

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MINERVA DAIRY, INC., and ADAM
MUELLER,

Civil Action No. 17-cv-299

Plaintiffs,

v.

BEN BRANCEL, in his official capacity as
the Secretary of the Wisconsin Department
of Agriculture, Trade and Consumer
Protection; BRAD SCHIMEL, in his official
capacity as the Attorney General for the state
of Wisconsin; and PETER J. HAASE, in his
official capacity as the Bureau Director of
the Division of Food and Recreational Safety
within the Wisconsin Department of
Agriculture, Trade and Consumer Protection,

Defendants.

**MEMORANDUM
IN SUPPORT OF
PRELIMINARY
INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

FACTUAL BACKGROUND..... 3

 A. Adam Mueller and Minerva Dairy 3

 B. Butter Grading..... 3

 C. Immediate Harm to Plaintiffs..... 5

LEGAL STANDARD FOR PRELIMINARY INJUNCTION..... 6

ARGUMENT 7

 I

 MINERVA DAIRY IS LIKELY TO PREVAIL ON
 ITS DORMANT COMMERCE CLAUSE CLAIM..... 7

 A. Wisconsin’s Grading Requirement Violates the
 Dormant Commerce Clause Because It Impermissibly
 Discriminates Against Out-Of-State Butter Makers 8

 1. Because the Wisconsin Grading Requirement
 Discriminates Against Out-Of-State Butter Makers,
 It Is Subject to a Virtually Per Se Rule of Invalidity 8

 2. Because Wisconsin Cannot Meet Its High Burden of
 Showing That There Are No Nondiscriminatory Means of
 Serving a Legitimate Governmental Interest, the Butter
 Grading Ban Violates the Dormant Commerce Clause 12

 B. Wisconsin’s Grading Requirement Also Fails Under *Pike*,
 Because It Unduly Burdens Interstate Commerce 14

 II

 MINERVA DAIRY IS NOW SUFFERING AND WILL
 CONTINUE TO SUFFER IRREPARABLE HARM IF THE
 INJUNCTION IS DENIED, FOR WHICH IT HAS NO ADEQUATE REMEDY..... 15

 III

 GRANTING TEMPORARY EQUITABLE RELIEF WOULD
 NOT HARM OTHERS AND WOULD SERVE THE PUBLIC INTEREST..... 16

 IV

 THE BOND REQUIREMENT SHOULD BE
 WAIVED OR SET AT A NOMINAL AMOUNT 17

TABLE OF AUTHORITIES

Cases

Alliant Energy Corp. v. Bie, 330 F.3d 904 (7th Cir. 2003)..... 12
Baskin v. Bogan, 983 F. Supp. 2d 1021 (S.D. Ind. 2014)..... 16
BBL, Inc. v. City of Angola, 809 F.3d 317 (7th Cir. 2015) 6
C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) 12
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 8
Craigsmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) 13
Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951)..... 8, 10
Dep’t of Revenue of Ky. v. Davis, 553 U.S. 328 (2008) 12
Dixie Dairy Co. v. City of Chicago, 538 F.2d 1303 (7th Cir. 1976)..... 8, 15
GoodCat, LLC v. Cook, 202 F. Supp. 3d 896 (S.D. Ind. 2016) 10-12, 15-16
Granholt v. Heald, 544 U.S. 460 (2005)..... 8, 13
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)..... 7
Habitat Educ. Ctr. v. U.S. Forest Serv., 607 F.3d 453 (7th Cir. 2010) 17
Hughes v. Oklahoma, 441 U.S. 322 (1979) 12
Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013) 7
Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980)..... 8
Maine v. Taylor, 477 U.S. 131 (1986) 7
Oregon Waste Sys., Inc. v. Dep’t of Envtl. Quality of the State of Oregon,
511 U.S. 93 (1994)..... 12
Oruna Foods North America, Inc. v. Eurogold USA, LLC,
No. 2:17-cv-00510-JPS (E.D. Wis. filed Apr. 10, 2017)..... 12
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 7, 14
Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978)..... 16
Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972)..... 17
Smith v. Bd. of Election Comm’rs for City of Chicago, 591 F. Supp. 70 (N.D. Ill. 1984) 17
Ty, Inc. v. Jones Grp., Inc., 237 F.3d 891 (7th Cir. 2001)..... 6
Univ. of Texas v. Camenisch, 451 U.S. 390 (1981) 6

