APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1520

Short Caption: *Minerva Dairy, Inc., et al. v. Sheila Harsdorf, et al.*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Minerva Dairy, Inc. and Adam Mueller

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Pacific Legal Foundation

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Joshua P. Thompson Date: April 16, 2018

Attorney's Printed Name: Joshua P. Thompson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ✓ **No** _____

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N/A

Attorney's Signature: s/ Anastasia P. Boden Date: April 16, 2018

Attorney's Printed Name: Anastasia P. Boden

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ✓ **No** _____

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N/A

Attorney's Signature: s/ Wencong Fa Date: April 16, 2018

Attorney's Printed Name: Wencong Fa

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ✓ **No** _____

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STATEMENT CONCERNING ORAL ARGUMENT

This appeal raises important constitutional questions involving the dormant Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Appellants request oral argument and believe that argument would aid this Court in deciding this case.

JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear plaintiffs' claims for declaratory and injunctive relief under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201-2202 (the Declaratory Judgment Act). This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered a final order that denied plaintiffs' Motion for Summary Judgment and granted defendants' Motion for Summary Judgment on February 5, 2018. Plaintiffs filed a timely notice on March 5, 2018—within the 30-day period prescribed by Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

Wisconsin is the only state in the nation to prohibit the sale of ungraded butter. *See* Wis. Stat. § 97.176. Grading entails great expense to artisanal butter makers like Appellants, not only in the significant operational costs, but also in the loss of brand equity. Yet butter grading serves no legitimate public purpose; it is unrelated to public health or safety, and amounts to a government mandated "taste test." The issues presented are:

1. Whether Wisconsin's butter grading law violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether Wisconsin's butter grading law violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether Wisconsin's butter grading law violates the dormant Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. Adam Mueller and Minerva Dairy

Adam Mueller is a fifth-generation owner of Minerva Dairy, a family-owned dairy located in Minerva, Ohio. APP002-003. Founded in 1894, Minerva has produced artisanal butter for over 100 years. APP003. Minerva also makes various other dairy products, including bottled milk, ice cream, and cheese, which it has produced for over eight decades. *Id.*

Unlike large commodity butter makers, Minerva Dairy[1] produces its Amish-style butters in small, slow-churned batches using fresh milk supplied by pasture-raised cows. APP001, APP003. The process churns out butter that is unique in consistency and flavor, delicious, and safe to eat. APP008-009. Minerva Dairy voluntarily submits to USDA-inspections of its facilities and complies with all applicable health and safety regulations in Ohio, where its butter is produced. *Id.* Minerva Dairy has never had its butter graded by a Wisconsin-licensed butter grader, nor does it pay to have its butter graded under the optional USDA grading system.

[1] For ease of reference, plaintiffs are collectively referred to as "Minerva Dairy."

Minerva Dairy has sold its artisanal butter to consumers in every state. APP009. From at least the mid-1980s until early 2017, Minerva Dairy sold its butter to consumers in Wisconsin. *Id.* In 2017, Minerva Dairy received an email from the Wisconsin Department of Agriculture, which warned Minerva Dairy that the Department "will 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." APP010. The email added: "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." *Id.*

Just weeks later, the Department sent Minerva Dairy a warning letter regarding "Butter grading and labeling violations." *Id.* The letter stated that the Department "received an anonymous complaint about ungraded butter being sold" in Lake Geneva, Wisconsin. *Id.* The sale of Minerva Dairy butter, the letter added, violated Wis. Stat. § 97.176 and Wis. Admin. Code ATCP § 85.06. *Id.*

B. The Butter Grading Law

Wisconsin law contains a "standard of identity" requirement for butter, which defines butter as 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 other milk constituents, with or without salt or added coloring matter, and contains not less than 80% milk fat." Wis. Stat. § 97.01. This law is

unchallenged, and no party disputes that Minerva Dairy sells "butter" under Wisconsin law.

