FILED
12-19-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT

No. 2023-AP-367

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

Plaintiffs–Respondents-Petitioners,

v.

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

Defendants–Appellants-Respondents.

Petition for Review of the Decision of the Court of Appeals,
District I, Filed on November 19, 2024,
Court of Appeals No. 2023-AP-367

PETITION FOR REVIEW

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

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

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

*Admitted *Pro Hac Vice*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

PETITION 10

STATEMENT OF ISSUES PRESENTED FOR REVIEW 10

STATEMENT OF CRITERIA SUPPORTING REVIEW............ 11

STATEMENT OF THE CASE 15

I. WISCONSIN ARBITRARILY PREVENTS PETITIONERS FROM SELLING THEIR SAFE FOODS WHILE ALLOWING NUMEROUS OTHERS TO SELL THEIRS.. 16

A. Respondents ban the sales of undisputedly low-risk foods 16

B. The Ban arbitrarily exempts other food sellers..... 18

II. THIS CASE IS A SEQUEL 20

III. PROCEDURAL HISTORY 21

A. The circuit court granted Petitioners' requested relief based on Respondents' admissions 21

B. The circuit court also denied Respondents' motion for a stay pending appeal because of Respondents' own admissions................................ 27

C. The court of appeals entered a stay pending appeal—based on the government's unsupported allegations of harm 27

D. The court of appeals reversed the district court's judgment 28

ARGUMENT 30

I. THIS CASE PRESENTS CRUCIAL QUESTIONS OF STATE CONSTITUTIONAL LAW THAT HAVE BEEN RECEIVING INCREASED ATTENTION ACROSS THE NATION........ 30

II. EACH OF THE SPECIFIC ISSUES PRESENTED HERE WARRANT THIS COURT'S REVIEW 33

CONCLUSION........ 41

CERTIFICATION OF FORM AND LENGTH 42

CERTIFICATE OF EFILE/SERVICE 43

TABLE OF AUTHORITIES

Case **Page(s)**

Assoc. Grocers, Inc. v. State,
787 P.2d 22 (Wash. 1990) 37

Blake v. Jossart,
2016 WI 57, 370 Wis. 2d 1 38

Burrows v. Bd. of Assessors,
473 N.E.2d 748 (N.Y. 1984) 37

Christoph v. City of Chilton,
205 Wis. 418, 237 N.W. 134 (1931) 37

City of Duluth v. Sarette,
283 N.W. 2d 533 (Minn. 1979) 37

City of Euclid v. Fitzthum,
357 N.E. 2d 297 (Ohio Ct. App. 1976)...................................... 40

Coffee-Rich, Inc. v. Wis. Dep't of Agric.,
70 Wis. 2d 265, 234 N.W.2d 270 (1973) 33

Condemarin v. Univ. Hosp.,
775 P.2d 348 (Utah 1989) 40

D.P. v. G.J.P.,
146 A.3d 204 (Pa. 2016) 40

Evitts v. Lucey,
469 U.S. 387 (1985) 40

Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund,
2005 WI 125, 284 Wis. 2d 573 .... 13, 35

Hooper v. Bernalillo Cnty. Assessor,
472 U.S. 612 (1985) 37

In re Adoption of M.M.C.,
2024 WI 18, 411 Wis. 2d 389 34

Katzev v. Los Angeles County,
341 P.2d 310 (Cal. 1959) 37

Kinsley v. Ace Speedway Racing, Ltd.,
904 S.E.2d 720 (N.C. 2024) 14, 31

Ladd v. Real Estate Comm'n,
230 A.3d 1096 (Pa. 2020) 14, 32

Lambert v. Wentworth,
423 A.2d 527 (Me. 1980) 37

Mary C. Wheeler Sch., Inc. v. Bd. of Assessors of Seekonk,
331 N.E. 2d 888 (Mass. 1975) 37

Mayo v. Wis. Injured Patients & Fams. Comp. Fund.,
2018 WI 78, 383 Wis. 2d 1 ....*passim*

Maxwell v. Reed,
7 Wis. 493 (1859) 34

Mo. Nat'l Assoc. v. Mo. Dep't of Lab. & Indus. Rel.,
623 S.W. 3d 585 (Mo. 2021) 37

N'Da v. Hybl,
Neb. Supreme Ct. Case No. S-23-000945
(pending) (argued Dec. 3, 2024) 14, 31

Nankin v. Vill. of Shorewood,
2001 WI 92, 245 Wis. 2d 86 37

Osterndorf v. Turner,
426 So. 2d 539 (Fla. 1982) 37

Pabst v. Comm'r of Taxes,
388 A.2d 1181 (Vt. 1978) 37

Pack v. City of Cleveland,
448 N.E. 2d 434 (Ohio 1982) 37

Patel v. Tex. Dep't of Licensing & Regulation,
469 S.W.3d 69 (Tex. 2015) 14, 32

Peppies Courtesy Cab Co. v. City of Kenosha,
165 Wis. 2d 397, 475 N.W.2d 156 (1991) 10, 33, 35

Porter v. State,
2018 WI 79, 382 Wis. 2d 697 .... 14, 31, 32, 35

Raffensperger v. Jackson,
888 S.E.2d 483 (Ga. 2023) 14, 31, 32

State v. Robinson,
873 So. 2d 1205 (Fla. 2004) 40

State v. Schmidt,
323 P.3d 647 (Alaska 2014) 37

State ex rel. Grand Bazaar Liquors, Inc. v. Milwaukee,
105 Wis. 2d 203 (1982) 33, 35, 37, 40

State ex rel. McCulloch v. Ashby,
387 P.2d 588 (N.M. 1963) 37

State ex rel. Week v. Wis. State Bd. of Exam'rs,
252 Wis. 32, 30 N.W.2d 187 (1947) 34

