

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.

**BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Adam Mueller is the owner of Minerva Dairy, America’s oldest family-owned cheese and butter dairy. Statement of Proposed Facts (SOPF) ¶ 1. Minerva Dairy¹ produces several artisanal butters that are enjoyed by consumers across the country. *Id.* ¶¶ 3, 6. Unlike large “commodity” butters, Minerva Dairy butter is made in small, slow-churned batches in the Amish style—resulting in a rich, creamy texture. *Id.* ¶ 4. Minerva Dairy butter is perfectly safe for consumption. The dairy complies with all health and safety regulations applicable in Ohio, where it is located, and submits to regular inspections by the United States Department of Agriculture (USDA). *Id.* ¶ 5. But because Minerva does not segment out the batches of butter to be sold in Wisconsin, subject those batches to a government mandated taste test, and stamp those packages with a Wisconsin-specific label, Minerva Dairy is barred from selling butter in that state. Wis. Stat. § 97.176 (Wisconsin’s butter grading requirement). This effectively cuts Minerva Dairy off from the Wisconsin market for no other reason than economic protectionism for large, and primarily Wisconsin-based, dairies. Minerva Dairy brought this suit to vindicate its constitutional rights under the dormant Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Wisconsin is one of the only states in the nation that prohibits the sale of ungraded butter. Its butter grading statute dates back to the 1950s, when it was supported by large, in-state buttermakers. Wis. Stat. § 97.176. Historically, the Department of Agriculture, Trade, and Consumer Protection² (DATCP) enforced the grading requirement in a discriminatory manner. SOPF ¶¶ 28, 29. While in-state butter makers were permitted to have their butter graded by the

¹ Plaintiffs are collectively referred to as “Minerva Dairy.”

² Defendants are sued in their official capacity pursuant to *Ex parte Young*, 209 U.S. 123 (1908), but for ease of reference, they are referred to herein as the Department of Agriculture, Trade, and Consumer Protection (DATCP) or “Department.”

USDA or a Wisconsin-licensed butter grader, out-of-state butter makers were only permitted to have their butter graded by the USDA—the far costlier option. *Id.* Since the initiation of this lawsuit, the Department has ceased that discriminatory practice. *Id.* But given that the Department may change its policy at any time,³ Minerva is entitled to a declaratory judgment that the previous policy violates the dormant Commerce Clause.

The current policy, too, violates the dormant Commerce Clause because it imposes serious burdens on interstate commerce without providing any legitimate local benefits. Wisconsin speculates that the butter grading requirement informs consumers about the product they are purchasing and/or that the requirement works to prevent deceptive marketing. But the State has no evidence that the butter grading law furthers either purpose. Instead all the evidence demonstrates that the butter grading law provides effectively no information to consumers, and that butter grades are themselves highly deceptive—or at best, unintelligible. Thus, not only does the state lack evidence about the benefits of its law, but the benefits it claims are illusory. In contrast, Wisconsin's butter grading law imposes significant costs on interstate commerce. It eviscerates the brand equity of artisanal butter makers, requires them to spend thousands of dollars to comply, and necessitates an upending of long-standing and cost-effective business practices.

The butter grading requirement also violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, because it irrationally burdens Minerva's right to earn a living and arbitrarily discriminates against ungraded butter. Ungraded butter is safe for consumption, and the

³ According to Peter Haase, the Department's Person Most Knowledgeable with respect to the grading requirement's enforcement, the Department's interpretation of the butter grading law is that it neither requires nor prohibits the Department from prohibiting out-of-state residents from obtaining a Wisconsin butter grading license. *See* Depo. of Peter Haase (Haase Depo.) at 28:11-29:6. This means the Department still considers it within its authority to change its policy and prohibit out-of-state graders from obtaining a Wisconsin license in the future.

Department does not argue that the butter grading requirement is related to protecting public health or safety. Instead, it claims that butter makers cannot sell perfectly healthful butter in the state without first having it graded because grading gives consumers information about the butter, and the sale of ungraded butter might otherwise be deceptive.

There is simply no evidence to support the Department's claims, and the Department does not even try to produce any. All evidence demonstrates that even the most sophisticated Wisconsin consumers understand very little about butter grading, and butter grading provides very little—mostly misleading—information anyway. Instead, the butter grading law acts as an anti-competitive and unconstitutional barrier to earning a living in Wisconsin.

No material facts are in dispute. Because those facts demonstrate that Minerva Dairy is entitled to judgment as a matter of law, Plaintiffs respectfully request that this Court grant summary judgment in their favor.

STANDARD OF REVIEW

Summary judgment must be granted if “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In order to show a dispute of material fact, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts,” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The “mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Instead, the nonmoving party must show that the dispute is material. Here, Minerva Dairy is entitled to judgment as a matter of law because the undisputed facts demonstrate that Wisconsin's

butter grading requirement, which denies Minerva the ability to participate in the Wisconsin butter market, violates the dormant Commerce Clause and the Fourteenth Amendment of the U.S. Constitution.

ARGUMENT

I WISCONSIN'S BUTTER GRADING REQUIREMENT VIOLATES THE DORMANT COMMERCE CLAUSE

Wisconsin's butter grading law violates the dormant Commerce Clause because it unduly burdens interstate commerce. The dormant Commerce Clause prevents states from enacting any law if the burden imposed on commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike* balancing, this Court must closely scrutinize the evidence the Department proffers to justify the butter grading requirement, and balance the weight of that evidence against the costs the law imposes on artisanal butter makers like Minerva Dairy. "The inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). This is not a rubber stamping exercise; the Department must prove that requiring butter to be graded before butter makers may enter the Wisconsin market produces real public benefits. "The *Pike* test thus requires a state agency to mobilize personnel, resources, and evidence to justify its policies, and often to do so where good evidence may be hard to come by." *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 469 (7th Cir. 2012) (Hamilton, J., concurring).