However, Wisconsin is the only state in the nation that requires perfectly safe and healthful butter to be graded before it may be sold to consumers in the state. Wis. Stat. § 97.176. While grading is voluntary in Wisconsin for products like cheese, honey, and maple syrup, Wisconsin law bans the sale of butter in the state unless the butter has been graded by the United States Department of Agriculture or a Wisconsin-licensed butter grader. Wis. Stat. § 97.176(1)-(2).

Before Minerva filed its lawsuit, Wisconsin-licensed butter graders were permitted to grade butter only at Wisconsin-based butter making facilities. APP111. This meant that while Wisconsin-based butter makers were able to choose between having their butter graded by either Wisconsin graders or the USDA, out-of-state butter makers like Minerva Dairy could get their butter graded only by the USDA[2]—the costlier option.[3]

Since the filing of this lawsuit, the Department has changed its internal policy to allow Wisconsin-licensed graders to grade butter outside of the state. No regulatory or statutory change was made, and out-of-state butter makers continue to face a host of challenges when doing business in Wisconsin because of the butter grading law. To obtain a Wisconsin butter-grading license, an aspiring butter

[2] Under USDA regulations, butter need not be graded before it is sold across state lines. It is instead an optional marketing feature. 7 C.F.R. § 58.122(b).
[3] USDA graders are federal employees who 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* Wis. Dep't of Agric., *Butter Grading and Labeling*, https://datcp.wi.gov/Pages/Programs_Services/fsbutter.aspx.

grader generally works in a Wisconsin butter plant for years and takes a two-day butter grading course at the University of Wisconsin. APP040. Wisconsin-licensed butter graders also must pass an exam. Because the State does not offer testing outside of Wisconsin, and applicants must pay their own travel and lodging to take the butter grading exam in Wisconsin, this requirement disproportionately affects out-of-staters. *Id.* All applicants must pay a $75 fee to become a Wisconsin-licensed butter grader and $75 every two years to renew the license. APP042.

In addition to these burdens, out-of-state butter makers must transform their business model to comply with Wisconsin's butter grading requirement. They must create Wisconsin-specific labels for butter sold in the state and contract with new suppliers that are willing to limit their shipments to Wisconsin stores. But because many butter makers sell through distributors, who do not inform butter makers where the butter will ultimately end up, it forces butter makers to grade all butter to avoid the threat of liability. Because each batch must be graded separately, APP119, these costs are compounded for artisanal butter makers like Minerva Dairy, which makes butter in small, frequent batches. APP026.

Artisanal butter makers nationwide must also give up their brand equity to comply with Wisconsin's butter grading requirement. Minerva Dairy, for example, makes its butter in slowed-churned batches. *Id.* The process leads to a unique taste. Yet in order to avail themselves of the Wisconsin market, artisanal butter makers

must display a grade, thereby holding themselves out as commodity butters sold in the State.[4]

Butter grading does not relate to healthfulness or safety, and instead is essentially a judgment of taste. It considers a butter's "flavor, body, color, and salt." Wis. Admin. Code ATCP § 85.03; APP065. The eighteen different flavor characteristics include "cooked," "neutralizer," and "utensil." *Id.* § 85.04(1)(a). The eight different "body characteristics" include "ragged-boring," "short," and "leaky." *Id.* § 85.04(1)(b). The Wisconsin guidelines also provide for four color characteristics, *id.* § 85.04(1)(c), and two salt characteristics, *id.* § 85.04(1)(d). For each characteristic, graders must determine whether the butter has a "slight, definite or pronounced" intensity. After examining each characteristic and determining its intensity, graders assign a composite score for the butter using the tables found in Wis. Admin. Code ATCP § 85.05, and the composite score determines the grade. *See id.* § 85.02.