State ex rel. Zimmer v. Kreutzberg,
114 Wis. 530, 90 N.W. 1098 (1902) 34

State ex rel. Winkler v. Benzenberg,
101 Wis. 172, 76 N.W. 345 (1898) 34

Taylor v. State,
35 Wis. 298 (1874) 34

State v. Tompkins,
144 Wis. 2d 116, 423 N.W. 2d 823 34

State v. Topolski,
303 A.3d 338 (Del. 2023) 40

White v. Assoc. Indus. of Alabama, Inc.,
373 So. 2d 616 (Ala. 1979) 40

Statutes

Wis. Stat. § 97.28 18

Wis. Stat. § 97.29(2)(b)(2) 18

Wis. Stat. § 97.30(2)(a) 15

Wis. Stat. § 97.30(bm) 16

Wis. Stat. § 97.30(2)(b)(1)(b) 18

Wis. Stat. § 97.30(2)(b)(1)(c) 19

Wis. Stat. § 97.30(2)(b)(1)(d) 18

Wis. Stat. § 97.42(11) 18

Wis. Stat. § 97.72 17

Wis. Stat. § 808.10 10

Wis. Stat. § 809.62 10

Wis. Stat. § 809.62(1r) 10

Regulations

Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B) 20, 29

Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B) 15, 17

Wis. Admin. Code ATCP ch. 75 App. 4-3 15

Wis. Admin. Code ATCP § 75.01(2) 15, 21

Wis. Admin. Code ATCP § 75.04 19

Wis. Admin. Code ATCP § 75.04(35)(a) 19

Wis. Admin. Code ATCP § 75.04(35)(d) 19

Wis. Admin. Code ATCP § 75.063(5) 18

Wis. Admin. Code ATCP § 75.063(6) 19, 29

Other Authorities

Appellants' Br., *N'Da v. Hybl*, No. A-23-0945
(Neb. Ct. App. filed Apr. 12, 2024) 31

Jennifer McDonald, Institute for Justice, *Flour Power*
(Dec. 2017), https://ij.org/report/cottage-foods-survey/ 12

Kivirist v. DATCP, Case No. 16-CV-06
(Wis. Cir. Ct. Lafayette Cnty.)
(Order, Feb. 26, 2018) 18–19, 20, 24, 26

N.J. Dep't of Health,
Cottage Foods – Approved Food Products, https://www.nj.gov/health/cottagefood/food-products/approved/ 11

PETITION

Plaintiffs-Petitioners Wisconsin Cottage Food Association (WCFA), Mark Radl, Stacy Beduhn, Kriss Marion, Lisa Kivirist, Dela Ends, and Paula Radl petition this Court, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the order of the Wisconsin Court of Appeals, District I, issued November 19, 2024, which reversed the district court's grant of summary judgment in *Wisconsin Cottage Food Association, et al. v. Wisconsin Department of Agriculture, Trade and Consumer Protection, et al.*, Appeal No. 2023-AP-367. As explained below, this case meets the criteria for review set forth in Wis. Stat. § 809.62(1r).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1. Are *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (1991); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209–11, 313 N.W.2d 805 (1982); and the rest of this Court's related, over-century-long line of precedent protecting the right to pursue one's chosen calling still good law?

The circuit court answered yes; the court of appeals answered no.

Issue 2. Can an equal-protection challenge be based on the challenged law's exemptions?

The circuit court answered yes; the court of appeals answered no.

Issue 3. When a plaintiff asserts both equal-protection and due-process claims, does losing the equal-protection claim mean that the plaintiff automatically loses the due-process claim?

The circuit court did not reach the question (because it granted Petitioners' equal-protection claim); the court of appeals answered yes.

STATEMENT OF CRITERIA SUPPORTING REVIEW

This petition meets the criteria for review for a variety of reasons.

First, this case presents novel questions of immediate and widespread statewide impact involving thousands of Wisconsinites whose ability to support themselves and their families depends on this Court taking this case.

Wisconsin is one of only two states in the nation where Petitioners' sales of "cottage foods"—ubiquitous, categorically low-risk homemade foods like Rice Krispies treats and fudge—are illegal.[1] As a result, it is a misdemeanor for many Wisconsinites to sell even one piece of homemade fudge to their next-door neighbor without first constructing or renting a commercial kitchen. This is despite the fact that these same homemade-food sales happen every day across most of the nation without incident.

---

[1] The other state is New Jersey, but even New Jersey allows some of these same cottage foods to be sold, just not all of them. *See* N.J. Dep't of Health, *Cottage Foods – Approved Food Products*, https://www.nj.gov/health/cottagefood/food-products/approved/. In other words, Wisconsin has the most restrictive cottage-food laws in the entire nation.

At the same time, the challenged law is riddled with exemptions. The government's own designated representative and expert testified that the disparate treatment between the exempted and non-exempted categories is nonsensical and results from nothing more than illegitimate special-interest favoritism. Consequently, the exact same sales of homemade goods that Petitioners are banned from conducting are made every day in Wisconsin by the various groups who are exempted from the law.

To say this state constitutional challenge[2] has a statewide impact would be an understatement. Petitioners are thousands of ordinary Wisconsinites across the state—working moms[3] and dads, widowed grandmothers, entrepreneurial teens, recent immigrants—who wish to support themselves and their families by selling homemade, shelf-stable foods, including fudges, Rice Krispies treats, hard candies, dried spices, and roasted coffee beans. Yet they are banned from doing so simply because they are not politically powerful enough to obtain one of the challenged law's myriad exemptions.

Second, this case presents issues of grave importance beyond this particular case. The court of appeals held that, under the Wisconsin Constitution: (1) an over-century-long, consistent line of

---

[2] The court of appeals stated that Petitioners have invoked "the United States Constitution," as well as the Wisconsin Constitution. Op. ¶ 15. That is incorrect; Petitioners have invoked only the Wisconsin Constitution. (R. 3.)