State Statutes

Wis. Stat. § 97.72(2) 2
§ 97.176..... 1, 3, 5
§ 97.176(1)(d) 4

Rule of Court

Fed. R. Civ. P. 65..... 17

Federal Regulations

7 C.F.R. § 58.38..... 9
§ 58.101(f)..... 5
§ 58.122..... 14
§ 58.122(a) 9
§ 58.122(b)..... 5

State Regulations

Wis. Admin. Code § 85.03.....	4, 14
Wis. Admin. Code ATCP § 85.02	4
§ 85.04(1)(b)	4
§ 85.04(1)(c)	4
§ 85.04(1)(d)	4
§ 85.05(2)	4
§ 85.05(3)	4
§ 85.05(4)	4

Miscellaneous

81 Fed. Reg. 27387-01 (May 9, 2016).....	9
Grassland Dairy Products, Inc., <i>Products: Butter</i> , http://www.grassland.com/Butter.php	11
United States Department of Agriculture: Agriculture Marketing Service, <i>Dairy Plants Surveyed and Approved for USDA Grading Service</i> (May 9, 2017), https://apps.ams.usda.gov/dairy/ApprovedPlantList/	5, 9, 11
Wisconsin Department of Agriculture, Trade and Consumer Protection: Division of Food and Recreational Safety, <i>Wisconsin Dairy Plant Directory 2016-2017</i> (Oct. 2016), https://datcp.wi.gov/Documents/DairyPlantDirectory.pdf	11
Wisconsin Department of Agriculture, Trade, and Consumer Protection, <i>Butter Grading and Labeling</i> , https://datcp.wi.gov/Pages/Programs_Services/fsbutter.aspx	9

INTRODUCTION

Through its recent enforcement of Wisconsin Statute Section 97.176 (artisanal butter ban), Wisconsin became the only state in the Nation that prohibits the sale of ungraded butter. The artisanal butter ban imposes significant costs and substantial burdens on butter makers who are located outside of Wisconsin. Accordingly, the statute violates the dormant Commerce Clause, the Equal Protection Clause, and the Due Process Clause. Plaintiffs Adam Mueller and Minerva Dairy, Inc., are Ohio butter makers that have sold their butter in Wisconsin for decades—and continue to sell their ungraded butter in every other state in the nation. They bring this lawsuit to vindicate their constitutional rights.

Mueller is a co-owner and President of Minerva Dairy, America's oldest family-owned cheese and butter dairy. Statement of Proposed Facts in Support of Plaintiffs' Motion for a Preliminary Injunction (SOPF) ¶ 1; Declaration of Adam Mueller (Mueller Dec.) ¶ 2. Minerva Dairy can legally sell its artisanal butter in any state except Wisconsin, which requires that all butter sold in the state be graded by the United States Department of Agriculture (USDA), or by a Wisconsin-licensed butter grader. SOPF ¶ 7; Mueller Dec. ¶ 15; Wis. Stat. § 97.176. Because Minerva Dairy is located outside of Wisconsin, Plaintiffs do not have the option of having their butter graded by a Wisconsin-licensed grader; they only have the option of having their butter graded by the USDA. SOPF ¶ 7. But because Minerva Dairy makes its butter in several small batches each day, SOPF ¶ 5; Mueller Dec. ¶ 8, and each batch must be separately graded, it is unduly burdensome and prohibitively expensive for Plaintiffs to comply with this Wisconsin-specific requirement. SOPF ¶¶ 8-9; Mueller Dec. ¶¶ 9-12. Wisconsin's grading requirement therefore not only discriminates against Plaintiffs on the basis of their location, it effectively amounts to a ban on their artisanal butter within Wisconsin's borders.

Despite the burdens this artisanal butter ban places on the interstate market for butter, it provides no legitimate benefit to the public. Grading has nothing to do with public health or safety; instead it is a government mandated taste test meant to ensure that butter conforms to the government's preferred flavor. It is also designed to benefit Wisconsin-based butter makers, who can more easily satisfy the grading requirement. For these reasons, the ban discriminates against out-of-state butter makers and unduly burdens the interstate market for butter in violation of the Commerce Clause.

Recently, the Wisconsin Department of Agriculture issued a letter threatening Minerva Dairy if it continues to sell ungraded butter in Wisconsin. SOPF ¶ 12; Mueller Dec. ¶ 18; Mueller Dec. Exh. 2. Violating the grading requirement can yield a fine of up to \$1,000 dollars, or imprisonment for up to six months. Wis. Stat. § 97.72(2). As a result of those threats, Minerva Dairy has ceased selling its ungraded butter at retail in Wisconsin. SOPF ¶ 14; Mueller Dec. ¶ 19. Plaintiffs therefore seek preliminary injunctive relief to enjoin enforcement of Wisconsin's irrational and discriminatory law, pending the outcome of this litigation.