Because a grade corresponds to a composite score, the grade does not indicate anything about any particular characteristic. Instead, the grade signifies whether, on the whole, the State considers the butter "pleasing." *Id.* § 85.03. An AA grade means that a butter grader believes the butter to be "highly pleasing." *Id.* An A grade butter is merely "pleasing and desirable," and B grade butter is "fairly pleasing." *Id.* Anything inferior is sold as "undergrade" butter. *Id.* Undergrade

[4] Grading ranks the "pleasingness" of butter in terms of how much it resembles typical, commodity butter flavor. And because grading is optional at the federal level, and expensive to undertake, it is largely used by and associated with large, commodity butter makers.

butter is perfectly healthful and may be sold in the state, but it must be labeled as "unpleasing" to the Wisconsin taste testers.

Because it's largely based on taste, butter grading is inherently subjective. When grading the same butter, the Department's food safety sanitarians have come to different conclusions about its characteristics, APP045, and Wisconsin-licensed butter graders have also graded butters differently than the Department. APP042, APP045. Recognizing that butter graders do not always agree, the Department has a process to arbitrate butter grading disputes. APP045-046.

Grading has nothing to do with ensuring, or informing consumers, that a butter is safe for consumption. APP091-097, APP108. Instead, the various butter grades are supposed to provide consumers with information about how a butter tastes, feels, and looks. APP065, APP072. In addition, butter makers are permitted to mislabel their butter with a lower grade so long as it has been graded. APP044.

C. Procedural History

After being threatened by the Department, Minerva Dairy initiated this civil rights lawsuit in the United States District Court for the Western District of Wisconsin. In its complaint, Minerva Dairy alleged that the butter grading requirement violated the Dormant Commerce Clause of Article I, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteen Amendment. APP001-002. Minerva requested an injunction preventing

the Department from enforcing the butter grading requirement and a declaration that the butter grading law is unconstitutional. APP016.[5]

During discovery, the Department provided news articles that suggested that the butter grading law is a protectionist measure dating back to the 1950s, when it was supported by large in-state butter makers. Dist. Ct. Doc. 28-1. The Department also acknowledged that before 2017, Wisconsin-licensed butter graders could grade butter only within Wisconsin borders. The Department further stated that it interprets the butter grading law as permitting it to revert to this practice in the future. APP111.

Throughout discovery and on motion for summary judgment, the Department asserted that its interests in the butter grading law relate to providing consumers with information. APP073. Yet the Department conceded that it did not know whether consumers understand a butter's grade. *Id.* Indeed, even officials designated as persons most knowledgeable of the purpose and enforcement of the grading requirement were unable to say what a butter's grade meant about a particular butter. *See* APP074; APP107.

Both parties filed cross-motions for summary judgment. The district court denied Minerva's motion and granted summary judgment in favor of the Department. The court concluded that Wisconsin had a legitimate interest "in ensuring that its citizens aren't duped into buying 'mealy,' 'musty,' or 'scorched'

[5] Minerva also moved for a preliminary injunction. The district court denied the motion, and the parties subsequently conducted discovery before filing cross-motions for summary judgment. Only the district court's decision on the cross-motions for summary judgment is at issue in this appeal.

butter," and that Wisconsin "could believe that required butter grading would result in better informed butter consumers." APP122. The court also ruled in favor of the Department on the dormant Commerce Clause claim. APP123-125. It held that the court need not balance the legitimate benefits of the statute with the burdens on interstate commerce under the *Pike* balancing test because "the ordinance does not discriminate against interstate commerce." APP125. Finally, the court held that even the pre-April 2017 application of the butter grading law, which prohibited out-of-state butter makers from using Wisconsin-licensed graders, complied with the dormant Commerce Clause. *Id.* This appeal followed.

SUMMARY OF ARGUMENT

Wisconsin's butter grading requirement imposes burdensome costs on butter makers nationwide while providing no benefit to the public. As such, it violates myriad constitutional provisions.

The butter grading requirement violates the Due Process and Equal Protection Clauses, even under the most lenient form of review. Here, the Department claims that butter makers cannot sell perfectly healthful and safe ungraded butter because grading is necessary to give consumers information and to prevent deception. But the record shows precisely the opposite: butter grading provides, if anything, meaningless information to consumers. Moreover it is not inherently deceptive to sell ungraded butter. Because the Department's rationale for the butter grading law is contradicted by the record, the law violates the Due Process Clause.