[3] Most of Petitioner WCFA's members are women—which tracks surveys suggesting that 83% of homemade food sellers across the country are women. *See* Jennifer McDonald, Institute for Justice, *Flour Power* (Dec. 2017), https://ij.org/report/cottage-foods-survey/.

this Court's precedent protecting Wisconsinites' right to pursue their chosen calling is no longer good law; (2) an equal-protection claim cannot be based on exemptions to the law; and (3) plaintiffs who lose on their equal-protection claim automatically lose on their due-process claim. Consequently, if the decision below stands, occupational freedom claimants will no longer be able to rely on a long line of this Court's precedent, government officials in Wisconsin (and only in Wisconsin) will be able to evade equal protection by describing discrimination as an "exemption," and claimants in Wisconsin (and only in Wisconsin) will be forced to choose between pressing an equal-protection claim or a due-process claim, lest a negative ruling on one bar the court from reaching the other. These are extremely important issues that threaten constitutional protections for all Wisconsinites.

Third, this case provides an opportunity for this Court to develop, clarify, and harmonize the law in light of its decision in *Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 2018 WI 78, 383 Wis. 2d 1 (overruling *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573). Thirteen years before *Mayo*, this Court struck down a statutory cap on noneconomic medical malpractice judgments. *Ferdon*, 2005 WI 125. In *Mayo*, this Court upheld a similar statutory cap—and overruled *Ferdon*, which had failed to consider facts that, in the *Mayo* Court's view, made the cap rationally related to a legitimate objective. *Mayo*, 2018 WI 78, ¶ 31. While doing so, this Court criticized *Ferdon* for creating a heightened

version of rational-basis scrutiny without a basis in the law. *Id.* ¶ 32.

Mayo did not purport to overrule this Court's cases holding that Article I, Section 1 of the Wisconsin Constitution protects the right to pursue one's chosen calling. In fact, *Mayo* never even mentioned them. Moreover, on that same day, this Court issued its opinion in *Porter*, a case involving "economic liberty" (which is another name for the right to pursue one's chosen calling) in which Justices Rebecca Grassl Bradley and Daniel Kelly pointed out that the claimants there had not made the type of argument that Petitioners are asserting here, so the Court was "leav[ing] that analysis for another case." *Porter v. State*, 2018 WI 79, 382 Wis. 2d 697, ¶ 75 (Grassl Bradley and Kelly, JJ., dissenting).

Nevertheless, the court of appeals here held that *Mayo* silently overruled all of this Court's occupational liberty precedent and now requires courts to rubberstamp occupational restrictions, even when the government itself admits that the restriction is nonsensical. As a result, this case is now the perfect vehicle to conduct the analysis that Justices Bradley and Kelly mentioned. It also arrives at the perfect time, as state high courts around the nation are analyzing similarly worded provisions in their own state constitutions. *See Kinsley v. Ace Speedway Racing, Ltd.*, 904 S.E.2d 720, 726–29 (N.C. 2024)*; Raffensperger v. Jackson*, 888 S.E.2d 483, 493 (Ga. 2023); *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1102 (Pa. 2020); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). *See also N'Da v. Hybl*, No. S-23-000945 (Neb. argued Dec. 3, 2024).

This Court should grant review to decide whether the Wisconsin Constitution's protection for occupational liberty remains good law after *Mayo* and to clarify the standard moving forward. Regardless of what this Court ultimately decides, the question of whether a line of this Court's precedent spanning over a century is no longer good law is one that should be expressly decided by the state's highest court.

STATEMENT OF THE CASE

The underlying case is a challenge to one application of Wisconsin's food-licensing requirements, which command that—unless exempted—food for sale must be produced within a commercial kitchen instead of a home kitchen.[4] Specifically, Petitioners challenged Wisconsin's unusual ban (the "Ban") on selling homemade, "not potentially hazardous" (*i.e.*, shelf-stable) foods. It is undisputed that the Ban's stated purpose is "protecting public health and safety." Wis. Admin. Code ATCP § 75.01(2). Yet Respondents themselves, as well as their own expert, expressly admitted that the Ban "doesn't make any sense" as a matter of public health and safety. This is because the banned foods are exceedingly low risk and are as safe or safer than every other exempted food (and the list of exemptions is ridiculously long), as

---

[4] Wisconsinites are required to obtain a retail-food-establishment license before they may conduct any direct sale of food they produce (unless they are covered by an exemption). Wis. Stat. § 97.30(2)(a). The licensing requirement bans homemade food sales by requiring that the food be prepared in an off-site, commercial kitchen instead of a home kitchen. *See* Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B); Wis. Admin. Code ATCP ch. 75 App. 4-3.

well as being as safe or safer than every other food item being sold anywhere.

This admission-filled factual record is why the circuit court found that the Ban violated equal protection. Yet, the court of appeals reversed the circuit court's judgment. In doing so, the court of appeals held that: (i) this Court's occupational liberty precedent on which Petitioners relied is no longer good law; (ii) Wisconsin's guarantee of equal protection does not apply when the disparate treatment results from exemptions; and (iii) courts must never evaluate a challenger's due-process claim if the court has denied the challenger's equal-protection claim.

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

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

Foods that are "not potentially hazardous" are extremely safe. *See* Wis. Stat. § 97.30(bm) (defining "potentially hazardous food"). Indeed, they are the safest possible foods. (R. 83:47.) These foods are also known as "shelf stable" because they do not need to be refrigerated; they "can be stored at ambient temperature without posing any microbiological safety issues." (R. 89:57; *see also* R. 84:15.) Unlike potentially hazardous foods, a piece of fudge can be left out on the counter for weeks; it "might taste a little stale, but in no way does that jeopardize the safety of that product." (R. 89:57.) Thus, Respondents' *own designated representative* testified that these foods "are generally considered to be safe" and are the safest category of food. (R. 84:27.) Moreover, as

Respondents' own expert further testified, if two foods are "considered non-potentially hazardous, they would be equally safe." (R. 84:55–56.)