Plaintiffs meet the standards for preliminary injunctive relief. Their case has a substantial likelihood of success on the merits, because the grading requirement both discriminates against out-of-state butter producers and unduly burdens interstate commerce. If Defendants are not enjoined from enforcing the law, Plaintiffs will suffer irreparable harm in the form of lost profits and continued constitutional injury. There are no adequate remedies at law, because sovereign immunity precludes Plaintiffs from recovering damages from Defendants. Moreover, the violation of a constitutional right is itself an irreparable injury. Although Plaintiffs would suffer irreparable harm if the artisanal butter ban were not enjoined, the issuance of a preliminary injunction would harm no one. The injunction will not harm the public because the grading requirement is not related

to public health or safety, and Defendants would still be able to lawfully enforce those regulations actually related to protecting the public. The prejudice to Plaintiffs if the injunction is denied, however, would be great. The motion for preliminary injunction should therefore be granted.

FACTUAL BACKGROUND

A. Adam Mueller and Minerva Dairy

Plaintiff Adam Mueller is a fifth-generation owner of Minerva Dairy, Inc., a family-owned dairy company located in Minerva, Ohio. SOPF ¶ 1; Mueller Dec. ¶¶ 3-5. Minerva Dairy originated in 1884 when Max P. Radloff established Radloff Cheese in Hustiford, Wisconsin. SOPF ¶ 2; Mueller Dec. ¶ 3. In 1935, Minerva Dairy moved to Minerva, Ohio, and began producing bottled milk, ice cream, butter, and cheese. SOPF ¶ 2; Mueller Dec. ¶ 5. Today, Minerva Dairy has approximately 75 employees, and produces 84% butterfat Amish roll butter, as well as cheddar, Swiss, Italian, and kosher cheeses. SOPF ¶ 3; Mueller Dec. ¶ 6. Minerva Dairy cheeses are sold in Wisconsin. SOPF ¶ 4; Mueller Dec. ¶ 7. In contrast to large commodity butter makers, Minerva Dairy produces its 84% butterfat Amish butters in small, slow-churned batches using fresh milk supplied by pasture-raised cows. SOPF ¶ 5; Mueller Dec. ¶ 8. Minerva Dairy voluntarily submits to USDA-inspection of its facilities, and complies with all applicable health and safety regulations in Ohio, where their butter is produced. SOPF ¶ 6; Mueller Dec. ¶ 14. Minerva may legally sell its butter across state lines into 49 states. SOPF ¶ 7; Mueller Dec. ¶ 15. It may not sell its butter in Wisconsin, however, because Wisconsin requires butter to be graded by the USDA or a Wisconsin-licensed butter grader before it is sold in the state. SOPF ¶ 7; Wis. Stat. § 97.176.

B. Butter Grading

Butter grading is essentially a judgment of taste. Grading has nothing to do with the nutritional value of butter, nor any other aspect related to the health or safety of consuming butter.

Instead, according to Wisconsin's own guidelines, grading is based on the butter's "flavor, body, color and salt." Wis. Admin. Code § 85.03. AA Grade is the highest grade. In terms of flavor, AA grade means the grader believes the butter to "possess a fine and highly pleasing butter flavor." Wis. Admin. Code § 85.03. A Grade butter is merely "pleasing and desirable," and B Grade butter is "fairly pleasing." *Id.* Anything inferior to AA, A, or B Grade is considered "Undergrade." *Id.* Undergrade butter is able to be sold to Wisconsin consumers. Wis. Stat. § 97.176(1)(d). Thus, even those butters which Wisconsin taste testers don't deem fit enough to qualify as "fairly pleasing" are still deemed perfectly safe to be sold to Wisconsin consumers.

The eight different "body characteristics" include such attributes as "crumbly," "sticky," and "grainy." Wis. Admin. Code ATCP § 85.04(1)(b). The four different "color characteristics" are "mottled," "speckled," "streaked," and "wavy." Wis. Admin. Code ATCP § 85.04(1)(c). The "salt characteristics" are "gritty," which means "the butter is characterized by sandlike feel of grains of undissolved salt on the tongue or between the teeth when the butter is chewed," and "sharp," which means "the butter is characterized by taste sensations suggestive of salt." Wis. Admin. Code ATCP § 85.04(1)(d). For each characteristic, graders must determine whether the butter has a "slight, definite or pronounced" intensity of that characteristic. After examining flavor, body, color, and salt, graders assign a grade using the tables under Wis. Admin. Code ATCP § 85.05(2), (3), and (4). *See* Wis. Admin. Code ATCP § 85.02.

Wisconsin butter graders are licensed by the Wisconsin Department of Agriculture. Licensed butter graders do not work for the Department; if they are paid, they are paid directly by the butter makers. Wisconsin butter makers also keep a Wisconsin-licensed grader on staff.