This is not a close case. The justification the Department offers for the butter grading requirement would be legally insufficient even if it could marshal evidence that the law actually furthers its purported justification. But it cannot provide *any* evidence that the butter grading law

provides the local benefits it claims. In contrast, the costs imposed on interstate commerce are significant. Wisconsin's butter grading requirement thus violates the dormant Commerce Clause.

A. Wisconsin Has Failed to Prove that Its Butter Grading Requirement Provides Real Benefits to the Public

1. The Department Has Not Produced Any Evidence that the Butter Grading Law Benefits the Public

In discovery, the Department identified what it considers the primary "local benefit" that its butter grading law serves. According to the state, "The primary benefit of having a butter grading and labeling requirement is for consumer protection and to prevent deceptive advertising of products sold for human consumption." Depo. of Steven Ingham (Ingham Depo.) Ex. 1 at 3.⁴ When asked to provide evidence that the law furthers that purpose, the Department answered that it "believe[s]" the benefits are there, but that it is "unaware" of any actual evidence. *Id.* at 4. This is legally insufficient to justify the law. "Speculation is not enough to show real benefits to weigh against the burdens on Commerce Clause plaintiffs." *Lebamoff*, 666 F.3d at 469 (Hamilton, J., concurring). The Department cannot show that a single consumer has *ever been misled* by purchasing ungraded butter. It cannot show that a Wisconsin consumer *has ever been deceived* by the purchase of ungraded butter. This despite the fact that Minerva Dairy and other ungraded butters have been selling their product in Wisconsin for decades.⁵ SOPF ¶ 7.

The secondary benefits the Department identifies as served by the butter grading law fare no better. It speculates that the mandatory butter grading requirement benefits consumers because

⁴ All citations to deposition transcripts are from the depositions of the people designated as the Department's Persons Most Knowledgeable under Fed. R. Civ. P. 30(b)(6) and their answers must be taken as the answers of the Department.

⁵ The enforcement of the butter grading law has been so haphazard and slipshod over the years that artisanal butter makers have been selling their product in Wisconsin unaware that Wisconsin had a butter grading mandate. SOPF ¶ 7; *see also* Depo. of Michael Pederson (Pederson Depo.) at 61:24-62:2.

it is “consistent” with the USDA’s *voluntary* butter grading standards. Ingham Depo. Ex. 1 at 3. The Department fails to explain how consistency with a voluntary marketing scheme benefits its citizens, but, regardless, it is “unaware” of any evidence that supports the argument that “consistency” is beneficial to the public. Lastly, the Department claims the law “supports local businesses and encourage [sic] business growth.” *Id.* It is again “unaware” of any evidence supporting this claim, Ingham Depo. Ex. 1 at 4, and at deposition, its Person Most Knowledgeable about the justifications for the law could not explain what that meant. Ingham Depo. 37:3-5 (Q: [The interrogatory answer] says that butter grading encourages business growth. Can you explain how that’s so? A: I could not do that justice. No.”).

In *Raymond Motor Transp., Inc. v. Rice*, the Supreme Court held that Wisconsin’s decision to “virtually default[]” on providing any evidence that a challenged traffic law produced local benefits was determinative in a *Pike* inquiry. 434 U.S. at 444. “The State of Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety.” *Id.* at 448-49. The same is true here. The Department has failed to produce any evidence that demonstrates real “putative local benefits” from the butter grading law. The Court should hold that the butter grading requirement violates the dormant Commerce Clause.

2. The Butter Grading Mandate Provides No Public Benefit

Because the Department disavows any health and safety rationale for the butter grading law, this is not a case where the Court should be cautious in scrutinizing the purported benefits of the law. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (plurality opinion) (“[R]egulations that touch upon safety . . . are those that “the Court has been most

reluctant to invalidate.”).⁶ A state’s interest in providing information, or preventing deception, must be scrutinized more closely than a public safety rationale. “A State’s interest in its commercial reputation or in preventing consumer deception will not always outweigh the national interest in the free flow of commerce under the *Pike* test.” *Gov’t Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1286 (7th Cir. 1992); *see also Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 663 (7th Cir. 1995) (invalidating a Wisconsin regulation under *Pike* that purported to further Wisconsin’s “sound . . . environmental policy”). Aside from lacking an evidentiary basis, the rationales the Department offers for the butter grading law fall apart even upon a cursory examination.

a. No Consumer Understands What a Butter Grade Is Intended to Convey

In order for the butter grading law to actually protect consumers,⁷ consumers would need to have at least some minimal knowledge about what a butter grade means. They do not, and the State does not even contend that consumers know what a butter grade means. *See, e.g., Ingham Depo.* at 44:21-22 (“I would say the Department is ignorant of whether consumers know that.”).

The characteristics Wisconsin taste testers consider when determining a particular butter’s grade are so obscure that they cannot reasonably be expected to be understood by the Wisconsin

⁶ Even where a regulation touches on health and safety, the *Kassel* Court recognized that “the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.” 450 U.S. at 670.