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

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

That burden is massive, arbitrary, and counterproductive to food safety. Buying or building a commercial-grade kitchen can cost tens of thousands of dollars, and renting also tends to be cost prohibitive. (*See* R. 75 ¶ 7.) Moreover, many rural Wisconsinites, including some Petitioners, do not live near any available commercial-grade kitchens. (*See, e.g.*, R. 74 ¶ 14.) Meanwhile, a

commercial-grade kitchen—often shared with other producers and subject to large amounts of moisture—likely *increases* food-safety risks under these circumstances. (R. 89:84–85.) In other words, the homemade versions of these foods are actually *safer* than the commercially produced ones. (*See id.*). Thus, due to the Ban, thousands of Wisconsinites are prevented from supporting themselves and their families by selling ubiquitous, safe, homemade foods—for no coherent reason.

B. The Ban arbitrarily exempts other food sellers.

While preventing Petitioners from selling their safe homemade foods, Respondents allow countless others (under 17 different exemptions) to sell homemade foods that are undisputedly equally or less safe. Indeed, Respondents expressly admitted that Petitioners' foods are as safe or safer than all the exempted foods, (*see* R. 83:51; *see also id.* at 22–23, 45–47), and that Petitioners' foods are as safe or safer than every food item sold in Wisconsin today by anyone, (R. 83:47).

Some sellers are exempt based on the foods they sell. Wisconsinites producing and selling high-acid home-canned foods, cider, eggs (from up to 150 hens at a time), raw poultry (up to 1,000 birds per year), unprocessed fruits and vegetables, not-potentially hazardous home-baked goods, honey, maple syrup, sorghum syrup, and popcorn may sell their foods directly to consumers—without needing to obtain any kind of license or commercial-grade kitchen. *See* Wis. Stat. § 97.28 (eggs); *id.* § 97.29(2)(b)(2) (canned goods); *id.* § 97.30(2)(b)(1)(b) (honey, cider, maple syrup, and fresh fruits and vegetables); *id.* § 97.30(2)(b)(1)(d) (popcorn); *id.* § 97.42(11) (raw poultry); Wis. Admin. Code ATCP § 75.063(5) (sorghum syrup);

Kivirist v. DATCP, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.) (Order, Feb. 26, 2018) (not-potentially hazardous home-baked goods). It is undisputed that none of these foods is safer than Petitioners' and, to the contrary, many of them present risks not found in Petitioners' foods. (*See* R. 83:51; *see also id.* at 22–23, 45–47.)

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

Perhaps most arbitrarily, the Ban exempts sales of *exactly*

the same homemade foods Petitioners wish to sell, with no limitation in quantity—if the proceeds are given away. Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B). Unsurprisingly, Respondents have admitted that these identical homemade foods are no safer than Petitioners'. (R. 85:118, 120.)

II. THIS CASE IS A SEQUEL.

This case is related to an earlier case that the government elected not to appeal. In 2016, home bakers challenged the Ban's application to shelf-stable *baked* goods (as opposed to the shelf-stable *non-baked* goods at issue in the present case). Based on the overwhelming factual record in that case showing that the Ban made no sense as anything other than illegitimate protectionism enacted at the request of powerful, self-serving trade associations, the circuit court sided with the bakers and issued an injunction. *Kivirist v. DATCP*, Case No. 16-CV-06 (Wis. Cir. Ct. Lafayette Cnty.) (Order, Feb. 26, 2018). The government did not appeal that ruling, which is not at issue here other than the resulting disparate treatment between the *Kivirist* shelf-stable baked goods (which are lawful to sell) and the shelf-stable non-baked homemade foods at issue here (which are unlawful to sell unless an exemption applies).

During the present case, Respondents admitted that there are no known incidents involving any *Kivirist* baked goods during the years since the *Kivirist* ruling. (R. 84:29, 116.) Respondents also admitted that the homemade foods at issue in this case are "equally safe" to the homemade foods covered by the *Kivirist* ruling. (R. 84:55–56.)

III. PROCEDURAL HISTORY

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

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

When deposed, Respondents' designated representative and expert admitted a number of key facts. And any events that predated their knowledge were testified to by their predecessors. The list of admitted facts includes that:

1. The Ban's purpose is public safety. (R. 84:116–17.) *See also* Wis. Admin. Code ATCP § 75.01(2).
2. The homemade food at issue in this case is as safe or safer than any other food item sold in Wisconsin today by anyone. (R. 83:47.)
3. The homemade food at issue in this case is classified by the government as "not potentially hazardous," which is the safest category of food. (R. 84:27.)
4. "Not potentially hazardous" food is classified as such because its moisture content level is so low as to be hostile to microbiological growth. In other words, even if you were to leave this food out on the counter, you

could still eat it. The food may eventually go "stale, but in no way does that jeopardize the safety of that product." (R. 89:57.)

5. The homemade food at issue in this case is "generally considered to be safe." (R. 84:27.)
6. All "not potentially hazardous" foods are equally safe. (R. 84:55–56.)
7. The Ban exempts many other sellers of homemade, "not potentially hazardous" foods. (R. 84:62.)
8. The Ban also exempts many sellers of homemade, less-safe foods. (*See, e.g.*, R. 84:61.)
9. Petitioners' foods are as safe or safer than all the exempted foods. (R. 84:112.)
10. None of the Ban's exemptions have caused any health or safety incidents. (*See* R. 83:32. *See also* R. 84:116.)
11. From the government's perspective, Petitioners' foods are identical to some of the exempted foods. (R. 84:59, 116.)
12. The precise thing that Petitioners seek to do here is already allowed in most other U.S. states. (R. 84:59, 116.)
13. Respondents are not aware of any problems being caused by these exact-same types of sales in the states where they are allowed. (R. 84:116.)
14. From the government's perspective, the distinctions drawn by the Ban between which homemade foods can and cannot be sold do not "make any sense." (R. 83:51.)

15. One of the distinctions drawn by the Ban is between Petitioners' homemade foods, which cannot be sold, and other types of homemade, statutorily exempted foods, which can be sold. (R. 84:62.)