By contrast, USDA butter graders are employees of the United States Department of Agriculture. Under USDA regulations, butter need not be graded in order to be sold across state

lines, but butter makers can opt for grading as an optional marketing feature. 7 C.F.R. § 58.122(b). Butter makers that choose to have their butter graded can either pay for a USDA grader to fly to their facility to grade a batch of butter, or they can retain a USDA grader under the Department's residential program—which allows a grader to be dedicated full time to a particular butter-making facility. 7 C.F.R. § 58.101(f); *see also* United States Department of Agriculture: Agriculture Marketing Service, *supra* (describing the resident program).

USDA grading standards are substantially similar to Wisconsin's, and consider a butter's flavor, cream, texture, color, and salt. Because small and artisanal producers like Minerva make butter in frequent, small batches, it can be very expensive to have butter graded by the USDA. Indeed, because of the expense, largely only the big commodity butter makers choose to have their butter regularly graded by the USDA. *See* United States Department of Agriculture: Agriculture Marketing Service, *Dairy Plants Surveyed and Approved for USDA Grading Service* (May 9, 2017), <https://apps.ams.usda.gov/dairy/ApprovedPlantList/>.

Under Wis. Stat. § 97.176, in-state butter makers have the choice of either hiring a Wisconsin-licensed butter grader on staff to grade its butter at its facilities, or having its butter graded by the USDA. Out-of-state butter makers, however, may not hire a Wisconsin-licensed butter grader to grade their butter at their facilities. They only have the option of having their butter graded at their facilities by the USDA. SOPF ¶ 8.

C. Immediate Harm to Plaintiffs

On February 7, 2017, Adam Mueller received an email from Peter J. Haase, Bureau Director, Division of Food and Recreational Safety within the Wisconsin Department of Agriculture, Trade and Consumer Protection. SOPF ¶ 10; Mueller Dec. ¶ 17. Mr. Haase explained that he would be

sending a formal letter from our department issueing [sic] a cease and desist the sale of ungrade [sic] butter at the retail level in the state of Wisconsin. If further regulatory action is warranted, we will not hesitate to move forward. It is in your company's best interest to have any and all ungraded butter removed from retail sale in Wisconsin retail outlets immediately.

Mueller Dec. Exh. 1. On February 28, 2017, Cathy Klecker, a regulatory specialist from Wisconsin's Division of Food and Safety, sent Minerva Dairy a "Warning Letter" stating that the "Wisconsin Department of Agriculture, Trade and Consumer Protection [Division] received an anonymous complaint about ungraded butter being sold" in Lake Geneva, Wisconsin. SOPF ¶ 12; Mueller Dec. ¶ 18; Mueller Dec. Exh. 2. The letter stated that sale of Minerva Dairy's Amish butter was "found in violation of § 97.176 Wisconsin Statutes, and § ATCP 85.06, Wisconsin Administrative Code, relating to butter grading and labeling." Mueller Dec. Exh. 2. Because of these communications, Plaintiffs have ceased all retail sales of Minerva Dairy butter in Wisconsin, and therefore request immediate relief in this Court. SOPF ¶ 14; Mueller Dec. ¶ 19.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

To prevail on a motion for preliminary injunction, the movant must show that (1) he will suffer irreparable harm before the final resolution of his claims; (2) available remedies at law are inadequate; and (3) he has a likelihood of success on the merits. *See BBL, Inc. v. City of Angola*, 809 F.3d 317, 323-24 (7th Cir. 2015). Because the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits, and due to the urgency of preserving those positions, a party is not required to prove his case in full. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Instead, a party need only show "some likelihood" of ultimate success. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 896 (7th Cir. 2001).

If the moving party makes this initial showing, the court then "weighs the competing harms to the parties if an injunction is granted or denied," "considers the public interest," and employs a

“sliding scale analysis.” *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013). The greater the likelihood of success on the merits, the less the balance of harms must tip in the moving party’s favor. *Id.*

All of these factors weigh in favor of issuing the injunction.

ARGUMENT

I

MINERVA DAIRY IS LIKELY TO PREVAIL ON ITS DORMANT COMMERCE CLAUSE CLAIM

Wisconsin’s artisanal butter ban is a classic example of a law prohibited by the dormant Commerce Clause. Wisconsin is insulating local butter makers from competition from outside of the state. Yet the Commerce Clause promises out-of-state butter makers that “every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no . . . state will by customs duties or regulation exclude them.” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949). Wisconsin’s statutory scheme is an affront to this principle because it prevents out-of-state small butter craftsmen, like Minerva Dairy, from participating in the Wisconsin butter market.

Laws that discriminate against interstate commerce must be struck down unless the state can demonstrate that the statute serves a legitimate local purpose that could not be served as well by nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). In addition, laws that do not discriminate, but unduly burden interstate commerce, will be struck down if the burden imposed is clearly excessive in relation to any legitimate local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The artisanal butter ban is unconstitutional under either test.

