



STATE SENATOR  
**Eric Wimberger**  
DISTRICT 30

## **Testimony on Senate Bill 886**

*Senate Committee on Sporting Heritage, Small Business and Rural Issues  
Thursday, February 24, 2022*

Chairman Stafsholt and Members,

In a panic on 12 March 2020, Governor Evers abused his emergency powers and issued executive order 72 declaring an emergency in perpetuity. His unelected and unconfirmed Department of Health Services designee, Andrea Palm, issued Emergency Order 12, outrageously labeled the “Safer At Home” order. Someone who wasn’t even a resident of Wisconsin until she obtained the appointment used bureaucratic powers to effectively order the entire Wisconsin population into confinement without Due Process.

In Emergency Order 12, Section 13 unilaterally shuttered all businesses not predetermined as “essential.” Small business owners across the state, by the swipe of a bureaucrat’s pen, saw their entire life’s work destroyed. It was a government taking without just compensation contrary to the takings clause.

The order also denied business owners and their employee’s equal protection of the laws. It was unmoored from reason and illogical. While Governor Evers issued executive order 72 on 12 March, the draconian Emergency Order rules to supposedly keep everyone safe from a communicable disease weren’t effective until 25 March. A corner bar with one occupant had to close while the liquor store with many people in line could stay open. A sparsely occupied small retailer selling non-food items had to shut the doors while a big box store had their non-food retail sections packed with people.

By a rule that is equally applied, future orders can still address specific problems. For instance, if the emergency relates to a communicable disease that is contagious and health officials suggest no more than one person per 500 square feet, then the rule would be that a business can’t have more than one person per 500 square feet. Of course that would disproportionately impact different businesses who are 500 square feet or smaller. That business would be effectively shut because it wouldn’t be able to comply. However, the underlying principle behind the order would not pass judgment on the nature of business and would be rationally related to the societal interest.

Governor Evers used the premise of an emergency to arbitrarily pick economic winners and losers. It can’t happen again.

Remember, the Court struck the order down on its technical merits. DHS Secretary Palm initially issued Emergency Order 12 for 30 days, and then extended it in Emergency order 28. It was Emergency order 28 that the Court ultimately struck down, and that order had slightly different language in it assuming authority from Wis. Stat 252 instead of from the Governor himself. For 50 painful days businesses sat with zero revenue and bills piling up until the Supreme Court decision on 13 May.

In *Wisconsin Legislature v Palm*, 2020 WI 42 at Paragraph 42, the Court states “As we said at the beginning of this decision, the Governor’s emergency powers are not challenged by the legislature, and Palm does not rely on the Governor’s emergency powers. Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval.” The case was about whether Palm had authority under Ch 252 to close businesses, not whether the Governor himself could issue the same order outside the framework of Ch 252.

This bill concludes an unresolved litigated issue and is necessary to prevent any Governor from arbitrarily picking winners and losers in an emergency. Any order in future emergencies would have to be applied uniformly and equally, and not permit certain businesses to be closed merely on bigoted assumptions about business types.

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**Statement Before the  
Senate Committee on Sporting Heritage, Small Business and Rural Issues**

**By**

**Bill G. Smith  
State Director  
National Federation of Independent Business  
Wisconsin**

**Thursday, February 24, 2022**

**Senate Bill 886**

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Chair Stafsholt, Vice Chair Petrowski, and members of the Committee, my name is Bill G. Smith, State Director for the National Federation of Independent Business. It is on behalf of nearly 10,000 Wisconsin member firms that I share with you their overwhelming support for passage of Senate Bill 886.

Allow me to begin by thanking you for scheduling today's hearing for Senate Bill 886, the Business Fairness Act, an important priority for our state's small business community.

NFIB members are located throughout Wisconsin, and they come from all sectors of our economy – from retail to restaurants to construction to agriculture to manufacturing and wholesale, and others. A majority of our members employ fewer than ten employees, and a typical member has less than \$350,000 in gross receipts.

Senate Bill 886 is a straightforward proposal that simply requires all businesses be treated equally during an emergency declaration by the government. It would eliminate the essential and non-essential designations of businesses from declarations of emergency.

It would eliminate the basic unfairness of government arbitrarily choosing winners and losers during an emergency, and it would eliminate the economic hardship endured by small businesses ordered to close, while their big box competitors remained open for business.

**National Federation of Independent Business in Wisconsin  
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Two years ago, the government decision to require all non-essential businesses to close created significant hardship and uncertainty on Main Streets all across Wisconsin. Many small businesses were unable to sell their goods and services and struggled to generate revenue to pay their employees.

Businesses deemed essential were allowed to remain open, including most big box stores, and were allowed to sell the same products as thousands of small businesses deemed non-essential, which the government ordered to close immediately.

As a result, government chose winners and losers, ordering some businesses to close - deemed non-essential - while allowing others to remain open - essential - often selling the same products or services as those firms ordered to close their doors.

Obviously, the action taken by state government, had a devastating impact on small business owners and their employees, creating significant economic hardship and uncertainty on Main Street throughout Wisconsin.

