

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

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WISCONSIN MANUFACTURERS AND COMMERCE, et al.  
Plaintiffs,

Case No. 20-CV-1389

v.

TONY EVERS, et al.,  
Defendants,

&

MILWAUKEE JOURNAL SENTINEL,  
Intervenor-Defendant.

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**AMICUS CURIAE BRIEF BY NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS, WISCONSIN RESTAURANT ASSOCIATION, AND RESTAURANT  
LAW CENTER**

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## **QUESTION PRESENTED**

May a Governor ignore privacy laws and release the confidential health information of an employer's employees under the guise of that information being subject to open records requests?

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington D.C. and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

The Wisconsin Restaurant Association (WRA) is one of the largest trade associations in the state with over 7,000 member locations throughout Wisconsin. The WRA's mission is dedicated to the success of the Foodservice and Hospitality Industry. The Association advocates on behalf of the restaurant industry, including filing amicus briefs such as this one, to provide a voice for the Wisconsin restaurant industry in the courts to highlight the real world implications of important cases on our industry. WRA membership includes a wide range of foodservice businesses representing virtually every size and style of restaurant in the state.

The Restaurant Law Center (Law Center) is a 501(c)(6) legal entity launched in 2015 by industry leaders with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and contributing to a robust American economy. The restaurant and foodservice industry employs approximately 10 percent of the U.S. workforce. Restaurants are job creators and the nation's second-largest private sector employer. Thus, the Law

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<sup>1</sup> Counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Center’s goal is to protect and advance the restaurant industry and to ensure that the views of America’s restaurants are taken in consideration by giving them a stronger voice in the regulatory process and in the courtroom, including through the filing of amicus briefs in cases such as this.

### SUMMARY OF ARGUMENT

After flip-flopping on his authority to release the names of businesses that have had employees test positive for COVID-19 and the number of employees who have tested positive, Governor Evers now plans to publish this information in response to public records requests.<sup>2</sup> Wisconsin Stat. § 813.02(1)(a) provides that state courts may grant a temporary injunction when “the commission or continuance of [some act] which during the litigation would injure the party[.]” Wis. Stat. § 813.02(1)(a). To obtain a temporary injunction, the movant need only show “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (quoting *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154). “[A]t the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.” *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (Wis. 1977) (footnote omitted).

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<sup>2</sup> In July, the Administration backtracked on prior plans to publicly list names of businesses with multiple positive COVID-19 cases. On September 9<sup>th</sup>, Governor Evers confirmed this backtracking due to some “privacy things going on there” and “we need to keep [this information] in a way that . . . protects the businesses.” Mitchell Schmidt, *WMC Files Lawsuit to Block State Plans to Reveal Businesses with Multiple COVID-19 Cases*, THE JOURNAL TIMES (Oct. 2, 2020), [https://journaltimes.com/news/state-and-regional/govt-and-politics/wmc-files-lawsuit-to-block-state-plans-to-reveal-businesses-with-multiple-covid-19-cases/article\\_f1f35fab-b5b1-5661-9eed-62aa980f320e.html](https://journaltimes.com/news/state-and-regional/govt-and-politics/wmc-files-lawsuit-to-block-state-plans-to-reveal-businesses-with-multiple-covid-19-cases/article_f1f35fab-b5b1-5661-9eed-62aa980f320e.html).

Amici focus this brief on the “irreparable harm” and necessity to “preserve the status quo,” not only for Plaintiffs and their members, but also restaurants and small businesses across Wisconsin. Recent surveys of restaurants and small businesses, plus consumer activity analyses, demonstrate that COVID-19 is taking a monumental toll on the financial health of businesses and their ability to survive these disastrous times. While Wisconsin is experiencing a “surge” in COVID-19 cases,<sup>3</sup> Governor Evers’s decision to publish the names of businesses with COVID-19 cases from as far back as months ago will do nothing to stop the current spread of the virus. Instead, it will simply instill fear in consumers and cause them to second-guess or forego patronizing these establishments linked with COVID-19. As empirical survey evidence demonstrates, this further loss in revenue will detrimentally and permanently harm the Wisconsin business community.

Due to this lost revenue, combined with stigma and reputational damage, the harm from not issuing a temporary injunction is immense and irreversible. Businesses will close, hundreds or thousands would lose their jobs, and citizens will have difficulty providing food and shelter for their families. Therefore, the NFIB SBLC, the WRA, and the Law Center urge this court to issue an immediate temporary injunction to “preserve the status quo.”