The artisanal butter ban discriminates against out-of-state residents. While Wisconsin-based butter makers can hire a Wisconsin-licensed grader to be on their staff, or to grade their

butter on-site, out-of-state butter makers only have the option of having their butter graded by the USDA—the far costlier and more burdensome option. SOPF ¶¶ 8-9. Moreover, the grading requirement unduly burdens the interstate market for butter by adding an unreasonable and irrational prerequisite to selling butter in Wisconsin. Yet the grading requirement serves no legitimate purpose and exists solely to protect Wisconsin butter makers from out-of-state competition. It therefore violates the dormant Commerce Clause. *See, e.g., Granholm v. Heald*, 544 U.S. 460 (2005) (wine permit law violated dormant Commerce Clause where out-of-state wineries were subject to additional burden not applicable to in-state wineries); *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir. 1976) (Chicago’s milk inspection requirement was undue burden on commerce and created additional cost that did not further any health or safety objective). Minerva Dairy is likely to prevail under either theory.

A. Wisconsin’s Grading Requirement Violates the Dormant Commerce Clause Because It Impermissibly Discriminates Against Out-Of-State Butter Makers

1. Because the Wisconsin Grading Requirement Discriminates Against Out-Of-State Butter Makers, It Is Subject to a Virtually Per Se Rule of Invalidity

Laws that discriminate against out-of-state businesses are subject to a virtually per se rule of invalidity. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Even facially neutral laws are subject to this rigorous test if they discriminate against out-of-state businesses in their effects. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980) (court should look to the “probable effect” to determine whether a law is discriminatory). Moreover, a law is discriminatory even if it burdens both in-state and out-of-state businesses, if it creates a benefit only available to in-state businesses. *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 n.4 (1951).

Here, Wisconsin’s grading requirement discriminates against out-of-state butter makers like Minerva Dairy by offering a unique advantage to in-state butter makers. Out-of-state butter

makers must have their butter graded by the USDA. Wisconsin-based butter makers, however, can either have their butter graded by the USDA, or by a Wisconsin-licensed butter grader. SOPF ¶ 8. The latter method—by a Wisconsin-licensed grader—is far less costly and far less burdensome. *Id.* ¶ 9.

USDA-grading requires butter makers to first become plant-approved through USDA site inspections. 7 C.F.R. § 58.122(a). “Plant approval is determined by unannounced inspections covering more than 100 items, including milk supply, plant facilities, condition of equipment, sanitary practices, and processing procedures. United States Department of Agriculture: Agriculture Marketing Service, *supra*.¹ Wisconsin grading has no such equivalent.² In addition, the actual USDA grading process itself is more costly. USDA graders are federal employees that work for a predetermined hourly rate. 7 C.F.R. § 58.38; 81 Fed. Reg. 27,387-01 (May 9, 2016). Wisconsin-licensed graders are private citizens, who can be hired to work on staff. *See* Wisconsin Department of Agriculture, Trade and Consumer Protection, *Butter Grading and Labeling*³ (“To acquire a [butter grader] license, an individual must take and pass an exam administered by the Department.”). Indeed, if Minerva Dairy were based in Wisconsin, Mueller could even go get a grading license himself, grade his own butter, and pay himself nothing except the fee for getting licensed. But because Minerva Dairy is based outside of the state, its only choice is to submit to USDA inspections and hire a USDA grader at the pre-set price and pay for her travel expenses to

¹ <https://apps.ams.usda.gov/dairy/ApprovedPlantList/>

² This undercuts any claim that the artisanal butter ban is protecting Wisconsin consumers. Minerva Dairy, because it is *eligible* to have its butter graded, is subject to unannounced inspections of its butter-making facilities—inspections that cover more than 100 items. Yet Minerva Dairy cannot sell its butter in Wisconsin. In contrast, Wisconsin butter makers need not have their plants so rigorously inspected in order to sell butter within the state, so long as the butter satisfies the government taste testers’ palate.

³ https://datcp.wi.gov/Pages/Programs_Services/fsbutter.aspx

Minerva, Ohio. SOPF ¶ 8; Mueller Dec. ¶ 10. And Mueller would need to do that each time he suspected a batch of butter might ultimately be sold in Wisconsin. SOPF ¶ 9; Mueller Dec. ¶ 9.