16. For example, homemade popcorn is statutorily exempted from the Ban while home-roasted coffee beans are not, even though the processes for both often use the same or similar equipment. (R. 84:62.)

17. Petitioners' foods are as safe or safer than all of the homemade, statutorily exempted foods sold pursuant to this particular distinction. (R. 84:113.)

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

19. Another distinction drawn by the Ban is between Petitioners' sales of homemade foods and statutorily exempted sellers selling the exact same types of homemade foods that Petitioners would sell if allowed to do so. (R. 84:62–64.)

20. For example, 501(c) nonprofit groups may lawfully sell *any kind* of food, including the homemade foods that Petitioners wish to sell. (R. 84:62–64.)

21. Moreover, the Ban allows for unlimited sales of homemade foods that are *literally the same* as Plaintiffs', so long as the proceeds are being donated. (R. 85:118; R. 88:26; R. 95:122.)

22. There is no reason to suspect that Petitioners' foods present any more food-safety risk than foods sold by

statutorily exempted sellers. (R. 84:113.)

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

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

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

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

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

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

29. Because the Ban does not make any sense, *Respondents* proposed legislation in the Wisconsin State Assembly to reform the Ban to allow more sales of homemade, not potentially hazardous foods, and

Respondents' lobbyist referred to the bill as "ours." (R. 84:70–77. *See also* R. 98.)

30. Respondents submitted an official "[p]roposal for legislative action" in the Wisconsin State Assembly to allow more sales of homemade, not potentially hazardous foods. (R. 84:42–43.)

31. Respondents were required to list any health and safety concerns in Respondents' official "proposal for legislative action." (R. 84:45.)

32. Respondents' official "proposal for legislative action" did not list any health and safety concerns because there were none. (R. 84:45.)

33. Respondents' proposed legislative reform was opposed by powerful business associations seeking to insulate themselves from competition posed by home-based sellers. (R. 84:50. *See also* R. 85:120.)

34. The anticompetitive lobbying from these groups was the "only stumbling block" to passing the reform. (R. 85:56.)

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

36. The same powerful associations that opposed the reform are themselves exempted from the Ban, and they use the profits from these exempted sales to lobby in favor of maintaining the Ban—insofar as it applies to people like Petitioners. (R. 84:132. *See also* R.

85:120–21.)

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

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

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

40. DATCP's[5] officers are forced to continue enforcing the Ban despite realizing that the Ban "doesn't make any sense." (R. 83:51, 68.)

Based on this overwhelming record, the circuit court granted Petitioners' equal-protection claim—for three independent reasons. First, it ruled that the Ban's disparate treatment of statutorily exempted specified foods and Petitioners' foods violated equal protection. (R. 122:14, 20–21.) Second, it ruled that the Ban's disparate treatment between exempted nonprofit sellers and Petitioners also violated equal protection. (R. 122:14–15, 21–22.) Third, it ruled that the Ban's disparate treatment of shelf-stable baked goods (lawful pursuant to *Kivirist*) and Petitioners' shelf-stable non-baked foods violated equal protection. (R. 122:15, 22.)

---

[5] Wisconsin Department of Agriculture, Trade and Consumer Protection.

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

B. The circuit court also denied Respondents' motion for a stay pending appeal because of Respondents' own admissions.

Two months later, Respondents filed their notice of appeal and their motion asking the circuit court to stay its order pending appeal. (R. 124–29.) Ignoring their own factual admissions to the contrary, Respondents asserted that the circuit court's decision presented a substantial risk to public safety while the case is on appeal. (R. 126:15–20.)

The circuit court denied the government's motion. In so doing, the circuit court relied on the undisputed factual record, which "is devoid of any proof that any person has been physically harmed or sickened by the sale of foods that are subject to this lawsuit." (R. 165:18–19.)

C. The court of appeals entered a stay pending appeal—based on the government's unsupported allegations of harm.

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

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

these sales occur every day throughout most of the United States, there is no evidence that anyone has been "harmed by the sale of the foods that are the subject of this ruling." *Id.* Nonetheless, the court of appeals held that the government met its burden because it presented "allegations that the injunction posed a risk to public health." *Id.*

D. The court of appeals reversed the district court's judgment.

Eighteen months after granting the government's stay request, the court of appeals reversed the circuit court's judgment.

First, the court found that "the circuit court erred when it used the exemptions to the retail food establishment laws as part of the relevant class for comparison in the equal protection analysis." Op. ¶ 23. According to the court of appeals, the legislature may freely exempt classes of people from the law, and non-exempt Wisconsinites may not invoke equal protection to challenge the disparate treatment. Instead, courts "need look no further than the generally applicable law" being challenged, without considering the exemptions at all. *Id.* ¶ 25.

Second, the court of appeals found that, "even considering the exemptions to the retail food establishment laws," the disparate treatment in this case satisfies equal protection. Op. ¶ 27. That is because, in the court's view, the exempted food sellers are limited in quantity of food, or types of food, that they may sell. *Id.* ¶¶ 28, 30. The court did not explain how exempted food sellers are limited in quantity—indeed, none of the exemptions includes a

sales cap of any kind.[6] Nor did the court address the fact that, to the extent that exempted food sellers are limited to selling a certain "type" of food, those "types" of foods present *undisputedly greater* food-safety risks than Petitioners' foods. (R. 84:113.) Nor still did the court address the fact that one of the exemptions is *literally the same* class as Petitioners—homemade, shelf-stable foods, allowed to be sold at unlimited amounts—so long as the proceeds are supporting someone *other* than the seller's own family. Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B). (R. 85:118, 120.) Indeed, these facts (and more) are why—as the court of appeals acknowledged—the government's designated representative and expert "believe the[se] laws to be irrational and arbitrary and the experts agree that the foods that WCFA seeks to sell are generally safe." Op. ¶ 31. However, in the court of appeals' view, these facts do not matter because (according to the court of appeals) this Court's rulings on which Petitioners relied and which

---

[6] The court of appeals was perhaps referencing the exemption for 501(c) nonprofits, which allows them to sell *all kinds* of foods (including potentially hazardous ones), while theoretically limiting them to twelve days of unlicensed food sales annually. *See* Wis. Admin. Code ATCP § 75.063(6). However, the government does not actually enforce this annual limit. (R. 86:49.) In fact, enforcement would be a practical impossibility—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).) Indeed, as the record shows, some exempted 501(c) entities have sold more than $800,000 of foods annually—a far greater volume than any home chef could hope to achieve. (R. 88:43.)

protect the right to pursue one's chosen calling are no longer good law after *Mayo*. *Id.* ¶¶ 32–33.