For similar reasons, the butter grading requirement violates the Equal Protection Clause. The butter grading law discriminates in two ways: (1) between graded and ungraded butter; and (2) between similarly situated commodities. Yet these classifications are not rationally related to a legitimate government purpose. The Department's discrimination against ungraded butter does not further a legitimate end because classifying butter in order to tell consumers which is "pleasing" to the Department is not a legitimate purpose. Moreover, the Department has irrationally chosen butter as the one product in all of Wisconsin that requires grading. There is no rational reason to discriminate against butter—and require a pleasing taste test—but not require it for other dairy or agricultural products.

The butter grading requirement also violates the dormant Commerce Clause. That doctrine prevents states from enacting laws that impose burdens on interstate commerce without any attendant local benefits. Yet that is exactly what the butter grading requirement does. Wisconsin has disavowed any interest in health and safety; it instead relies on various interests that are all related to providing consumers with information or preventing deception. But the State has provided no evidence that the grading requirement actually provides consumers with information. Rather, the record shows that butter grades are unintelligible not just to consumers, but even to officials designated by the Department as persons most knowledgeable about the law. By contrast, the butter grading requirement 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 that they upend long-standing and cost-effective business practices.

In addition, the Department's past enforcement of the butter grading law facially discriminated against out-of-state businesses. The policy that the Department implemented until 2017 plainly discriminated against out-of-state butter makers. While in-state butter makers were permitted to have their butter graded by either a USDA or a Wisconsin-licensed butter grader, out-of-state butter makers could have their butter graded only by the USDA—a far costlier option. The Department has changed that practice—without changing the underlying law—since Minerva Dairy filed this lawsuit. Yet the Department is free to revert to that plainly discriminatory policy on a whim. Minerva is thus entitled to a declaratory judgment that the Department's previous enforcement of its current law violates the dormant Commerce Clause.

Appellants respectfully request that this Court reverse the decision below.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This Court reviews a district court's grant of summary judgment *de novo*. *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 575 (7th Cir. 2007).

ARGUMENT

I

MINERVA DAIRY SHOULD HAVE PREVAILED ON ITS DUE PROCESS CLAIM

The Fourteenth Amendment protects a person's constitutional right to earn a living without unreasonable government interference. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). While states have broad authority under their police power to legislate to protect public health or safety, any restriction on a person's right to earn a living must be rationally related to some legitimate government interest. *Id.* Where laws do not further a legitimate state objective, or are only tangentially related to it, they must be struck down as violative of due process. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

Butter grading is not rationally related to any legitimate state interest. While states have an interest in ensuring that products are safe and healthful, or preventing deceptive advertising, or requiring disclosure of important factual information, *none* of those interests apply here. Minerva Dairy butter is perfectly safe and healthful, it does not seek to advertise deceptively, and butter grading does not relate to any factual information about butter. Instead, butter grading amounts to a mandatory subjective "taste test" for a product that is otherwise perfectly safe for consumption and truthfully labeled. It is not rational to force Minerva to incur serious operational costs and harm to its brand equity simply to inform consumers of whether the government considers butter "pleasing"—especially when the

company presents itself to the public as an artisanal, rather than a commodity, butter.

But even if informing the public about whether a product "pleases" the government were a legitimate state interest, Minerva Dairy should have succeeded on its due process claim. It presented substantial unrebutted evidence that butter grading does not actually inform the public of anything, because the public does not understand what grading is based on, and even the most informed consumers do not understand the meaning of the grading terms. The record is bereft of any evidence to the contrary that would show that grading is informative to consumers, or that the grading requirement relates to any other legitimate state objective.

The district court failed to engage with any of these arguments, instead concluding without analysis that "the state could believe that required butter grading would result in better informed consumers." APP122. But even under the deferential rational basis standard, courts must consider the factual record in order to determine whether the law actually furthers the state's interest in concrete ways. *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) (rational basis review "is not a rubber stamp of all legislative action."). Here, there were no facts in the record substantiating the Department's claim that grading informs the public. Indeed, the facts contradicted that claim. The district court's analysis therefore does not comport with even rational basis analysis, and must be overturned.