In *Dean Milk Co.*, the Supreme Court deemed a Wisconsin law discriminatory that banned the sale of any pasteurized milk not bottled within five miles of Madison. The Court held that it was “immaterial” that even some Wisconsin milk from outside the Madison area would be subjected to the same burden as milk producers from out-of-state, because all of those benefitted were located in the state. 340 U.S. at 354 n.4. The effect of the law was to “erect[] an economic barrier protecting a major local industry against competition from without the State,” which “plainly discriminate[d] against interstate commerce.” *Id.*

Wisconsin’s butter grading requirement is no different. While it is true that Wisconsin butter makers must also have their butter graded to be sold within Wisconsin, they, unlike Minerva Dairy, do not need to pay the travel costs of a USDA official stationed in Chicago to comply. SOPF ¶ 9; Mueller Dec. ¶ 10. Nor do Wisconsin butter makers need to predetermine which batches are going to be Wisconsin-specific, unlike Minerva Dairy. SOPF ¶ 9; Mueller Dec. ¶ 9. No state in the union prohibits a Wisconsin-grade label on butter, so Wisconsin butter makers need only produce one label for all butter produced in the state. Not so for Minerva Dairy. In order to sell its butter nationwide, it must produce a nationwide label, and a Wisconsin-specific label. SOPF ¶ 9; Mueller Dec. ¶ 11. All of these costs are imposed on Minerva Dairy simply because it is located outside of Wisconsin. Wisconsin has erected an economic barrier that benefits Wisconsin butter makers and only Wisconsin butter makers. *Dean Milk*, 340 U.S. at 354.

One indication of whether a law is discriminatory is whether it “reallocate[s] commerce among local and out-of-state firms.” *GoodCat, LLC v. Cook*, 202 F. Supp. 3d 896, 916 (S.D. Ind. 2016). In *GoodCat*, a company that made e-liquids for vaping devices alleged that a facially neutral

permit requirement placed a disproportionate burden on out-of-state businesses. The State of Indiana argued that the law was not discriminatory because out-of-state businesses were still able to engage in interstate commerce; in fact, a third of the manufacturers that held permits were from out-of-state. *Id.* at 916-17. Nonetheless, the court noted that prior to the enactment of the law, there had been far more out-of-state e-liquid firms that operated in the state than they did after the law was passed. *Id.* It held that this reallocation of the market share from out-of-state to in-state firms was strong evidence of discrimination, and granted a preliminary injunction on that basis. *Id.*

Similarly, here, the only parties that the artisanal butter ban advantages are the in-state butter makers who have the choice to use Wisconsin-licensed graders. This is an impressive benefit for in-state butter makers, and is demonstrated by the fact that, while there are fourteen butter manufacturers located in Wisconsin, only four are even *eligible* to be graded by the USDA. Compare Wisconsin Department of Agriculture, Trade and Consumer Protection: Division of Food and Recreational Safety, *Wisconsin Dairy Plant Directory 2016-2017* (Oct. 2016),⁴ with United States Department of Agriculture: Agriculture Marketing Service, *supra*.⁵ Of those four, only one uses the resident grading program of the USDA. *Id.* And even the lone Wisconsin butter maker that uses the USDA resident grading service, Grassland Dairy Products, still chooses to grade the vast majority of its butter using Wisconsin graders. See Grassland Dairy Products, Inc., *Products: Butter*.⁶

There can be little doubt that the artisanal butter ban discriminates against out-of-state butter makers. The only businesses that benefit from the program are Wisconsin businesses. And even those businesses that have the option of using the USDA grading service choose

⁴ <https://datcp.wi.gov/Documents/DairyPlantDirectory.pdf>

⁵ <https://apps.ams.usda.gov/dairy/ApprovedPlantList/>

⁶ <http://www.grassland.com/Butter.php>

overwhelmingly to use the low-cost, and seamless, Wisconsin service. The grading requirement has placed an economic barrier around the state, which has forced out-of-state butter makers out of the Wisconsin marketplace. Since Wisconsin began enforcing the grading requirement, at least two out-of-state butter makers have ceased selling butter.⁷ Commerce in Wisconsin has been “reallocat[ed]” among “local and out-of-state firms.” *GoodCat*, 202 F. Supp. 3d at 916.

2. Because Wisconsin Cannot Meet Its High Burden of Showing That There Are No Nondiscriminatory Means of Serving a Legitimate Governmental Interest, the Butter Grading Ban Violates the Dormant Commerce Clause

Laws that discriminate against interstate commerce—or against out-of-state providers of intrastate services—are subject to a “virtually per se rule of invalidity,” and will only be upheld if the state can show that it has no other nondiscriminatory means of serving a legitimate purpose. *See, e.g., Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392 (1994). The state’s justification of the law invokes “the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Under this rigorous test, the “State’s burden of justification is so heavy that facial discrimination by itself may be a fatal defect.” *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003) (quoting *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality of the State of Oregon*, 511 U.S. 93, 100 (1994)). Wisconsin’s butter grading law neither advances a legitimate state purpose, nor is it the least