Third, after rejecting Petitioners' equal-protection claim, the court stated that the circuit court should dismiss Petitioners' entire case—including the due process claim that the circuit court never reached. *Id.* ¶ 39. This is because, according to the court of appeals, a plaintiff who loses an equal-protection challenge automatically loses their due process challenge. *Id.*

ARGUMENT

All three issues presented merit this Court's review. This is especially true considering that the issues here include the same types of state constitutional issues with which other state courts of last resort have recently been grappling. Therefore, this section will begin with the national picture before turning to the three specific issues presented.

I. THIS CASE PRESENTS CRUCIAL QUESTIONS OF STATE CONSTITUTIONAL LAW THAT HAVE BEEN RECEIVING INCREASED ATTENTION ACROSS THE NATION.

The questions presented here are not unique to Wisconsin. High courts in other states have been addressing similar tension in their own precedent. On one hand, they have a long line of precedent explaining that their state constitution provides substantial protection for people's right to pursue ordinary occupations. On the other, those same states have other precedent that largely tracks the federal rational basis precedent.

This recent wave of cases addressing this tension is illustrated by two different cases from 2024. In one, a state

supreme court recently heard oral argument, while in the other, a different state supreme court already has issued its opinion.

The court that recently heard oral argument was the Nebraska Supreme Court. *See N'Da*. The case was a challenge to a law requiring a certificate of public convenience and necessity, which in that case was a barrier to economic competition between transportation providers. *See* Appellants' Br. at 12–22, *N'Da v. Hybl*, No. A-23-0945 (Neb. Ct. App. filed Apr. 12, 2024). The entire question before the court was whether occupational freedom challenges brought under the Nebraska Constitution receive higher scrutiny (the real-and-substantial test) instead of the rational basis test. *See id*. At the time of this brief, the Nebraska Supreme Court has yet to issue its ruling.

The North Carolina Supreme Court has already issued this type of opinion in 2024. *See Ace Speedway*, 904 S.E.2d at 726–29. The case included an equal protection challenge that the challenger's economic liberty was violated by facing regulatory enforcement from which other businesses were exempt. *Id*. at 728–29. Much like in Nebraska, the North Carolina challenger argued that their state constitution provided substantive protection for occupational freedom, and the supreme court agreed. *Id*. at 726–29. As a result, occupational freedom challenges brought under the North Carolina Constitution will now receive a fact-based inquiry that disregards hypotheticals. *Id.*

Only a year earlier, the Georgia Supreme Court reached a similar conclusion. *See Raffensperger v. Jackson*, 888 S.E.2d 483, 493 (Ga. 2023). Again, much like in Wisconsin and elsewhere,

Georgia had conflicting lines of precedent—one saying that all non-fundamental rights receive very deferential review, and another saying that the right to pursue one's chosen profession receives substantial protection under the state constitution. *Id.* at 490–97. The Georgia Supreme Court twice granted review to address this tension in a case involving occupational licensing requirements for lactation consultants. *Id.* at 486–87. Ultimately, the Court held that the Georgia Constitution does indeed provide substantive protection for the right to pursue one's chosen profession. *Id.* at 490–97. The occupational freedom test announced by the Georgia Supreme Court requires the government's *actual* purpose (not a hypothetical one) to be legitimate and then engages in a fact-based (again, not hypothetical) analysis of whether the law is reasonably necessary to achieve that purpose. *Id.*; *see also Ladd*, 230 A.3d at 1108–16 (holding that there is more protection for the right to pursue a chosen occupation under the Pennsylvania Constitution); *Patel*, 469 S.W.3d at 80–87 (similar holding under the Texas Constitution).

To be clear, this is not to say that this Court should resolve this tension in favor of higher protection for occupational freedom, as this is merely a petition for review. But what is important here is that Wisconsinites, no less than their fellow Americans in other states, deserve to have this crucial tension in their state's precedent resolved by the state's highest court—regardless of the direction ultimately chosen by this Court.

The same is equally true for the second and third issues presented by this petition. Both involve legal questions of state

constitutional law where the court of appeals' holding would cause Wisconsin to break from every other state's well-established precedent. And, of course, if this Court decides that Wisconsin should have a different rule for exemption-based equal protection challenges than everywhere else or a different approach to the relationship between equal-protection and due-process challenges than everywhere else, then that would be this Court's prerogative as the final word on the Wisconsin Constitution. But these important questions of state constitutional law should be answered by the state's highest court.

II. EACH OF THE SPECIFIC ISSUES PRESENTED HERE WARRANT THIS COURT'S REVIEW.

A. Issue 1. Are *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (1991); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209–11, 313 N.W.2d 805 (1982); and the rest of this Court's related, over-century-long line of precedent protecting the right to pursue one's chosen calling still good law?

Wisconsin's occupational liberty precedent has been on a collision course with its rational basis precedent ever since June 27, 2018—the day this Court issued its *Mayo* and *Porter* decisions. *See Mayo*, 2018 WI 78; *Porter*, 2018 WI 79.