## ARGUMENT

### **I. Allowing Wisconsin’s Governor to bypass privacy laws will detrimentally and permanently impact restaurants and small businesses throughout the State of Wisconsin.**

To reiterate, the issuance of a temporary injunction requires a showing of “irreparable harm” and a necessity to “preserve the status quo.” *Service Employees International Union, Local 1*, 2020 WI 67, ¶93 (quoted source omitted); *see also Winter v. Natural Resources Defense*

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<sup>3</sup> *Wisconsin Reports 18 More COVID-19 Deaths as Cases Surge*, WISCONSIN STATE JOURNAL, (Oct. 11, 2020), [https://madison.com/wsj/news/local/health-med-fit/wisconsin-reports-18-more-covid-19-deaths-as-cases-surge/article\\_f1c21192-19c6-5eb1-9ec9-38b99821b520.html](https://madison.com/wsj/news/local/health-med-fit/wisconsin-reports-18-more-covid-19-deaths-as-cases-surge/article_f1c21192-19c6-5eb1-9ec9-38b99821b520.html).



*Council, Inc.*, 555 U.S. 7, 21 (2008) (affirming a likelihood of irreparable harm for a preliminary injunction). A showing of “irreparable harm” simply means that a permanent injunction issued post-merits proceedings, cannot remedy the actions taken during litigation. *See Werner*, 80 Wis. 2d at 520. This showing is easily satisfied here due to the immediate detrimental impact the Governor’s proposed action will have on the business community.

The loss of business revenue, or business operation altogether, can demonstrate an “irreparable harm.” “Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.” *American Mut. Liability Ins. Co. v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152 (Wis. 1973) (cited sources omitted). Indeed, the United States Court of Appeals for the Second Circuit has noted that “[m]ajor disruption of a business can be as harmful as termination, and a ‘threat to the continued existence of a business can constitute irreparable injury.’” *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (quoting *John B. Hull, Inc., v. Waterbury Petroleum Prods. Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978)).

In *John B. Hull, Inc.*, the Second Circuit reviewed the district court’s grant of a preliminary injunction in a price discrimination antitrust suit. 588 F.2d at 26. The district court found Defendants’ pricing practices put one of the Plaintiffs in “danger of losing many customers” and “if it lost those customers, it would probably be forced out of the heating oil business.” *Id.* at 28. Relying on this threat of business existence, the Second Court affirmed and held this loss of customers and threat to the business’s existence constituted an irreparable injury. *Id.* at 29. Similarly, the Seventh Circuit reversed the denial of a preliminary injunction in a case where law

enforcement actions negatively affected a business's financial health. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 230, 237-38 (7th Cir. 2015).

In this case, the Governor seeks to combat the spread of COVID-19 by releasing the names of businesses with employees who tested positive and the number of employees who tested positive. Bauer Aff. ¶¶ 4,7,9. The business community appreciates that Wisconsin is a growing hotspot for COVID-19,<sup>4</sup> and supports the goal of reversing this spread. However, the Administration's plan to release the names of businesses who had employees test positive over twenty-eight days ago,<sup>5</sup> will not slow this spread. *See generally* Alex Bell, *How Long Does it Take for Symptoms of COVID-19 to Appear?*, MEDICAL NEWS TODAY (June 17, 2020), <https://www.medicalnewstoday.com/articles/how-long-does-it-take-for-covid-19-symptoms-to-appear> (noting that the typical incubation period is between two and fourteen days, but the mean is just over five days); *When You Can Be Around Others*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html> (discussing the time period when spreading the virus is no longer a concern as ten days after symptoms appear for possible, mild, or asymptomatic cases, and typically less than twenty days for serious cases).

It does not take a mathematician to conclude the contagion period for most positive cases will pass before the twenty-eight-day period of non-release. Releasing old data will not only cause irreparable harm to businesses, it could jeopardize effective public health response by disincentivizing public cooperation with contact tracing efforts. Individuals who are concerned

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<sup>4</sup> *See* David Mills, *Here are the States Where COVID-19 is Increasing*, HEALTHLINE (Oct. 8, 2020), <https://www.healthline.com/health-news/here-are-the-states-where-covid-19-is-increasing> (discussing states with the highest number of new cases, hospitalizations, and deaths).

<sup>5</sup> Bauer Aff. ¶ 5.

that naming a business could result in public blacklisting might be reluctant to cooperate with tracing.

Even if the Governor were to change course and release the names of businesses with positive employee tests within the preceding twenty-eight-day window, this would not slow the spread of COVID-19. Publishing the numbers of recent positive tests at a certain business would not inform the public of important contextual information, such as:

- (1) Did the employee contract the virus inside or outside of the workplace;
- (2) If outside, did the employee bring the virus into the workplace;
- (3) If the employee never brought the virus into the workplace, did any other employee or owner have contact with the infected employee and return to the workplace;
- (4) If the employee brought the virus into the workplace, was there ever a point when he or she was not wearing a mask or social distancing while at work; and
- (5) In the case of a restaurant, did the employee engage in food preparation or delivery?

