

STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

KRIST OIL COMPANY and
ROBERT LOTTO,

Plaintiffs,

v.

Case No. 16CV117

BEN BRANCEL, Secretary,
Wisconsin Department of
Agriculture, Trade and Consumer
Protection,

Defendant,

and

WISCONSIN PETROLEUM MARKETERS
AND CONVENIENCE STORE ASSOCIATION,

Intervenor-Defendant.

**SECRETARY BRANCEL'S REPLY BRIEF IN OPPOSITION TO
PLAINTIFFS' REQUEST FOR A JURY TRIAL**

The plaintiffs offer no Wisconsin case law where a jury decided the constitutionality of a statute because, in Wisconsin, this is a question of law for the court. There is no constitutional right to a jury trial here because the right only applies in cases at law and Wisconsin considers declaratory relief to be a form of equitable relief. The declaratory judgment statute, Wis. Stat. § 806.04(9), does not grant the general right to a jury trial; it merely provides for jury trials if cases would otherwise be tried to a jury. Given that the constitutionality of a statute is an issue of law for the court to decide, there

are simply are no factual issues for a jury to resolve in this case. The absence of Wisconsin cases supporting the plaintiffs' position speaks volumes because, if their argument were correct, then there would be abundant authority for the proposition that juries are to decide the constitutionality of statutes.

I. Under Wisconsin law, requests for injunctive and declaratory relief are equitable claims in which there is no right a jury trial.

As the defendant pointed out in his initial brief, the right to a jury trial attaches to “all cases at law,” Wis. Const. art. I, § 5, meaning that “[w]hen equitable relief is requested, there is no constitutional right to a jury trial.” *In re Marriage of Zabel v. Zabel*, 210 Wis. 2d 336, 345, 565 N.W.2d 240 (Ct. App. 1997). The *Zabel* decision makes clear that a right to a jury trial is not created by adding a request for declaratory relief to a claim for injunctive relief. In the case, the plaintiff sought both “an order enjoining [the third-party defendant] from disposing of the proceeds of any sale of the disputed property” and “an order setting aside the deed and declaring the deed ‘illegal as a sham transaction.’” *Id.* at 344–45. The Court of Appeals held that these “requests involve injunctive and declaratory relief, which are equitable in nature.” *Id.* at 345. As a result, there was no right to a jury trial because “the claims contained and relief requested in the third-party complaint are equitable in nature.” *Id.*

Contrary to the plaintiffs' contentions, Wisconsin courts have always treated requests for declaratory relief as equitable in nature. See *Ross v. Honey Lake Prot. & Rehab. Dist.*, 166 Wis. 2d 739, 745 n.2, 480 N.W.2d 795 (Ct. App. 1992) ("An action for declaratory relief is essentially equitable in character."); *Belanger v. Local Div. No. 1128*, 256 Wis. 274, 278, 40 N.W.2d 504 (1949) (same); *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921, 924 (1936) (same). While the plaintiffs rely on federal case law characterizing declaratory judgments as neither legal nor equitable, federal courts recognize that "Wisconsin courts regard a claim for declaratory relief as 'essentially equitable in nature,'" while "[t]he same is not true under federal law." *Kaeser Compressors, Inc. v. Compressor & Pump Repair Servs., Inc.*, 803 F. Supp. 2d 974, 975 (E.D. Wis. 2011) (quoting *Belanger*, 256 Wis. at 278).

II. The declaratory judgment statute does not grant the right to a jury trial on constitutional claims.

The plain language of the declaratory judgment statute does not provide the right to a jury trial in this case. Instead, the statute merely provides that issues of fact "may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." Wis. Stat. § 806.04(9). As explained in the defendants' opening brief, this provision provides for jury trials when the

declaratory judgment is sought in a case that would otherwise be tried to a jury, such as a case at law properly seeking damages. The statute does not otherwise grant a right to jury trial, which has been clear since Wisconsin adopted the Model Declaratory Judgment Act. As one of the drafters of the Act explained, “[t]here was no necessity for mention of jury trial in the Uniform Act except to give an assurance that the matter had not been overlooked and that the usual rules adopted by the state for the classification of civil issues and their trial were not intended to be interfered with.” Edwin M. Borchard, *The Uniform Declaratory Judgments Act*, 18 Minn. L. Rev. 239, 255 (1934). As a result, Wis. Stat. § 806.04(9) does not provide a right to a jury trial beyond that already provided for in the Wisconsin Constitution.¹

While the plaintiffs acknowledge that the question is governed by the plain language of Wis. Stat. § 806.04(9), they do not explain how the provision that issues of fact are to “be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending” provides for a jury trial here. Civil actions encompass both “actions at law,” for which there is a jury trial right

¹ The Legislature can grant the right to jury trials by statute, Wis. Stat. § 805.01(1), but the plaintiffs have cited Wis. Stat. § 806.04(9) as the sole statutory source of their alleged right to a jury trial.

under Wis. Const. art. I, § 5, and actions in equity, for which there is no such right. *E.g.*, *Zabel*, 210 Wis. 2d at 345. If the plaintiffs were correct that the Legislature intended to provide for a jury trial on all fact issues arising in declaratory judgment actions, it would have simply said so in the statute. This court, however, must apply the statute as it is written.