⁷ Kerrygold’s newest lawsuit reveals the protectionist nature of the butter grading requirement. Once Kerrygold stopped shipping to Wisconsin, it became apparent that the only way for it to continue selling its butter would be to contract with a local butter maker in Wisconsin, who could have the butter inspected on-site by a Wisconsin licensed grader. But soon after entering into negotiations, the local butter maker broke off negotiations and started their own “Irishgold” brand of butter, trying to profit on Kerrygold’s popularity. Unsurprisingly, Kerrygold filed a trademark infringement lawsuit shortly thereafter. *See Oruna Foods North America, Inc. v. Eurogold USA, LLC*, No. 2:17-cv-00510-JPS (E.D. Wis. filed Apr. 10, 2017) (complaint filed).

discriminatory means of achieving a legitimate state purpose. As to the former, the artisanal butter ban fails because its purpose is an illegitimate one: simple economic protectionism.⁸ As to the latter, even assuming that Wisconsin's law serves a legitimate state purpose, there are significantly less discriminatory means to achieve that purpose.

In *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court struck down a law that allowed out-of-state wineries to make direct sales to consumers in New York only if they jumped through an additional hoop not applicable to in-state wineries. Whereas in-state wineries automatically qualified for a license to make direct shipments to consumers, out-of-state wineries were forced to establish a branch factory, office, or storeroom within the state in order to make the same shipments. *Id.* at 470. For most out-of-state wineries, such an expense was cost-prohibitive, and amounted to an outright ban on direct shipments to consumers. *Id.* at 475.

New York argued that the law helped keep alcohol from minors and facilitated tax collection, but the Court found little evidence for those "sweeping assertions." *Id.* at 492. Instead, the Court determined that the law existed solely to give in-state wineries access to the state's consumers on advantageous terms. Such a law threatened to create a "low-level trade war" that would undermine the free flow of commodities across state lines, *id.* at 473, and was therefore unconstitutional. *Id.* at 493.

As in those cases, the ban on ungraded butter imposes an additional burden on out-of-state butter makers, and exists solely to give Wisconsin butter makers access to the Wisconsin consumers on advantageous terms. Butter grading has nothing to do with the health or safety of

⁸ As discussed above, the statute does not serve any legitimate governmental interest in protecting health and safety. When this is so, courts do not hesitate to establish that the government's real interest is protecting powerful in-state political interests. *See Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002).

butter; it is essentially a government mandated taste test that requires all butter to conform to the same, uniform taste. Wisconsin consumers are undoubtedly capable of deciding for themselves whether perfectly safe butter tastes “highly pleasing,” “pleasing,” or “fairly pleasing,” Wis. Admin. Code § 85.03, and Wisconsin does not have the legitimate governmental authority to restrict interstate commerce to make that decision in consumers’ stead. Importantly, no other state imposes such a requirement. Even under the USDA, grading is an optional practice explicitly run by the Department’s *marketing* arm. *See* 7 C.F.R. § 58.122. Given that the law disproportionately burdens out-of-state sellers, yet provides no legitimate governmental benefit, Plaintiffs are likely to prevail on their claim that the artisanal butter ban violates the dormant Commerce Clause.

Even assuming that the artisanal butter ban serves a legitimate state interest—which it does not—there are certainly less discriminatory means of achieving that interest. Forty-nine other state governments as well as the United States government have managed to protect their citizens from unsafe butter without resorting to a state-mandated taste test. Even Wisconsin, until recently, never enforced its artisanal butter ban. Ungraded butters, like Minerva Dairy butter, have, for decades, been sold in Wisconsin. Mueller Dec. ¶ 16. There is simply no evidence that the ban is needed to protect Wisconsin consumers—if it were otherwise, Wisconsin would have been enforcing it long ago.

B. Wisconsin’s Grading Requirement Also Fails Under *Pike*, Because It Unduly Burdens Interstate Commerce

Even if the artisanal butter ban were not discriminatory, it would violate the dormant Commerce Clause because it unduly burdens interstate commerce. Any law that burdens interstate commerce must be struck down if the “burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In *Dixie Dairy Co. v. City of Chicago*, 538 F.2d 1303 (7th Cir. 1976), the Seventh Circuit struck down under the *Pike* balancing test a law that required milk processors to obtain a permit and submit to inspections before selling milk in Chicago. The court found that the law imposed a substantial burden on interstate commerce because it subjected milk processors to a duplicative inspection requirement that often caused them to forgo a license and selling milk in the city. That burden was not outweighed by any local benefits because health and safety standards already assured that Dixie’s milk was wholesome, and the City could introduce no evidence showing that those standards were inadequate. *Id.* at 1310. Thus, even though the ordinance was designed to protect health and safety, it had “no appreciable effect in promoting that interest.” *Id.*