Without this information, members of the public have no way of knowing whether the business was even exposed to the virus, whether they were exposed to the virus and must self-quarantine, or whether they would be exposed to the virus if visiting the business. Releasing names of businesses with positive employee tests in the preceding twenty-eight-day period, without more information, simply brands the restaurant or small business with a COVID-19 badge of infamy.

Many restaurants and small businesses could not survive a public shaming that would inevitably deter customers and clients as the economy remains perilous for many businesses. Studies show the ravaging effect COVID-19 has taken on businesses. *See* Mitchell Schmidt, *COVID-19 Edges Out Workforce Shortage as Biggest Concern among Wisconsin Businesses, Survey Finds*, WISCONSIN STATE JOURNAL (July 12, 2020), <https://madison.com/business/covid->

[19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article\\_fe649fa2-92bc-58fc-aae2-443d022517a0.html](https://www.wisconsinbusiness.com/19-edges-out-workforce-shortage-as-biggest-concern-among-wisconsin-businesses-survey-finds/article_fe649fa2-92bc-58fc-aae2-443d022517a0.html). Of those responding, 75 percent indicated COVID-19 has negatively impacted their business, with 23 percent predicting they will end the year in the red. *Id.*

Businesses are also concerned about the economic effect of government measures taken in the name of public health. In fact, in July, Wisconsin business owners ranked government response measures as the most important public policy issue in the state. *Id.* The NFIB Research Center has consistently collected information from small businesses about the financial struggles that COVID-19 and the government responses thereto, are imposing on their businesses. In a recent survey of over 20,000 member businesses was conducted at the end of September. Almost half of all responders indicated that their businesses were struggling so much that they would need further government financial support to stay in business. NFIB RESEARCH CENTER, COVID-19 SMALL BUSINESS SURVEY (12) 6 (Sep. 2020), <https://assets.nfib.com/nfibcom/Covid-19-12-Questionnaire-and-Write-up-FINAL-web-version.pdf>.

Also in this same survey, 22 percent of responses expressed that business sales are still below 50 percent of their pre-crisis levels, or the business closed altogether; almost 50 percent of responses indicated sales are still up to 75 percent less than pre-crisis levels. *Id.* Ignoring any possible further government regulation and economic downturn, over 20 percent of business respondents already indicate they will be laying off employees in the next 6 months. *Id.* Wisconsin small businesses have a dire COVID-19-related financial prognosis, as demonstrated by the state ranking in the top ten for early-summer SBA approved loan funding. Chris Hubbuch, *Wisconsin Businesses Still Waiting on Help as Federal Program Runs Dry*, WISCONSIN STATE JOURNAL (Apr.

17, 2020), [https://madison.com/wsj/business/wisconsin-businesses-still-waiting-on-help-as-federal-program-runs-dry/article\\_d73cda6a-af0d-594f-9075-dce3de7947f2.html](https://madison.com/wsj/business/wisconsin-businesses-still-waiting-on-help-as-federal-program-runs-dry/article_d73cda6a-af0d-594f-9075-dce3de7947f2.html).

For the Wisconsin restaurant industry in particular, COVID-19 has had a devastating impact. A recently completed nationwide survey of restaurant owners and operators provide a shocking data-driven update on the dire state of the restaurant industry in Wisconsin. Consumer spending in restaurants remained well below normal levels in August. Of Wisconsin restaurant operators surveyed, 85 percent say their total dollar sales volume in August decreased compared to August 2019. Samara Kalk Derby, *Survey Finds 33% of Wisconsin Restaurants Could Close Within 6 Months if COVID-19 Measures Continue*, WISCONSIN STATE JOURNAL (Sept. 22, 2020), [https://madison.com/wsj/entertainment/dining/restaurants/survey-finds-33-of-wisconsin-restaurants-could-close-within-6-months-if-covid-19-measures/article\\_ae15cd99-5bb1-530d-b687-d9d28e583706.html](https://madison.com/wsj/entertainment/dining/restaurants/survey-finds-33-of-wisconsin-restaurants-could-close-within-6-months-if-covid-19-measures/article_ae15cd99-5bb1-530d-b687-d9d28e583706.html). Overall, sales were down 36 percent on average. *Id.*

Even though sales were significantly lower for most restaurants, it does not mean their costs also fell proportionally. Total operational costs (as a percent of sales) are higher than they were prior to the COVID-19 outbreak for 53 percent of Wisconsin restaurants. *Id.* Furthermore, 33 percent say it is unlikely their restaurant will still be in business 6 months from now, if business conditions continue at current levels. *Id.*

Although many restaurants added back employees as restrictions were partially lifted in recent months, overall staffing levels remain well below normal. On average, Wisconsin restaurant operators say their current staffing levels are only 71 percent of what they would typically be in the absence of COVID-19. *Id.* Overall, 44 percent of Wisconsin restaurant operators do not expect their staffing levels to return to pre-coronavirus levels within the next six months. *Id.* Also, in Wisconsin specifically, businesses in general are still experiencing a double-digit decrease in

patronage relative to this time last year. See Jennifer Valentino-DeVries, et al., *Virus Alters Where People Open Their Wallets, Hinting at a Halting Recovery*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.