A. Informing Consumers About the Government's Subjective Aesthetic Butter Preferences Is Not a Legitimate Government Purpose

The Department argues that butter grading provides consumers with "information" about the butter they purchase. But the information that grading conveys is essentially meaningless, if not outright arbitrary. By the government's own admission, grading does not evaluate, ensure, or inform consumers about a product's healthfulness or safety for consumption. *See* APP091-092; *see also* APP108. Nor does grading indicate that a butter has any one quality. In fact, two butters with different qualities may share the same grade, while two butters with the same qualities may obtain different grades. APP044; APP065. Instead, grading merely conveys whether, overall, a butter comports with the State's subjective preferences for taste, consistency, saltiness, and color, sufficiently enough so that the Department considers it "pleasing." Wis. Admin. Code § 85.03. In other words, grading establishes an arbitrary butter goodness standard. The State has no legitimate interest in establishing subjective aesthetic preferences for how otherwise safe and legal products should taste, look, or feel.

Though states have broad authority under their police power to legislate in furtherance of public health or safety, there are limits to the ends that they can pursue. States cannot, for example, legislate solely in order to protect a discrete interest group from economic protectionism. *See, e.g., St. Joseph Abbey*, 712 F.3d at 215. Nor can they pursue wholly arbitrary ends. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 588 (1972) ("The protection of the individual against arbitrary action is the very essence of due process."). Due process requires that states pursue

an end that is actually in the public interest. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[L]iberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.").

Informing the public of whether butter, or any otherwise safe and legal product, meets the government's subjective aesthetic preferences, does not further the public interest. Under that rationale, the State could require clothing manufacturers to hire licensed graders to grade clothing according to the government's "fashion" standards. It could require blanket companies to grade blankets according to a "cuddly" scale. It could require pen companies to grade their pens according to the government's "writeability" preferences. Such tests could even be based on objective criteria: cuddliness could be based on the fabric's material, thickness, warmth, etc. All of these tests would ostensibly "inform" consumers of *something*. But the substance of that information, *i.e.*, whether the government considers a shirt to look pleasing, or a blanket to feel cuddly, or a pen to glide nicely, is valueless and capricious. It is valueless because it is subjective, and it is capricious because it is determined by mere whim of the State. The State simply doesn't have an interest in prescribing how healthful and safe products should taste, look, or feel.

That is not to say that the government cannot prohibit businesses from *falsely* advertising their product as something it is not. States can *prohibit* a butter from calling itself USDA AA grade if it is not graded USDA AA. They can also ban a

margarine from calling itself a "butter."[6] But butter grading does not prohibit false advertising. Instead, it *mandates* disclosure of the State's subjective butter preferences. Indeed, butter grading permits (if not fosters) mislabeling: it permits butters to mislabel their grade so long as they use a lower grade, APP044, and it requires artisanal butters like Minerva Dairy to associate themselves with commodity butter grades when it does not taste like or market itself as commodity butter.

Butter grading is qualitatively different from laws mandating disclosure of factual information, like laws requiring products to disclose their country of origin, or laws requiring food products to disclose nutritional information. Nor does grading inform consumers of factual information related to the healthfulness, safety, or even the objective characteristics of the butter. Instead, the butter grading requirement informs consumers of whether a butter conforms to the government's aesthetic preferences, which have no inherent value. AA graded butter is no better than A graded butter in any way, except that the State has deemed it so through *ipse dixit*. Whether butter, or a shirt, blanket, or pen, is "likeable" is something that consumers can tell for themselves without looking at a government grade.

Because butter grading pursues an illegitimate end, the butter grading requirement violates due process for that reason alone.

[6] And to this end, Wisconsin already has a truth in advertising statute that applies to food advertisements, Wis. Stat. § 100.18, and a standard of identity statute for butter, Wis. Stat. § 97.01.