⁷ When the government argues that the butter grading requirement “protects consumers,” it does not argue that ungraded butter is unsafe, or that graded butter makes the butter more fit for consumption. Instead, the State only argues that the information conveyed by a grade label is intrinsically helpful to consumers. *See Ingham Depo. Ex. 1* at 3-4; *Haase Depo.* at 16:21-17:1 (“Q: In your position, do you believe the consumption of ungraded butter poses a health risk? . . . A: No, I do not.”).

consumer. If a diligent Wisconsin consumer sought to discover why a favorite butter received a grade of B, looking at a butter grader's score sheet would be no help. Butter grading characteristics like "mealy," "mottled," and "weed" are so technical, subjective, and obscure that the grade label effectively communicates no information.

Indeed, even the individuals designated as the *persons most knowledgeable* about the purpose of the grading requirement and the enforcement of the grading requirement were unable to say what various butter characteristics mean. Steve Ingham, the Administrator of the Department's Division of Food and Recreational Safety, could not describe the meaning of the terms "stale," "smothered," "ragged boring," or "utensil." Ingham Depo. at 44:7-47:4. Peter Haase, the Director of the Department's Bureau of Food and Recreational Businesses and the man designated as the Department's Person Most Knowledgeable about the enforcement of the statute, could not describe the meaning of "ragged boring" or "flat." Haase Depo. at 14:13-15:1.

Mr. Ingham holds a Ph.D in food science from Cornell University, and yet was unable to provide a definition of these terms. Both he and Mr. Haase have been dealing with the butter grading law for years; they were designated as the Persons Most Knowledgeable about the law by the Department. Yet, even they don't know what the grading characteristics mean. No consumer does either.

b. Consumers Have Different Tastes

Under Wisconsin law, "butter" must be a "clean, nonrancid product made by gathering in any manner the fat of fresh or ripened cow's milk or cream into a mass, which also contains a small portion of the other milk constituents, with or without salt or added coloring matter, and contains not less than 80% of milk fat." Wis. Stat. § 97.01. No one is challenging this definition, and there is no dispute that Minerva Dairy sells "butter" consistent with Wisconsin's standard of

identity. The butter grading requirement, however, mandates that in addition to being butter, Minerva Dairy butter must be graded according to a particular flavor profile provided by the Department. That does not provide a public benefit; it clearly hinders the public's ability to choose among a variety of delicious and healthful butters legally sold nationwide.

Worse than hindering Wisconsinites' choices, the "proper" taste is highly subjective and varies from grader to grader. The Department admits consumers' preferences may differ from the Department's. Ingham Depo. at 22:13-15. The Department's professional butter graders—who have been tasting butter for decades—differ on the presence or absence of butter characteristics. SOPF ¶ 19. To become licensed to be a Wisconsin butter grader, an applicant need only score 70% on the Department's written examination, meaning that they *regularly* misidentify butter characteristics. SOPF ¶ 35. Yet, despite being "right" fewer than 3 out of 4 times, these individuals can determine whether butter conforms to the standards of the Department, and have the authority to affix the label they determine based on their own particular palate. Indeed, the evidence shows licensed graders do sometimes disagree. SOPF ¶ 19. The Department has discovered butter that it considered not properly graded, and has an entire adjudication procedure set up for such events. SOPF ¶ 19. Thus, when Wisconsin consumers purchase Grade A butter—assuming they understand what that grade is *intended* to convey—they have no assurance that the particular grader is also intending to convey that.

c. Butter Grades Do Not Convey Any Real Information

The butter grades—AA, A, B, and undergrade—are composite scores that are respectively supposed to denote whether the butter is "highly pleasing," "pleasing," "fairly pleasing," or something else for undergrade. These are mere taste determinations, not health and safety considerations. Wis. Admin. Code § 85.03. But because the "pleasing spectrum" is based on a

composite of 31 distinct criteria, whatever “pleasing” grade a particular butter receives effectively communicates no information at all.

For example, a butter with Wisconsin grade A, may or may not have an “acid” flavor. It may or may not have an “aged,” “bitter,” “coarse,” “flat,” “smothered,” or “storage” flavor. It may or may not have a combination of those flavors. Wis. Admin. Code § 85.03. It may or may not be “crumbly,” “gummy,” “leaky,” “mealy,” “grainy,” “short,” or “weak.” Wis. Admin. Code § 85.05. It could have any two of those body characteristics and still receive an A grade, or it could have none at all. It could have a “wavy,” “speckled,” or “streaked” color or none of those characteristics. And it could have a “gritty” or “sharp” salt presence. *Id.* The mathematical combinations of defects that could still result in a butter receiving an A grade are prodigious, and the combination that could lead to a B grade are exponentially higher. Thus, a consumer has *no idea* what combination of defect led to a particular butter grade when she sees that label on the package.

A butter maker may even voluntarily choose to put an A grade on AA butter. Pederson Depo. at 41:2-10. So even if the butter grader was perfect, had an identical palate as the consumer, the consumer knew what each characteristic meant, and the butter was scored accurately, the consumer could still not be sure that the butter grade matched the actual score of the butter.

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 an ordinance that was designed to protect health and safety, because it had “no appreciable effect in promoting that interest.” *Id.* Similarly here, by looking at the Wisconsin grade label, the Wisconsin consumer has absolutely no idea which characteristics are present in her butter. All she knows—all she is supposed to know—is that based on a particular Wisconsin grader’s palate, and when evaluated based on 31 criteria, the taste tester

felt that the butter was somewhere on the “pleasing” spectrum. Then again, it may not even be correctly labeled on the pleasing spectrum.

d. The Discriminatory Benefit Mentioned by the Department Should Be Rejected Out-of-Hand

As a secondary benefit to the butter grading law, the Department mentions in passing that the requirement “supports local businesses.” Ingham Depo. Ex. 1 at 3. Prior to April, 2017, it was probably true that the butter grading law helped local businesses, because it overtly discriminated against out-of-state businesses. As explained below, it was this lawsuit that forced Wisconsin to abandon its discriminatory practice of only allowing Wisconsin-licensed butter graders to work in Wisconsin. *See infra* Part I.C. But an avowedly discriminatory rationale cannot save the butter grading law even if Wisconsin had the evidence to prove it. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (laws that discriminate in favor of local business are virtually per se unconstitutional); *see also Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 352-53 (1977) (facially neutral laws are still discriminatory if their purpose and effect is to favor local businesses).