Here, Plaintiffs allege that the grading requirement would subject them to substantial costs, and they have therefore ceased selling butter in Wisconsin. SOPF ¶¶ 9, 14; Mueller Dec. ¶¶ 12, 19. Yet the law has no appreciate effect on promoting public health or safety. As in *Dixie Dairy*, Minerva Dairy already submits itself to biannual USDA inspections, and complies with all applicable Ohio regulations over butter producers, both of which ensure that their butter is safe to ship across state lines. SOPF ¶ 6. The law therefore produces no benefit, save for the illegitimate benefit of protecting in-state butter makers from competition by out-of-state butter makers. That is exactly what the dormant Commerce Clause prohibits.

II
MINERVA DAIRY IS NOW SUFFERING AND WILL
CONTINUE TO SUFFER IRREPARABLE HARM IF THE
INJUNCTION IS DENIED, FOR WHICH IT HAS NO ADEQUATE REMEDY

If the Court does not issue a preliminary injunction, Minerva Dairy will suffer irreparable harm. First, it will suffer lost profits as a result of its inability to ship butter to Wisconsin. Mueller Dec. ¶ 20. That harm is irreparable, because sovereign immunity precludes Minerva Dairy from ever receiving monetary relief from Defendants. *See GoodCat*, 202 F. Supp. 3d at 918 (plaintiff

will suffer irreparable harm because it would “incur lost profits and have no way to recover” due to sovereign immunity).

Moreover, a reasonable likelihood of a constitutional violation itself is irreparable harm for purposes of injunctive relief. *Id.*; see also *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (same); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014) (same, quoting several federal cases). Plaintiffs have therefore shown that continued enforcement of the artisanal butter ban will cause irreparable harm.

III GRANTING TEMPORARY EQUITABLE RELIEF WOULD NOT HARM OTHERS AND WOULD SERVE THE PUBLIC INTEREST

The balance of equities favors granting the injunction. So long as Wisconsin continues enforcing the grading requirement, Plaintiffs will suffer irreparable harm. Minerva Dairy will continue to lose profits, Mueller Dec. ¶ 20, and its constitutional rights will continue to be violated. Yet permitting Minerva Dairy to sell its butter without having it graded would not harm the public. Butter grading is unrelated to safety or quality, and in any event, Plaintiffs already submit to inspections and health and safety regulations by the USDA and the Ohio Department of Agriculture’s Dairy Division. SOPF ¶ 6; Mueller Dec. ¶ 14. Moreover, even if the injunction were granted, the state would maintain its ability to enforce *actual* safety regulations—it would merely lose the ability to enforce its government-mandated taste test.

Granting the injunction would promote the public interest by stopping what is likely to be held a violation of Plaintiffs’ constitutional rights, and by allowing the free flow of butter across state lines for Wisconsin consumers to enjoy. An injunction would also ensure that Minerva Dairy has a full and fair opportunity to seek resolution of its claims.

IV
THE BOND REQUIREMENT SHOULD BE
WAIVED OR SET AT A NOMINAL AMOUNT

While Federal Rule of Civil Procedure 65 may impose a bond requirement, the decision of whether to require security rests within the discretion of the district court, and failure to require security is not reversible error. *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972). In constitutional cases, the bond requirement can “condition the exercise of plaintiffs’ constitutional rights upon their financial status.” *Smith v. Bd. of Election Comm’rs for City of Chicago*, 591 F. Supp. 70, 72 (N.D. Ill. 1984). For this reason, where “there’s no danger that the opposing party will incur any damages from the injunction,” courts have routinely waived the bond requirement, particularly in public interest cases. *See, e.g., Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010); *Smith v. Bd. of Election Comm’rs for City of Chicago*, 591 F. Supp. 70, 71-72 (N.D. Ill. 1984).

Plaintiffs are civil rights plaintiffs represented free of charge by Pacific Legal Foundation, a 501(c)(3) nonprofit legal foundation, and they bring this case pursuant to Section 1983. Given the public interest nature of the lawsuit, the unlikelihood of harm if the butter ban is enjoined, and

the fact that the issue may be resolved through prompt appellate review, Plaintiffs respectfully request that the Court waive the bond requirement.

DATED: June 7, 2017.

Respectfully submitted:

/s/Joshua P. Thompson

JOSHUA P. THOMPSON

ANASTASIA P. BODEN

WENCONG FA

Attorneys for Plaintiffs

Pacific Legal Foundation

930 G Street

Sacramento, CA 95814

Telephone: (916) 419-7111

E-mail: JThompson@pacificlegal.org

E-mail: apb@pacificlegal.org

E-mail: WFa@pacificlegal.org