Small business owners deemed "non-essential" complied with orders while they waited for a better understanding and knowledge of the unique challenges of a pandemic.

These small business owners watched and waited as other businesses were allowed to remain fully operational, able to pay their employees, receive goods, provide services, and for the most part operate as usual.

The cost of the government mandated lockdown of so-called non-essential businesses was devastating for small business employers and their employees, yet minimal impact on controlling the spread of the pandemic.

A study by an economist at the University of Michigan found "little statistical relationship between lockdown severity and declining deaths."

In fact, according to this study, "Economic shutdowns provide massive, concentrated costs on those businesses and individuals impacted by these restrictions. Many businesses who were mandated to close will never reopen. Many individuals who worked in the affected industries consequently will have a difficult time finding a new job."

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Earlier I described NFIB's membership as large and diverse. When we surveyed this large and diverse membership, small business spoke clearly and with one voice – 97 percent indicated support for eliminating the essential and non-essential designations from emergency orders.

Mr. Chair, members of the Committee, Senate Bill 886 seeks to ensure any government, state or local, is not allowed to select winners and losers when responding to an emergency, and it ensures our small businesses will be free to compete on a level playing field with their big box competitors.

We believe discriminating against one business over another by describing one as "essential" and another as "non-essential", especially when they have similar products or services, is an arbitrary and capricious abuse of emergency powers.

Mr. Chair, thank you for the opportunity to share these comments, the companion legislation, Assembly Bill 912, has been approved by the Assembly – 59-35, and I **respectfully urge members of the Committee to also act promptly and favorably on Senate Bill 886, the Business Fairness Act.**



**THE LEADING VOICE  
FOR WISCONSIN SMALL  
AND INDEPENDENT BUSINESSES**

**February 24, 2022**

**TO: Members  
Senate Committee on Sporting Heritage, Small Business and Rural Issues**

**FR: Brian Dake  
President  
Wisconsin Independent Businesses**

**RE: 2021 Senate Bill (SB) 886 relating to: emergency power to regulate businesses.**

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Chairman Stafsholt and committee members, my name is Brian Dake, President, of Wisconsin Independent Businesses. Thank you for the opportunity to testify in support of 2021 Senate Bill (SB) 886.

By way of background, Wisconsin Independent Businesses (WIB) was formed in 1977 to provide small, independent business owners with an effective voice in the legislative and regulatory activities of state government. Today, we proudly represent more than 2,000 small business owners throughout Wisconsin. Most of our members (approximately 85%) own and operate businesses that fit within the legal definition of a small business – fewer than 25 employees and annual gross revenues of less than \$5 million.

Shortly after the onset of the pandemic in March 2020, Andrea Palm, Secretary-designee of the Wisconsin Department of Health Services issued a statewide Safer-at-Home Order that was subsequently extended through May 26, 2020. The Wisconsin Supreme Court struck down the Safer-at-Home Orders as an unlawful exercise of executive branch authority on May 13, 2020.

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While the Safer-at-Home Orders were in effect, many Wisconsin small businesses were forced to shut down. These Emergency Orders designated Wisconsin businesses as either essential or non-essential. Essential businesses were “encouraged” to remain open subject to certain restrictions while non-essential businesses were required to cease all activities at facilities located within Wisconsin, except for minimum basic operations.

In effect, the Safer-at-Home Orders gave preferential treatment to large multistate corporations and nationwide big box retailers. For example, national chain stores which sold clothing as well as groceries were allowed to remain open while local hometown clothing stores were shut down. National chain stores which sold outdoor furniture as well as groceries were allowed to remain open while Main Street furniture stores across Wisconsin were shut down.

In practice, the Safer-at-Home Orders created confusion for many small businesses that were unsure whether they were essential or non-essential. For example, landscaping businesses hired in connection with the construction of new homes were determined to be essential whereas landscaping businesses hired to perform landscaping for their residential customers were determined to be non-essential. The lack of clarity led the Wisconsin Economic Development Corporation (WEDC) to become the arbiter of whether a Wisconsin business was essential or non-essential. For nearly two weeks, we worked closely with a member business – a Milton, Wisconsin manufacturer – to help the business determine whether it was essential or non-essential. Thankfully, WEDC deemed the business to be essential and allowed it to remain open.

At the outset of the COVID-19 pandemic, Governor Evers and his Administration had to make difficult decisions with limited information and knowledge about a novel virus for which there were no treatments, therapeutics, or vaccines. I am not here today to second guess their judgements. Instead, we respectfully ask you to use the knowledge and experience gained over the last two years to adopt new state laws that will position the State of Wisconsin to better respond to future public health emergencies.

In response to a public health emergency, designating Wisconsin businesses as either essential or non-essential and allowing only the essential businesses to remain open is neither sound public policy nor is it scientifically defensible. Such a policy will always lead to subjective judgement and preferential treatment that will place small businesses at a competitive disadvantage.

From our perspective, a fair and just law that applies the same requirements and restrictions to all Wisconsin business uniformly without regard for the type of business or the product or service provided by the business is a better alternative.

We respectfully ask for your support of SB 886.

Thank you in advance for your consideration.