B. The Wisconsin Butter Grading Law Imposes Real Costs on Interstate Commerce

The government has produced no evidence on the benefits of its butter grading requirement, and the benefits it speculates about simply fail upon closer inspection. Conversely, the burdens the butter grading law imposes on the interstate market for artisanal butter are significant and burdensome.

1. Butter Grading Significantly Undercuts the Brand Equity of Artisanal Butter Makers

For over 100 years, Minerva Dairy has been producing an artisanal butter produced in the Amish style. SOPF ¶¶ 2, 4. Its butter is slow-churned and made in small batches. SOPF ¶ 4. Its

product tastes unique. It is supposed to taste unique. And Minerva Dairy and the other artisanal butter makers across the country bank on their unique tasting butter to drive the sale of their product. Their unique taste is their brand. If, in order to avail themselves of the Wisconsin market, they must identify their butter as tasting *exactly like* all the commodity butters sold in Wisconsin, their national brand is irreparably damaged.

The damage that labeling their product would cause could have ripple effects throughout the nation. The State here even suggested that in order to minimize costs of complying with their butter grading, Minerva Dairy could label all the butter they sell nationwide with a Wisconsin label. Opposition to Mtn. for Preliminary Injunction at 10-11. Nothing would destroy the artisanal butter maker quicker.

Amish-churned butter takes longer to produce than commodity butters. SOPF ¶ 4. It costs more to do so, but the product tastes better. Consumers of artisanal butter prefer the taste to commodity butters, and they are willing to pay a little extra for that taste. But if artisanal butter makers were required to identify their butter as tasting just the same as machine-sheared commodity butters, they could not compete. So long as the Wisconsin butter grading requirement remains on the books, artisanal butter makers will not participate in the Wisconsin butter market. It would cause too much harm to the brand equity they have built up over generations. To date, no artisanal butter makers who use a slow churn have hired Wisconsin-licensed graders. Pederson Depo. at 24:7-11.

In *Pete's Brewing Co. v. Whitehead*, the court recognized that the labeling law at issue there was "particularly harsh because it actively undermine[d]" out-of-state business' "fairly developed brand equity by forcing them to carry on their labels the brand names of competitors who produce very different beverages and have different brand equities." 19 F. Supp. 2d 1004,

1014 (W.D. Mo. 1998). The same is true here, except the Department goes a step further. It does not just require the label, it actually requires that the taste conform to the Department's preferred flavor profile. Just like a micro-brew would not want to be saddled with an Anheuser-Busch label, so too an artisanal butter maker does not want to be saddled with a Land-O-Lakes taste profile. Imagine if Leinenkugels had to label their beer with a sticker that denoted it tasted exactly like Miller Lite. It would leave the Wisconsin market. Brand equity is too valuable.

2. Becoming a Licensed Butter Grader Costs Time and Money

Learning how to grade butter is not done overnight. It takes study. Usually butter graders work in commodity butter plants for years. Pederson Depo. at 24:16-17. Then they often take a butter grading course that lasts two days at the University of Wisconsin. Pederson Depo. at 24:18-25:20. Of course, if you live outside of Wisconsin you'd need to fly to Madison and find lodging for a couple of days. The state does not offer testing or courses outside of the State of Wisconsin. SOPF ¶¶ 34-36. The individual would then need to pass a written test and a practical test. If she was lucky enough to pass on her first time, she'd need to pay a \$75 fee to become a Wisconsin-licensed butter grader, and she'd need to pay that fee every two years. SOPF ¶ 37.

3. Employing a Licensed Butter Grader Costs Time and Money

After spending all of the time and money to train and register a Wisconsin-licensed butter grader, the butter maker then needs to employ that person. At an artisanal butter maker like Minerva Dairy that produces its butter in small batches, the butter grader would essentially need to be working around the clock, as each batch of butter needs to be independently graded. SOPF ¶ 25. More likely is that Minerva Dairy would need to train and hire three to four butter graders permanently on staff. Indeed that is precisely what Kerrygold did. SOPF ¶ 31. But small, artisanal outfits like Minerva Dairy cannot absorb the costs like an international conglomerate can. In

addition to destroying its brand equity, the sheer cost of employing a Wisconsin-licensed butter grader—or four—makes it cost prohibitive for artisanal butter makers like Minerva Dairy.⁸

4. To Comply with the Butter Grading Requirement, Artisanal Butter Makers Would Need to Design a New Business Model for Wisconsin-Bound Butter

In addition to the significant costs of grading its butter, Minerva Dairy would need to create Wisconsin-specific labels for butter sold in that state. It would also need to contract with a new supplier that was willing to limit its shipments to Wisconsin stores (butter distributors are typically regional). *See* Mueller Dec. ¶¶ 8-12. Butter makers must either somehow determine in advance how much product is destined for the Wisconsin market, and separately grade and label those batches, or grade all of their batches. Either method of compliance would require upending their current business model in order to avail themselves of the Wisconsin butter market.