For over a century, this Court held that under the Wisconsin Constitution, occupational freedom cases were different than "non-fundamental" rights cases. *See Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (1991); *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 210, 313 N.W.2d 805 (1982); *Coffee-Rich, Inc. v. Wis. Dep't of Agric.*,

70 Wis. 2d 265, 273, 234 N.W.2d 270 (1973); *State ex rel. Week v. Wis. State Bd. of Exam'rs*, 252 Wis. 32, 36, 30 N.W.2d 187 (1947); *State ex rel. Zimmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1102 (1902); *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172, 76 N.W. 345, 346–47 (1898); *Taylor v. State*, 35 Wis. 298 (1874); *Maxwell v. Reed*, 7 Wis. 582 (1859). Indeed, because the Wisconsin Constitution was intended to protect this occupational freedom, some of these opinions go so far as to expressly describe it as a "fundamental right[]." *See Taylor*, 35 Wis. at 301; *Maxwell*, 7 Wis. at 594.

This was consistent with the fact that "[e]ven a cursory review of Article I, Section 1 of our constitution and the Fourteenth Amendment indicates that the clauses have different meanings." *In re Adoption of M.M.C.*, 2024 WI 18, 411 Wis. 2d 389, ¶ 54 (Dallet, J., concurring). Indeed, Article I, Section 1 reflects Wisconsin's "long history of interpreting our constitution to provide greater protections for the individual liberties of Wisconsinites than those mandated by the federal Constitution." *Id.* ¶ 52. *Accord State v. Tompkins*, 144 Wis. 2d 116, 132–33, 423 N.W. 2d 823 (1988). Of course, this does not mean that the Wisconsin Constitution *always* provides greater protection for all types of claims. But this Court consistently explained that cases involving the right to pursue one's chosen occupation presented a situation where it did.

Because Article I, Section 1 of the Wisconsin Constitution was always intended to protect occupational liberty, Wisconsin courts were instructed to view anti-competitive restrictions either

with "some skepticism," *see Grand Bazaar*, 105 Wis. 2d at 209–11, or to apply the real-and-substantial test, *see Peppies Courtesy Cab*, 165 Wis. 2d at 400–01. Of course, even so much as treating a law with any skepticism is the opposite of the typical rational basis test, which directs no skepticism towards the government whatsoever.

In many respects, the confusion over whether this Court's occupational liberty precedent was its own separate line began with a case that had nothing to do with occupational liberty nor even mentioned any occupational liberty precedent—this Court's 2005 decision in *Ferdon*. *See Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573. There, in a case striking down a statutory cap on noneconomic medical malpractice damages, this Court applied a form of heightened scrutiny known as "rational basis with teeth." *Id.* ¶ 78. In *Mayo*, this Court would reverse *Ferdon*, uphold a statutory cap on medical malpractice damages, and remove "the teeth" that *Ferdon* had given to the rational basis test. 2018 WI 78, ¶ 32. And like *Ferdon*, *Mayo* neither had anything to do with occupational liberty nor mentioned this Court's occupational liberty precedent. But an occupational liberty case named *Porter* was significantly impacted by the fact that it was argued during the period when *Ferdon* was considered good law.

Porter involved a challenge to anti-combination laws brought by a cemetery and its owner. *See Porter v. State*, 2018 WI 79, 382 Wis. 2d 697. But the *Porter* challengers had largely based their argument on *Ferdon*, which this Court reversed on the same

decision day. *Id.* ¶ 33. As a result, the *Porter* challengers lost. *Id.* ¶ 50.

In their dissent, Justices Rebecca Grassl Bradley and Daniel Kelly pointed out that the *Porter* challengers had not made the type of argument that Petitioners are asserting here—that economic liberty was a different type of claim governed by its own, different analysis. *Id.* ¶ 75 (Grassl Bradley and Kelly, JJ., dissenting).[7] Therefore, the Court was "leav[ing] that analysis for another case." *Id.* This is that case.

This case also presents the ideal vehicle for this Court to do so. Here, the court of appeals held that *Mayo* silently overruled all of this Court's occupational liberty precedent. Op. ¶ 33. As a result, this case has perfectly teed up the type of inquiry that Justices Bradley and Kelly invited, regardless of the eventual result.

For these reasons, this Court should grant review to resolve the tension between this Court's occupational liberty precedent and this Court's rational basis precedent. No matter which way this Court ultimately decides to resolve this tension, the question of whether to judicially eliminate over a century of precedent providing stronger protections for occupational liberty is a question that should be answered by the state's highest court.

---

[7] Indeed, Justices Grassl Bradley and Kelly explain that the Wisconsin Constitution's protection for occupational liberty is so strong that one could plausibly argue that strict scrutiny should apply. *Id.* ¶¶ 74–75. However, the record here is so overwhelming that even applying any type of "skeptical" test would likely result in victory for the Petitioners. Therefore, this Court would not need to go further unless it wished to do so.

B. Issue 2: Can an equal-protection challenge be based on the challenged law's exemptions?

The same is true of the court of appeals' holding that equal protection challenges cannot be based on a law's exemptions. This Court, similarly to the U.S. Supreme Court and likely ever other state high court in the nation, has long held that grants of exemptions may result in disparities that violate unexempted persons' right to equal protection. *See Grand Bazaar*, 105 Wis. 2d at 217 (holding that "the exempted class . . . is a denial of equal protection").[8] Indeed, "if any classification made by a statute grants to one class rights or privileges which are denied to another class under the same or substantially similar conditions, it offends against the principle of equal protection of the law." *Christoph v. City of Chilton*, 205 Wis. 418, 237 N.W. 134, 135 (1931). This Court has also explained that equal protection applies to "disparate treatment" in substance, regardless of its form. *Nankin v. Vill. of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, ¶ 6.

