25 (Plaintiffs' brief in opposition to motion to dismiss).) Although they now try to walk back their earlier concession (Respondents' Br. 45), their original statement speaks for itself. Even now Plaintiffs cannot explain why it is constitutional to regulate larger-scale producers such as "a factory that produces millions of cookies" (R. 24:25), but unconstitutional to regulate Plaintiffs roasting millions of coffee beans. This is because the Constitution draws no such line and instead leaves it to lawmakers to do so. *See Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also Blake v. Jossart*, 2016 WI 57, ¶ 32 n.16, 370 Wis. 2d 1, 884 N.W.2d 484.

Plaintiffs also mischaracterize the five-factor test that Wisconsin courts occasionally use when analyzing equal-protection claims, asserting that "[f]ailing *even one* of these prongs means that the law's disparate application is unconstitutional." (Respondents' Br. 34 (citing *Metro. Assoc. v. City of Milwaukee*, 2011 WI 20, ¶ 64, 332 Wis. 2d 85, 796 N.W.2d 717). Plaintiffs' framing simply misstates rational-

basis review. The test is nothing more than an "analytical tool" that courts may use to assess the "basic question" of whether there is a rational basis for a law. *See Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986). The test is not a prerequisite such that each of the five factors must be examined in every case. *See, e.g., State v. Smith*, 2010 WI 16, ¶¶ 14–40, 323 Wis. 2d 377, 780 N.W.2d 90 (upholding legislative classification without applying five-factor test). Given that the retail-food laws easily satisfy the "basic question" on rational-basis review, *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 98, this Court should reject Plaintiffs' attempts to cast the five-factor test as a set of stumbling blocks.[1]

III. Fact-finding is irrelevant on rational-basis review.

Many of Plaintiffs' arguments rest on "admissions" about the laws that Plaintiffs elicited from DATCP witnesses in discovery, or facts the circuit court supposedly "found" about the relative safety of various foods. (*See* Respondents' Br. 21–24.) These arguments are irrelevant.

The constitutionality of statutes does not depend on whether witnesses "admit" that a different statute would be a better fit, or what a court "finds" about the law's efficacy. The case law could not be clearer: "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 40, 383 Wis. 2d 1, 914 N.W.2d 678.

[1] As explained in the opening brief, even if the Court were to apply the five-factor approach, the retail-food laws are rational. (*See* Opening Br. 43–45.)

The cases Plaintiffs cite don't support their fact-finding approach, either. For example, *Blake* says nothing about examining "real-world application" of statutes and instead makes clear that on rational-basis review courts "must identify or, if necessary, construct a rationale supporting the legislature's determination," and that once a conceivable, legitimate basis for the law is identified, "the court must assume the legislature passed the act on that basis" and uphold the law. *Blake*, 370 Wis. 2d 1, ¶¶ 31–32; (*contra* Respondents' Br. 28.)

Porter also doesn't help them. Despite the court's reference to an expert report in that case, the court was clear that the conceivable rational bases were alone sufficient to sustain the challenged laws, and the court noted that it would be "unprecedented" to undertake fact-finding about the constitutionality of statutes. *Porter v. State*, 2018 WI 79, ¶¶ 40–41, 50 n.15, 382 Wis. 2d 697, 913 N.W.2d 842; (*contra* Respondents' Br. 49–50).

Another case they cite, *Minerva Dairy*, directly refutes their fact-finding approach. Plaintiffs quote a statement that the challenged law could be upheld because the state "presented at least some evidence" to support the legislative scheme. (*See* Respondents' Br. 51 (quoting *Minerva Dairy, Inc. v. Harsdorf*, 905 F.3d 1047, 1057 (7th Cir. 2018)). But Plaintiffs fail to include what the court said just before: "First and foremost, on rational-basis review '[the state] does not need to present actual evidence to support its proffered rationale for the law, which can be "based on rational speculation unsupported by evidence or empirical data."'" *Id.* (quoting *Monarch*, 861 F.3d at 683). Only after that did the court state that the laws would survive "even if the state were required to present actual evidence to support its rationale." *Id.*

And even if findings about "safety" mattered as a constitutional matter, the record amply supports upholding the laws, including as to foods like those Plaintiffs wish to sell. The circuit court completely disregarded evidence about possible contamination by allergens or substances like THC, among other risks. (*See, e.g.*, R. 67:14–15, 22–23; R. 69 ¶¶ 18–41; R. 129 ¶¶ 7–8, 16; R. 159 ¶¶ 2–8.) The court's failure to address these risks was clearly erroneous, and Plaintiffs offer no real response as to why risks like possible contamination from THC or allergens aren't sufficient to sustain the laws. (*See* Respondents' Br. 38.)

The circuit court was incorrect to base its decision on "findings" about the laws, and Plaintiffs' continued reliance on this theory only highlights that error.

IV. Neither Wisconsin nor federal law supports Plaintiffs' theory of "skeptical" review.

Like their fact-based approach, Plaintiffs' theory of "skeptical" review of statutes and rules is directly contrary to Wisconsin and federal precedent. Most recently, the court in *Mayo v. Wisconsin Injured Patients & Families Compensation Fund* expressly rejected an "intermediate level of review that it called 'rational basis with teeth, or meaningful rational basis.'" 383 Wis. 2d 1, ¶ 30 (quoting *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶¶ 59–96, 284 Wis. 2d 573, 701 N.W.2d 440). The *Mayo* court's repudiation of "rational basis with teeth" is dispositive here.