Given that many butter makers sell butter through distributors, who do not notify the butter makers of where the butter will ultimately end up, butter makers effectively have no choice but to grade all of their butter in order to avoid potential liability. Because each batch must be graded separately, those costs are compounded for artisanal butter makers like Plaintiffs—who make their butter in small, frequent batches. SOPF ¶ 26.

5. The Costs Are Real and Apply to Artisanal Butter Makers Nationwide

It is important that the focus be on the burdens to interstate commerce, not a specific butter maker like Minerva Dairy. *Pike*, 397 U.S. at 142. All of these burdens apply to the hundreds of butter makers nationwide who, like Minerva Dairy, also sell ungraded butter. *See* United States Department of Agriculture: Agriculture Marketing Service, *Dairy Plants Surveyed and Approved*

⁸ Given the significant costs involved in becoming a licensed butter grader, there's little question why the USDA charges \$82/hour plus travel costs.⁸ *See* 81 Fed. Reg. 27,387-01 (May 6, 2016). That rate arguably reflects all of the hard costs involved in training, licensing, and employing an official butter grader.

for *USDA Grading Service* (May 9, 2017), <https://apps.ams.usda.gov/dairy/ApprovedPlantList>.

No out-of-state butter makers who produce butter in small batches employ a Wisconsin-licensed butter grader.

C. Plaintiffs Are Entitled to a Declaration that Prohibiting Wisconsin Butter Graders From Working Out-Of-State Is Unconstitutional

For years, the Department has enforced its graded butter requirement in a manner that facially discriminates against out-of-state butter makers. The Department has flatly prohibited out-of-state butter makers from having their butter graded by Wisconsin-licensed graders. SOPF ¶ 28. The only option out-of-state butter makers had for selling their butter in Wisconsin was to have their butter graded by the USDA. In contrast, Wisconsin butter makers could choose to have their butter graded by either the USDA or Wisconsin-licensed butter graders.

Prior to filing this lawsuit, counsel for Plaintiffs phoned Mike Pederson, Food Sanitarian-Grader for the Department. Mr. Pederson confirmed to Plaintiffs' counsel that Wisconsin-licensed graders could not grade butter outside Wisconsin. Boden (June 7, 2017) Dec. ¶ 5. Mr. Pederson further explained to Plaintiffs' counsel that permitting Wisconsin graders to grade butter out-of-state would be "extraterritorial" and is therefore prohibited. Boden (July 19, 2017) Dec. ¶ 5. In response to Plaintiffs' motion for preliminary injunction, however, Defendants changed their behavior and Mr. Pederson declared that "nothing prevent[s] Minerva Dairy from having one of their employees licensed to grade butter destined for Wisconsin, according to Wisconsin standards and affix that designation at their facility in Ohio." Pederson Dec. in Support of Opposition to Mtn. for Preliminary Injunction ¶ 14.

Relying solely on Mr. Pederson's declaration, the Court denied Plaintiffs' motion for preliminary injunction because, "even if Pederson changed the policy in response to this lawsuit, and even if no out-of-state employee has ever obtained a Wisconsin butter-grader license, the

undisputed facts indicate that as of this moment, Minerva Dairy employees can become licensed Wisconsin butter graders so that Minerva Dairy can sell its butter in Wisconsin.” Court Op. at 3. The court held that since Minerva Dairy could now hire a Wisconsin-licensed butter grader, it could not show “irreparable harm” sufficient to grant the motion for a preliminary injunction. *Id.*

The Court’s reason to deny the preliminary injunction motion, however, is not sufficient to deny Plaintiffs’ claim for declaratory relief. “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice” unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Palmetto Properties, Inc. v. Cnty. of DuPage*, 375 F.3d 542, 550 (7th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Here, the Department bears a “heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again.” *Friends of the Earth*, 528 U.S. at 189. The Department must show that subsequent events have made it “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002) (quoting *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)).

The State cannot meet its heavy burden. There is little doubt that this litigation prompted the Department’s change in behavior. Peter Haase, Director for the Bureau of Food Safety and Inspection within the Department, was designated by Defendants as the Person Most Knowledgeable about enforcement of the butter grading law. He explained that he “would have to agree that prior to 2017 there may have been a nonwritten understanding that individuals outside of Wisconsin could not hold a Wisconsin butter graders license.” Haase Depo. at 28:23-29:2.

Moreover, Mr. Haase admitted the Department prohibited out-of-state graders because the Wisconsin statute and regulation are unclear. *Id.* at 29:3-6.

The State of Wisconsin has adopted no new statute; the Department has not promulgated any new regulations. The statute and regulations that have for decades prohibited Wisconsin butter graders from working out-of-state are unchanged. Save a litigation-prompted declaration that Minerva Dairy can hire Wisconsin butter graders to work in its Ohio-based facility, the Department has done nothing to “meet its heavy burden” of showing that it is “absolutely clear” its discriminatory interpretation will not be resurrected. *Friends of the Earth*, 528 U.S. at 189. Plaintiffs are entitled to a declaration that the Department’s past practice of prohibiting Wisconsin butter graders from working out-of-state is unconstitutional.