Instead of preventing the spread of COVID-19 and helping businesses through these hard times, Defendants' proposed activity will further alienate consumers and irreparably damage the outlook for businesses branded as COVID-19 positive businesses. Whether intentionally or unintentionally, the Governor's plan to release the names of businesses with employees who test positive for COVID-19 will place an irreparable stigma on the businesses and result in lost revenue. In the minds of the community, this plan will label these establishments as uncompliant, unsafe, or more likely to transmit COVID-19. This stigma is not speculative, and one need only look to the CDC for the strength of COVID-19-related stigma and harm thereof:

“Stigma is associated with a lack of knowledge about how COVID-19 spreads, a *need to blame someone* . . . . Fear and anxiety about a disease can lead to social stigma, which is negative attitudes and beliefs towards people, *places*, or things. Stigma can lead to labeling, stereotyping, discrimination, and *other negative behaviors* towards others. For example, stigma and discrimination can occur when *people link a disease, such as COVID-19, with a population, community, or nationality*. . . . Stigma hurts everyone by creating more fear or anger toward ordinary people instead of focusing on the disease that is causing the problem. . . . **Community leaders and public health officials can prevent stigma by:** Maintaining the privacy and confidentiality of those seeking healthcare and those who may be part of any contact investigation.”<sup>6</sup>

Defendants might try to minimize or downplay this stigma and the resulting loss in revenue as speculative. But just as federal courts recognize in other areas, it is entirely impossible to

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<sup>6</sup>*Coronavirus Disease Reducing Stigma*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 11, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsymptoms-testing%2Freducing-stigma.html](https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/reducing-stigma.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fsymptoms-testing%2Freducing-stigma.html) (some emphasis added).

quantify the business loss of revenue in certain contexts, which is also true when being linked with a COVID-19 danger. *See Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (applying a presumption of irreparable harm because it “is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill”); *see also American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306 (“Where a defendant’s wrong threatens a plaintiff with the loss of business and the amount of the plaintiff’s future damages are difficult or impossible to ascertain, this court has held that a plaintiff’s remedy at law would be inadequate and that an injunction is an appropriate remedy.”).

Businesses are “fight[ing] to survive.”<sup>7</sup> Not only will releasing business names with employees who test positive place a stigma on those businesses and lead to further loss of revenue in an already disastrous business climate, but public disclosure could ultimately force many businesses to shut their doors altogether. This threat to their continued existence is enough to find “irreparable harm” and a necessity to preserve the status quo. *See Nemer Jeep-Eagle, Inc.*, 992 F.2d at 435; *John B. Hull, Inc.*, 588 F.2d at 28-29.

The release of business names will permanently and irreparably harm businesses in Wisconsin and their reputation by brandishing what amounts to a scarlet letter on businesses. This COVID-19 stigma will inevitably lead to a loss of revenue. This too, is enough to find irreparable harm. *See American Mut. Liability Ins. Co.*, 58 Wis. 2d at 306. A future permanent injunction cannot eliminate the public stigma and lost revenue that would result in businesses whose names might be released imminently. Therefore, a temporary injunction is necessary.

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<sup>7</sup> *See* Jennifer Valentino-DeVries, et al., *Virus Alters Where People Open Their Wallets, Hinting at a Halting Recovery*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/interactive/2020/08/18/business/economy/coronavirus-economic-recovery-states.html>.

**CONCLUSION**

*Amicus curiae* respectfully request that this Court grant Plaintiffs' motion for a Temporary Injunction prohibiting the Administration from revealing the names of businesses that have employees who test positive for COVID-19.

DATED this 4th day of November 2020.

Respectfully submitted,  
GREAT LAKES LEGAL FOUNDATION

Electronically Signed by Robert I. Fassbender  
Robert I. Fassbender SBN 1013985  
Attorney for Movants:

National Federation of Independent Business  
Wisconsin Restaurant Association  
Restaurant Law Center

Address:  
10 East Doty Street, Suite 504  
Madison, Wisconsin 53703  
Telephone: (608) 310-5315  
E-mail: [fassbender@greatlakeslegalfoundation.org](mailto:fassbender@greatlakeslegalfoundation.org)