---

[8] For U.S. Supreme Court and other state supreme court holdings, *see, e.g.*, *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indus. Rels.*, 623 S.W.3d 585 (Mo. 2021); *State v. Schmidt*, 323 P.3d 647 (Alaska 2014); *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash. 1990); *Burrows v. Bd. of Assessors*, 473 N.E.2d 748 (N.Y. 1984); *Osterndorf v. Turner*, 426 So. 2d 539 (Fla. 1982); *Pack v. City of Cleveland*, 438 N.E.2d 434 (Ohio 1982); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980); *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn. 1979); *Pabst v. Comm'r of Taxes*, 388 A.2d 1181 (Vt. 1978); *Mary C. Wheeler Sch., Inc. v. Bd. of Assessors*, 331 N.E.2d 888 (Mass. 1975); *State ex rel. McCulloch v. Ashby*, 387 P.2d 588 (N.M. 1963); *Katzev v. Los Angeles County*, 341 P.2d 310 (Cal. 1959).

Nevertheless, the court of appeals announced that "exemptions created by the legislature . . . [are not] part of the relevant class for comparison in the equal protection analysis." Op. ¶ 23.[9] This new approach threatens to completely undo the Wisconsin Constitution's guarantee of equal protection.

Should the court of appeals' astonishing new approach be allowed to stand, the result will be as predictable as it is disturbing. Merely by labeling disparate treatment as "exemptions," the State could play favorites by exempting the powerful; it could leave disfavored or politically disconnected persons to languish under oppressive standards that, if applied evenly, would not withstand political pressure; and it would have free rein to discriminate as it wished, in however absurd or unjust a manner. All that would be required is the right label.

Of course, this Court is the last word on the Wisconsin Constitution, so it is ultimately up to this Court whether to adopt the court of appeals' approach. But that is precisely the point. If Wisconsin is going to break from every other state in the union (as well as the U.S. Supreme Court), then this Court should be the one to say so.

[9] The court of appeals appears to have based its decision on *Blake v. Jossart*, 2016 WI 57, 370 Wis. 2d 1. However, *Blake* said no such thing. *See id.* ¶ 41.

C. Issue 3: When a plaintiff asserts both equal-protection and due-process claims, does losing the equal-protection claim mean that the plaintiff automatically loses the due-process claim?

Finally, the court of appeals' holding that equal-protection and due-process claims are completely redundant to each other similarly warrants this Court's review.

In addition to their equal-protection claim discussed above, Petitioners brought a due-process claim that was never reached by the circuit court because its equal-protection ruling awarded Petitioners their full relief sought. *See* Op. ¶ 15 n.8. While Petitioners' equal-protection claim focuses on the arbitrary distinctions between Petitioners and the exempted classes, Petitioners' due-process claim, by contrast, focuses on the arbitrary and expensive burden of requiring them to produce their foods away from home, in a commercial kitchen that, if anything, increases food-safety risks. (R. 3:23–29.) In other words, Petitioners would have brought their due-process claim even if the challenged law had no exemptions.

Yet, the court of appeals held that Petitioners' due-process claim should never be heard. Observing *Mayo*'s language that these claims are relevant to each other, the court of appeals concluded that courts "need only address one in order to resolve the other." Op. ¶ 15 n.8. Therefore, after rejecting Petitioners' equal-protection claim, the court of appeals held that the circuit court should "enter judgment in favor of DATCP and dismiss[] WCFA's complaint" without addressing Petitioners' due-process claim at all. *Id.* ¶ 39.

Once again, the court of appeals' decision would cause Wisconsin to break from both the U.S. Supreme Court's precedent and that of every other state. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 405 (1985); *State v. Topolski*, 303 A.3d 338, 356 (Del. 2023); *D.P. v. G.J.P.*, 146 A.3d 204, 210 (Pa. 2016); *State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004); *Condemarin v. Univ. Hosp.*, 775 P.2d 348, 356 (Utah 1989); *White v. Associated Indus. of Ala., Inc.*, 373 So. 2d 616, 617 (Ala. 1979); *City of Euclid v. Fitzthum*, 357 N.E. 2d 402, 406 (Ohio Ct. App. 1976).

It also ignores this Court's precedent explaining that these claims vindicate different concerns. *See, e.g.*, *Grand Bazaar*, 105 Wis. 2d at 214 ("[E]ven if we were to find sec. 90-25.1(2) constitutional [under a due-process challenge], sec. 90-25.1(3) is violative of the equal protection clause."). That is evident in this very case: While the court of appeals held that the disparities between Petitioners and the exempted classes are rational, it never explained why it is legitimate to ban people from preparing this undisputedly low-risk food at home in the first place. Unless this Court grants review, it appears no court will ever address that question.

The ramifications of the intermediate court's ruling extend far beyond this particular case, as it would functionally require claimants in all contexts to choose between bringing either a due-process or an equal-protection claim. If equal-protection claims and due-process claims are now entirely coextensive under the Wisconsin Constitution, then this Court should be the one to say so and should therefore grant review. And if these two types of

claims have not become coextensive, then this Court should grant review to vindicate the Wisconsin Constitution's guarantees of equal protection *and* due process. Either way, this question of whether Wisconsin should break from every other state is one that is best answered by this state's highest court.

CONCLUSION

For the reasons presented above, Petitioners respectfully request that the Court grant their petition and undertake a review of the court of appeals' order reversing the circuit court's judgment.

Dated this 19th day of December 2024.

Respectfully submitted,

Electronically signed by:

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

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

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

*Admitted *Pro Hac Vice*

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this petition, excluding the appendix, conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (8g) as to form, pagination, and certification for a petition produced with a proportional serif font. The length of this petition complies with Wis. Stat. § 809.62(4)(b) and is 7,778 words.

Dated this 19th day of December 2024.

Electronically signed by:

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

/s/ Justin Pearson
Justin Pearson
(FL Bar No. 597791)*
INSTITUTE FOR JUSTICE

*Admitted *Pro Hac Vice*

CERTIFICATE OF EFILE/SERVICE

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

Dated this 19th day of December 2024.

Electronically signed by:

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

/s/ Justin Pearson
Justin Pearson
(FL Bar No. 597791)*
INSTITUTE FOR JUSTICE

*Admitted *Pro Hac Vice*