II WISCONSIN’S BUTTER GRADING REQUIREMENT VIOLATES THE FOURTEENTH AMENDMENT

A. Wisconsin’s Butter Grading Requirement Is Irrational in Violation of the Due Process Clause

Wisconsin’s butter grading requirement makes it expensive—and for some butter makers, impossible—to sell butter in the state. Because the law burdens Minerva Dairy’s right to earn a living, it can only be sustained if it bears a rational relationship to a legitimate state interest. *See Greene v. McElroy*, 360 U.S. 474, 492 (1959). While the rational basis test is deferential, courts must look to the facts at hand to determine whether the law actually furthers the government’s stated purpose. *See Sams v. Ohio Valley Gen. Hosp. Ass’n*, 413 F.2d 826 (4th Cir. 1969) (rational basis determination must be based on “practical considerations” rather than “theoretical” ones). Where there is a misfit between the law’s means and the government’s stated ends, the law fails rational basis scrutiny. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

At the outset, it's important to note that the Department does not contend that the law has any relationship to protecting public health or safety. It does not argue, for example, that consuming ungraded butter is unsafe, or that grading somehow makes butter safe for consumption. *See* Ingham Depo. Ex. 1 at 4-5; *see also* Haase Depo. at 16:21-17:1. Instead, it offers several related arguments⁹ amounting to a truth in advertising rationale. It asserts that the grading requirement informs consumers about the quality of the butter they are purchasing¹⁰ and prevents deceptive advertising. Ingham Depo. at 39:5-43:14. But butter grading is uninformative to consumers and is unrelated to preventing deceptive marketing practices—which are otherwise already prohibited by Wisconsin law. The grading requirement serves as an irrational and anti-competitive barrier to selling butter in the state which fails rational basis scrutiny.

1. The Butter Grading Requirement Does Not Rationally Relate to Informing Consumers About Butter

The Department argues that butter grading provides consumers with information about a butter's "flavor, the body or texture, color" and "saltiness." Ingham Depo. at 11:4-7; 39:15-23; *see also* Ingham Depo. Ex. 1 at 4-5. But that argument is undercut by the Department's own evidence and the structure of butter grading.

First, there is no evidence that consumers know the characteristics on which butter grading is based, or that they know whether the government has deemed those characteristics "attributes"

⁹ The only arguments that the Department has put forward in support of the law is that it furthers the government's interest in "consumer protection, information, certification, verification, and marketing." *See* Ingham Depo. Ex. 1 at 4-5. At deposition, the Department's Person Most Knowledgeable testified that all of those purposes were related, and essentially amounted to the same interest in grading. Ingham Depo at 40:19-42-6.

¹⁰ The Department cannot argue that butter grading ensures that butter meet a certain quality standard, because butters are not actually required to meet the state's preferred level of tastiness. Even butters that are rated as "undergrade," the lowest grade, can still legally be sold in Wisconsin. Butter grading merely informs consumers about whether or not a butter meets the state's preferred taste, consistency, color, and saltiness.

or “defects.” When evaluating flavor, for example, a grader must determine whether the butter tastes, among other things, “cooked,” “culture,” “flat,” “utensil,” or “storage.” Wis. Admin. Code ATCP § 85.04(1)(a). “Culture” is consistent with an AA grade—unless it is found in high intensity, in which case it is consistent with an A grade. *Id.* “Lipase” is considered a defect in butter, but it is deliberately added to provolone cheese because it is seen as a desirable cheese trait. Depo. of Michael Pederson at 17:20-18:16. During discovery, the Department could produce no evidence that consumers know that butter grading measures these characteristics, and it’s reasonable to assume that consumers expect otherwise. Ingham Depo. Ex. 1 at 4-5. The Department does not disseminate pamphlets or other materials to inform consumers about butter grading. Ingham Depo. at 15:21-24. And as the Department itself has stated, consumers may very well disagree with the State’s preferences; Ingham Depo. at 22:13-15; they may enjoy the taste of lipase (as some do when put in provolone cheese), while the Department considers it disagreeable. They have no reason to anticipate the State’s arbitrary taste preferences. When asked, the Department explicitly disavowed having any knowledge or an opinion on whether consumers understand what butter grading is based on. *See, e.g.*, Ingham Depo. at 44:14-22; 46:4-7; 16:8-17; 39:24-40:15.

Even if consumers knew that butter grading was based on those characteristics, there’s no reason to think they know what those characteristics mean. At deposition, two of the individuals designated as Defendants’ “Persons Most Knowledgeable” were unable to describe several of the characteristics that a butter’s grade supposedly communicates to consumers. For example, Steve Ingham, the Administrator of the Department’s Division of Food and Recreational Safety and the individual designated as the Department’s Person Most Knowledgeable about the purposes of the grading requirement, could not describe the meaning of the terms “stale,” “smothered,” “ragged

boring,” or “utensil.”¹¹ Ingham Depo. at 16:8-10; 44:23-45:3; 46:8-17; 46:18-47:5. Peter Haase, the Director of the Department’s Bureau of Food and Recreational Businesses and the man designated as the Department’s Person Most Knowledgeable about the enforcement of the statute, could not describe the meaning of “ragged boring” or “flat.” Haase Depo. at 14:22-24; 14:25-15:1. Both of these Persons Most Knowledgeable had extensive experience with the Department. If people who work to enforce the butter grading laws cannot explain what “smothered” or “ragged boring” means, there is no reason to think that consumers can do any better.

And even if consumers knew what butter grading was based on, and even if they understood the meaning of those terms, it’s dubious that butter would inform them of how the butter tastes because there’s no reason think the butter grader graded it consistent with the consumers’ own tastes. The Department has stated that consumers may disagree about whether a butter tastes “pleasing,” Ingham Depo. at 22:13-15; consumers might also simply disagree about what a butter tastes like. Even the Department’s highly experienced graders sometimes disagree on the intensity of the same butter sample’s various characteristics. SOPF ¶ 19. Wisconsin-licensed butter graders, too, sometimes disagree. *Id.* The Department has encountered instances where they disagree with a licensee’s grade, and have a process for resolving such disputes.