The lack of support for plaintiffs' argument is confirmed by their failure to cite a single Wisconsin case where a jury acted as a factfinder in a case challenging the constitutionality of a statute. Thus, they have failed to establish that trial to a jury in this case would be in "the same manner as issues of fact are tried and determined in other civil actions in the court." Wis. Stat. § 806.04(9). As a practical matter, if the plaintiffs' interpretation of Wis. Stat. § 806.04(9) were correct, one would expect the Wisconsin reports to be littered with cases in which juries acted as factfinders in actions seeking declarations that statutes are unconstitutional. No such case exists because cases seeking declaratory and injunctive relief are tried to the court.

In fact, a trial to a jury would be contrary to Wisconsin law on how constitutional challenges to laws are adjudicated. In Wisconsin, juries do not decide the validity of statutes under the constitution. Instead, "[a] statute's constitutionality is a question of law that [the Supreme Court] reviews de novo." *Blake v. Jossart*, 2016 WI 57, ¶ 26, 370 Wis. 2d 1, 884 N.W.2d 484. Put another way, "[t]he interpretation of the Wisconsin Constitution and a

determination of the constitutionality of a statute are ordinarily questions of law that [the Supreme Court] determines independently of the circuit court and court of appeals, but benefiting from their analyses.” *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 58, 284 Wis. 2d 573, 701 N.W.2d 440. In these cases, the appellate courts decided the legal issue with no assistance from a jury and, more broadly, without deference to the lower courts. Given the *de novo* standard of review in these cases, Wis. Stat. § 806.04(9) does not even come into play because there is no “determination of an issue of fact” for a jury to perform.

Further, fact-finding by a jury is inconsistent with the legal standard Wisconsin courts apply in cases like this one. Economic regulations like the Minimum Markup Law are evaluated using the rational basis test. *E.g.*, *Tomczak v. Bailey*, 218 Wis. 2d 245, 262, 578 N.W.2d 166 (1998). Under that test, the law will be struck down only if it “it is patently arbitrary and bears no rational relationship to a legitimate government interest.” *Blake*, 370 Wis 2d 1, ¶ 32 (quoting *Tomczak*, 218 Wis. 2d at 264). In this analysis, “*the court* seeks to determine whether a classification rationally advances a legislative objective. To do so, *the court* must identify or, if necessary, construct a rationale supporting the legislature’s determination.” *Id.* (emphasis added). Case law makes clear that the court determines whether a particular law advances the legislative objective (and must even construct

rationales on which the Legislature might have acted). Wisconsin law does not contemplate using a jury to do so.

III. This case is a facial constitutional challenge, not an “inverted action” for a violation of the Minimum Markup Law.

The plaintiffs are simply incorrect that this is an “inverted action” for a violation of the Minimum Markup Law. An “inverted law suit” is a declaratory judgment action “brought by one who would have been a defendant at common law.” *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002) (quoting *Owens–Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1189 (3d Cir. 1979)). For example, a potential defendant in a breach of contract claim for damages—where there is a right to a jury trial—could bring an “inverted law suit” in which it is the plaintiff in a declaratory judgment action seeking a declaration that it did not breach the contract. This was why a jury was used in *American Motorists Insurance Co. v. R & S Meats, Inc.*, 190 Wis. 2d 196, 200, 526 N.W.2d 791 (Ct. App. 1994), cited in the defendant’s initial brief. In that case, the insured (R & S Meats) could have brought a breach of contract action against its insurer (American Motorists) for damages based on its failure to pay an insurance claim. Instead, the insurer (the potential defendant) sought a declaratory judgment that it was not responsible for the insurance claim. *Id.* This qualifies as an “inverted law suit” because it was a claim at law—a

contract claim for damages—brought by the party that would normally have been the defendant. The right to a jury trial was not lost because the potential defendant started a declaratory judgment action rather than waiting for the plaintiff to sue.