Plaintiffs also point to a handful of Wisconsin and out-of-state cases where the courts invalidated statutes or ordinances, claiming that this shows that on rational-basis review courts will not simply give laws a "rubber stamp," and that plaintiffs "can win" in Wisconsin and across the country. (*See* Respondents' Br. 47–52.) This is correct, but it doesn't show that Wisconsin courts apply a heightened form of scrutiny, or that Plaintiffs win here. It only shows that when

a statute invidiously discriminates against a textually identified class, courts will strike down the laws, even on rational basis review. (*See supra* Arg. § I.)

V. Even if this Court were to evaluate the Legislature's line-drawing, it is not unconstitutional to deny Plaintiffs an exemption.

The Court need not reach the exemptions because the relevant constitutional inquiry is whether the generally applicable laws—*i.e.*, those that impose licensing requirements on Plaintiffs and everyone else—are rational. (*See* Opening Br. 42–47.) But even if this Court would analyze the rationality of the exemptions, Plaintiffs cannot show that it was unconstitutional not to exempt them. (Respondents' Br. 40–43.)

For example, they claim it's irrational to grant an exemption to nonprofits but not to Plaintiffs because, like nonprofits, Plaintiffs also might "not have the financial resources to afford a commercial kitchen." (Respondents' Br. 40.) And they claim the exemptions for single-ingredient foods show that they, too, should get an exemption because one of their foods (coffee beans) also consists of "one ingredient." (Respondents' Br. 40.)

These line-drawing disputes fail to establish a constitutional violation. (*See* Opening Br. 29–31, 44.) Legislative decisions about the scope of regulation do "not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in inequality.'" *Blake*, 370 Wis. 2d 1, ¶ 32 n.16 (citation omitted); *see also Beach Commc'ns, Inc.*, 508 U.S. at 315 (rejecting similar "scope of coverage" challenge").

Even if this Court would analyze the Legislature's line-drawing, there are meaningful distinctions that support treating Plaintiffs differently from the exempted sellers and foods. Plaintiffs seek to sell foods for profit without any limit

on their income—they are thus materially different from nonprofits.[2] Nor are the foods Plaintiffs wish to sell like the few specific foods that are expressly exempted: fresh veggies and eggs, for example, are different from candies and energy bars. For equal-protection purposes, this lack of similarity is sufficient to justify different treatment (*see* Opening Br. 45–46 (and cases cited)), and is sufficient to defeat Plaintiffs' exemption-focused theory even on its terms.

VI. Plaintiffs cannot rescue the vague and overbroad injunction.

Plaintiffs offer multiple arguments in support of the circuit court's injunction. None is persuasive.

Plaintiffs first try to normalize the injunction: "it is not even remotely novel for a court to prevent a statute's application." (Respondents' Br. 53.) Certainly not, but that's not what the circuit court did here. The court enjoined *multiple* laws, as applied to an invented class found nowhere in the statutes, leaving DATCP and the public to divine the scope of the court's order. Plaintiffs don't point to any binding or even persuasive precedent supporting this novel injunction.

Plaintiffs next try to analogize, selectively quoting *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017), which discussed "extension of benefits to the excluded class."

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[2] Plaintiffs misstate the holding of *Wisconsin Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 625, 279 N.W.2d 213 (1979), which they claim means that the Legislature's ability to consider nonprofit status is limited to laws relating to taxation. (Respondents' Br. 33; *see also id.* at 46). *Moebius* was indeed about a challenge to a tax law, but the court applied the same principles of rational-basis review discussed elsewhere in this and the opening brief. *See Moebius*, 89 Wis. 2d at 625–27. Neither *Moebius Printing* nor any other case supports the "taxation v. everything else" distinction Plaintiffs try to draw.

(Respondents' Br. 53–54.) That case involved a challenge to clear statutory classifications, and Plaintiffs do not explain how the Court's reasoning could be extended to the invented class here. Nor do they mention that the Court there *declined* to extend benefits, holding that the "potential for 'disruption of the statutory scheme' is large." in *Morales-Santana*, 582 U.S. at 75 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)).

Plaintiffs also again lean on *Kivirist*, claiming that, in light of that decision, it would have been "unreasonable" not to grant Plaintiffs an injunction here. (*See* Respondents' Br. 52–53.) But *Kivirist* is neither binding nor persuasive (*see* Opening Br. 47–51), and cannot justify the circuit court's judgment or its new injunction in this case.

Plaintiffs next accuse DATCP of "feigning confusion" about the injunction's multiple undefined terms. (Respondents' Br. 54.) But DATCP's position has been clear from the outset, when it filed a motion to dismiss highlighting the confusion that would flow from Plaintiffs' sought-after relief. (*See* R. 20:22–24; 28:20–21.)

Plaintiffs then seek to deflect, suggesting that if the injunction is vague, DATCP bears the burden to correct it by seeking clarification. (Respondents' Br. 55.) The one unsigned order they cite on this point says nothing to that effect, nor are Defendants aware of any such requirement in Wisconsin law.

Finally, Plaintiffs simply mistake what this case is about. They claim the circuit court correctly enjoined Wis. Stat. § 97.29(2)(a) because that statute includes a provision about *canning* that Plaintiffs didn't like. (Respondents' Br. 55–56.) This case has never been about canning or "food processing plants," which is what Wis. Stat. § 97.29 covers. Other than noting their dislike of the sales limit in that statute, Plaintiffs don't even try to explain why the statute is

relevant here. Thus, even if the Court would reject every other of DATCP's arguments, the injunction of the canning statute should be vacated.

CONCLUSION

This Court should reverse the decision below in its entirety. In the alternative, the Court should vacate the injunction.

Dated this 18th day of September 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,953 words.

Dated this 18th day of September 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.

Dated this 18th day of September 2023.

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