But even if consumers understood the factors on which butter grading is based on, knew the meaning of those terms, and tasted butter the same as the graders, grading still would not inform consumers about a butter’s flavor, consistency, color, or saltiness, because a grade is a composite score that does not communicate that a butter has any one characteristic. SOPF ¶ 16. That is, butters

¹¹ Mr. Ingham also testified that he probably could not tell the difference between an AA and A grade butter without some training, Ingham Depo. at 13:25-14:2, further undermining the argument that butter grading imparts important information to consumers. If they can’t taste the difference, it’s not necessary for the Department to tell them that they taste differently.

with different flavors can have the same grade. *Id.* Butters with different textures can have the same grade. The same is true of color and saltiness: to the extent there is variation among butters, vastly different butters can all have the same grade.

At best, grading merely signifies that a butter has earned a score which makes it either “highly pleasing,” “pleasing,” “fairly pleasing,” or something less (“undergrade”) in the opinion of the Department. Consumers are perfectly capable of determining whether butter is pleasing for themselves. Ingham Depo. at 40:19-20 (“I certainly think that a person eating butter can form an opinion about how it tastes.”). After all, they alone, and not the Department, know what something taste like to them, and whether they enjoy that taste.

As the Department testified, whether a grade provides information to a consumer is “entirely dependent on the knowledge and interest of the consumer.” *See* Ingham Depo. at 12:8-11. The evidence suggests that even the most informed consumers know very little about grading, and in any event, even the most informed will disagree. It is not rational to prohibit buttermakers from selling a perfectly healthful product on the theory that it provides information to consumers when there is no evidence that consumers understand what a grade means, they may disagree with that determination anyway, and they are fully (if not more) capable of doing it themselves.

In sum, consumers do not need the government to tell everyone how good everything tastes. Under that theory, the Department could prohibit vendors from selling perfectly safe vanilla ice cream, strawberry yogurt, or chocolate milk unless it, too, went through a government mandated taste test. But even if that were a legitimate state purpose, the butter grading requirement is not a rational way of pursuing it.

2. The Butter Grading Requirement Does Not Rationally Relate to Preventing Deceptive Advertising

The Department also contends that requiring butter to be graded prior to being sold prevents deceptive advertising. Ingham Depo. Ex. 1 at 4-5. But there is nothing inherently deceptive about selling ungraded butter. It is not deceptive to sell a safe, healthful product that conforms to the government's standards of identity without first telling consumers whether the government considers it "pleasing." It's only deceptive to sell ungraded butter if the butter maker markets the butter contrary to its qualities—by calling it "sweet cream" flavor when it's actually "whey based," or by calling it AA if it only meets A standards. Those acts, which actually do qualify as deceptive, are already otherwise prohibited by Wisconsin law. Ingham Depo. at 24:24-25:4. The butter grading requirement doesn't prohibit misrepresentations; the regulations related to misbranding do.

At deposition, the Department's Person Most Knowledgeable posited that selling ungraded butter might be deceptive if it was "such low quality or such an extreme off-flavor that it was to many consumers off-putting." Ingham Depo. at 21:13-17. He contended that consumers expect that the word "butter" means "a sweet cream AA grade butter," so if they purchase an ungraded butter that tastes differently, the consumer "could feel deceived." Ingham Depo. at 22:18-22:9. But that argument is circular. The government cannot establish expectations for a product and then justify imposing those expectations on the theory that consumers now expect the product to conform to those expectations. That theory is self-justifying.

In *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009), the state banned individuals from calling themselves "interior designers" unless they were licensed as interior designers. The state made a similar to argument to the one the Department makes here: it argued that, "Texas created a licensing regime; therefore, unlicensed interior designers who refer to themselves as interior

designers will confuse consumers who will expect them to be licensed.” The Fifth Circuit called that argument “circular.” It reasoned that, although the term “interior designer” could be “employed deceptively, for example if a person does not actually practice interior design,” the use of the term, alone, was not inherently misleading. The state could not deem it deceptive by relying on its own licensing mandate. That argument would allow the government to bootstrap its way out of the Constitution’s restrictions.¹²

The same is true here. Selling ungraded butter without a grade is not misleading to consumers, and the Department may not use the state-imposed taste preferences to call butter that does not conform to those preferences “deceptive.” Moreover, it is facetious to argue that butter grading prevents deceptive advertising when the Department does not even contend that consumers know what a butter’s grade means, or that consumers rely on the grade when purchasing butter.

Lastly, the Department’s argument that the grading requirement prevents deceptive advertising is undercut by the fact that it actually *permits* misbranding: a butter maker is permitted to misrepresent its grade so long as it displays a grade lower than the one for which it qualifies. Pederson Depo. at 41:2-10. In fact, the Department indicated that this is a common practice. *Id.* If the grading requirement’s purpose is truth in advertising, it sanctions the very evil it is purportedly designed to prevent.

¹² In any event, “what consumers believe to be” the attributes of a given commodity “does not make [a seller’s truthful representation] misleading.” See *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017); see also *Mason v. Florida Bar*, 208 F.3d 952, 957 (11th Cir. 2000) (“Unfamiliarity is not synonymous with misinformation.”).

3. The Butter Grading Requirement Violates Due Process

Even where the government has asserted a legitimate government objective, due process requires that the means rationally relate to achieving that objective. Though the rational basis test is deferential, it does not require courts to turn a blind eye to the facts. Where the evidence shows that a law's means do not rationally relate to the government's purported objective, the law fails rational basis scrutiny.