This concept has no application here. The plaintiffs rely on a case establishing that there is a right to a jury trial in a claim brought by a competitor under Wis. Stat. § 100.30(5m) for violating the Minimum Markup Law. *Village Food & Liquor Mart v. H & S Petroleum*, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177. In this case, however, the plaintiffs are not would-be defendants in a claim under Wis. Stat. § 100.30(5m) attempting to establish their non-liability by declaratory judgment. Instead, plaintiffs are seeking a declaration and injunction that the entire Minimum Markup Law is unconstitutional. (Compl. 16 ¶¶ A–C.) As a result, this claim is not the “inverse” of a claim under Wis. Stat. § 100.30(5m). In addition, this argument also makes no sense for plaintiff Lotto, who is not a retailer and therefore cannot violate the Minimum Markup Law. (See Compl. ¶ 9.)

Further, the reason why the *Village Foods* court held there was a right to a jury trial under Wis. Stat. § 100.30(5m) does not apply here. The court granted a jury trial because “[t]he plaintiff in this case seeks monetary damages for loss sustained as a result of the unfair pricing. An action seeking money damages is one at law.” 254 Wis. 2d 478, ¶ 33. In contrast, this case is

not a “case at law” to which there is a right to a jury trial because the plaintiffs are not seeking, and cannot seek, monetary damages against the State, its arms, or its officials.

IV. The plaintiffs rely on inapposite federal cases holding there is a right to a jury trial when plaintiffs seek damages.

While this issue is easily resolved under Wisconsin law, the plaintiffs support their contention by misstating federal law regarding the right to a jury trial. Federal law does not apply here to begin with. And, in any event, federal courts do not provide jury trials in cases which involve only declaratory and injunctive relief. In a case where the plaintiff was “seeking declaratory and injunctive relief, but not monetary damages,” the Western District of Wisconsin held that “the plaintiff’s right to the requested relief is determined by the court rather than a jury.” *Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034, 1048 (W.D. Wis. 2007), *amended* (Sept. 25, 2007). The *Greybuffalo* court was able to apply this straightforward rule in one paragraph.

The plaintiffs are incorrect when they claim federal courts have found it “impossible to apply” the rules regarding jury trial rights in declaratory judgment actions. (Pls.’ Br. 5.) The plaintiffs confuse the issue by referring to *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), a case that jettisoned an outdated rule, called the *Enelow-Ettelson* doctrine,

regarding whether “certain orders that stay or refuse to stay judicial proceedings are considered injunctions and therefore are immediately appealable.” *Id.* at 279. The *Gulfstream* case had nothing to do with the right to a jury trial in declaratory judgment actions.

Further, the federal cases holding that there is a right to a jury trial in claims for damages under 42 U.S.C. § 1983 do not assist the plaintiffs, even if they did otherwise apply, because those holdings were based on the plaintiffs’ request for monetary damages. For example, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999), the Supreme Court held “that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment.” The court reached this result because the plaintiff sought “damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy.” *Id.* at 710. The request for damages likewise distinguishes this case from *Loesel v. City of Frankenmuth*, 692 F.3d 452 (6th Cir. 2012) and *Reid v. Rolling Fork Public Utility District*, 979 F.2d 1084 (5th Cir. 1992), both of which sought damages for allegedly unconstitutional conduct. *Loesel*, 692 F.3d at 460 (“As a remedy, they sought \$4 million in compensatory damages.”); *Reid*, 979 F.2d at 1090 (referencing “jury’s finding of no damages”). In none of these cases did the plaintiffs seek to have a statute declared unconstitutional on its face, as the plaintiffs seek here. As under Wisconsin law, the plaintiffs can

cite no federal authority for using a jury to determine factual issues when plaintiffs seek only a declaration that a statute is unconstitutional but do not seek monetary damages.

Lastly, the plaintiffs incorrectly analogize this case to the common law action of trespass. Justice Scalia's concurrence in *City of Monterey*, relied upon by the plaintiffs, shows why this comparison is inapt. Justice Scalia reasoned that the

Seventh Amendment question before us, therefore, is whether a tort action *seeking money damages* was a 'suit at common law' for which a jury trial was provided. The answer is obviously yes. Common-law tort actions were brought under the writs of trespass and trespass on the case.

Id. at 729 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added). In contrast, this is not a "tort action seeking damages"; it is a state declaratory action asking the court to rule that a statute is unconstitutional. Under both Wisconsin and federal law, this is an issue of law for the court, not an issue of fact for the jury.

CONCLUSION

For the foregoing reasons and those stated in Secretary Brancel's opening brief, the Court should deny the plaintiffs' request for a jury trial.

Dated this 24th day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed the foregoing Reply Brief in Opposition to Plaintiffs' Request for a Jury Trial with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 24th day of July, 2017.

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