In *Dias v. City and County of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009), the court held that the government could not evade rational basis scrutiny by simply asserting a legitimate state interest. There, the City of Denver sought to justify its pit bull ban on the basis that it protected the "health and safety of the public." *Id.* The Tenth Circuit acknowledged that it was "uncontested" that Denver had a legitimate interest in protecting health and safety. *Id.* But "[e]ven so, the plaintiffs have alleged that the means by which Denver has chosen to pursue that interest are irrational. In particular, the plaintiffs contend that there is a lack of evidence that pit bulls as a breed pose a threat to public safety or constitute a public nuisance, and thus, that it is irrational for Denver to enact a breed-specific prohibition." *Id.*

Similarly, in *St. Joseph Abbey*, 712 F.3d 215, an Abbey challenged a Louisiana law that required anyone who sold caskets—including the Abbey's monks—to obtain a funeral director's license. *Id.* at 215. The state alleged that the law was a consumer-protection measure aimed at preventing predatory casket selling practices and protecting the health and safety of its citizens. *Id.* at 223, 226. After considering the evidence, the court found that the statute did not actually further those purposes. First, there was no evidence that casket sellers were engaged in deceptive sales practices, and in any event, the training required to obtain a funeral director's license did not pertain to casket selling. *Id.* at 223. Second, the licensing requirement did not further the state's

interest in protecting health or safety because the state did not even require that caskets be used for burial. *Id.* at 226. The court ruled that “[t]he great deference due state economic regulation” did not require courts to “accept nonsensical explanations for regulation,” and struck down the law as irrational. *Id.*; see also *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff’d*, 312 F.3d 220 (6th Cir. 2002) (same).

Here, the Department contends that the purpose of the grading requirement is to inform consumers about butter and prevent deceptive advertising. But there is nothing inherently deceptive about selling ungraded butter, see *Byrum*, 566 F.3d at 447, and the Department explicitly disclaims knowing whether consumers understand or rely on a butter’s grade. Ingham Depo. 40:8-15. Moreover, the evidence suggests that even those people who are experienced and familiar with butter grading don’t know the meaning of its terms. At best, butter grading informs consumers generally that a butter lives up to the government’s taste expectations. But even then, consumers may disagree both with those expectations and disagree with how a grader thinks the butter tastes.

It would be another thing altogether if ungraded butter were somehow unhealthful. But as the Department concedes, ungraded butter is perfectly safe. The Department here has prohibited the sale of a product that poses no threat public health on the basis that consumers first must be informed about whether it lives up to Wisconsin’s arbitrary standards. The butter grading requirement simply doesn’t achieve that purpose.

B. Wisconsin’s Butter Grading Requirement Violates the Equal Protection Clause

1. The Law Irrationally Discriminates Amongst Butters

By allowing only graded butters to be sold in the state, the Department arbitrarily distinguishes between graded and ungraded butters. Ungraded butter is just as safe for consumption as graded butter—in fact, a graded and ungraded butter might be identical in

composition, but one would be prohibited from hitting the shelves merely because the manufacturer has not affixed a tag to it. Because the law treats similarly situated butters and butter makers differently, it is subject to rational basis scrutiny—which it cannot meet. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

In *City of Cleburne*, the city required a special use permit for homes meant to house the mentally retarded, but not other group homes like apartment buildings, fraternity or sorority houses, dormitories, or nursing homes. *Id.* at 435. The Court held that while homes for the mentally retarded were in some respect different than the others, they were not different in any meaningful sense that threatened the public. *Id.* at 442. The city argued that such homes necessitated a special permit because of fears from the community, potential harassment from students who attended a nearby school, the home's potential location on a floodplains, and the number of residents. The Court held that these distinctions did not justify differential treatment, and struck down the special permit requirement. *Id.* at 448.

Here, there is no rational reason to differentiate between graded and ungraded butters. The distinction rests not on some intrinsic quality of the butter, but on whether the butter is affixed with a label indicating whether it meets the government's standards of taste. But as previously explained, ungraded and thus unlabeled butter presents no threat to the public. As the Department's Person Most Knowledgeable testified, "a person eating butter can have an opinion about how it tastes." Ingham Depo. at 40:19-20. They are not harmed by having to make that determination for themselves.

2. The Law Irrationally Discriminates Amongst Commodities Regulated by the Department

By requiring butter to be graded before being sold in the state, but allowing optional grading for other commodities regulated by the Department, the grading requirement also irrationally discriminates amongst similarly situated commodities.

In *Merrifield v. Lockyer*, 547 F.3d 978, 990-92 (9th Cir. 2008), the Ninth Circuit struck down a law that required pest controllers who did not use pesticides to get a pest controller's license, but which also exempted pest controllers who worked with certain animals. The government claimed that the law was intended to ensure that exterminators were properly trained in the event that they encountered prior pesticide use. However, the law exempted the very pest controllers who were *most* likely to encounter prior pesticides. The court therefore found the differential treatment of pest controllers irrational and unconstitutional. *Id.*

Here, the Department requires mandatory grading for butter, but makes grading for several other commodities—including cheese, honey, and maple syrup—voluntary. SOPF ¶ 10. There is no reason for this differential treatment. If consumers need more information about a common product like butter, they are even more in need of information about commodities like cheese, which include several varieties with which the public is unfamiliar, or syrup, which is less commonly consumed. The Department itself testified that consumers would be more informed if other dairy commodities, like ice cream and yogurt, likewise required grading. Ingham Depo. at 61:4-14. As in *Merrifield*, this Court cannot uphold the requirement as applied to one class on a theory that applies to an exempted class.