B. Even If Informing Consumers About Whether the Government Considers Butter Pleasing Is a Legitimate Government Purpose, Butter Grading Doesn't Further It

Here, the Department argued, and the district court agreed, that butter grading informs consumers. APP122. The undisputed evidence shows that grading does not actually further this purpose, and instead serves as an irrational and anti-competitive barrier to selling butter in the State, and therefore fails rational basis scrutiny.

First, it is reasonable to assume that consumers don't understand what butter grading communicates because even those individuals designated as Defendants' "Persons Most Knowledgeable" were unable to describe the characteristics that are supposedly communicated to consumers through grading. 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," each of which is ostensibly considered taken into account during grading.[7] APP067; APP074. 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." APP107. Both of these Persons Most

[7] Mr. Ingham also testified that he probably could not tell the difference between an AA and A grade butter without some training, APP066, 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.

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 grading, which supposedly communicates to consumers whether butter is "smothered" or "ragged boring," informs consumers of anything at all.

Even if consumers knew the meaning of these terms, there is no evidence that they know whether the government considers those characteristics to be "attributes" 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. APP038. Whether a characteristic is an attribute or defect is not necessarily intuitive; the Department admitted that consumers may very well disagree with the State's preferences. APP068. They may enjoy the taste of lipase (as some do in provolone cheese), while the Department considers it disagreeable. Consumers have no reason to know or anticipate the State's arbitrary taste preferences. Even so, the Department does not disseminate pamphlets or other materials to inform consumers about butter grading. APP066. During discovery, the Department could produce no evidence that consumers know that butter grading measures these characteristics, APP091-092. And when asked, the Department explicitly disavowed

having any knowledge or opinion on whether consumers understand what butter grading is based on. *See, e.g.*, APP074; APP067; APP072.

Even if consumers knew the meaning of different butter characteristics, and knew whether they were considered attributes or defects under the grading statute, it's dubious that butter grading would actually inform them of how the butter tastes, because taste is a subjective quality. The Department admits that consumers may disagree about whether a butter tastes "pleasing," APP068; 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. APP045. Wisconsin-licensed butter graders, too, sometimes disagree. The Department has encountered instances where their employees disagree with a licensee's determination of a butter's grade, and it even has a process for resolving such disputes. APP042; APP045.

But even if consumers knew the meaning of different butter characteristics, knew whether they were considered attributes or defects, and tasted butter the same as the graders tasted them, grading still would not inform consumers about a butter's flavor, consistency, color, or saltiness, because grading uses a composite scoring system. That means that grading does not communicate anything about any individual characteristic. It also means that two butters with different characteristics can obtain the same grade. APP044; APP065. Two butters with different textures, for example, can both be graded AA, while two butters with the same texture can receive A and AA grades. The same is true for color and saltiness.

Grading doesn't communicate anything about the specific butter traits that the Department claims to be providing to consumers.

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. As the Department must concede, consumers are perfectly capable of determining whether butter is pleasing for themselves. APP073 ("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 tastes like to them, and whether they enjoy that taste. Even if the threat of consumers' purchasing a butter that displeased them was an evil that required government action, butter grading would not necessarily prevent that evil from occurring.

As the Department testified, whether a grade provides information to a consumer is "entirely dependent on the knowledge and interest of the consumer." *See* APP066. 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 butter makers 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 capable of doing it themselves.

C. The Butter Grading Requirement Does Not Further Any Other Conceivable Legitimate State Interest

Nor does requiring butter to be graded prior to being sold prevent deceptive advertising. 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 deceptive to sell ungraded butter only 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. APP069. 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." APP068. 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." *Id.* 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 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.[8]

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. APP044. In fact, the Department indicated

[8] In any event, "what consumers believe to be" the attributes of a given commodity "does not make [a seller's truthful representation] misleading." *See Ocheesee Creamery LLC v. Putnam*, 851 F3d 1228 (11th Cir. 2017); *see also Mason v. Florida Bar*, 208 F.3d 952, 957 (11th Cir. 2000) ("Unfamiliarity is not synonymous with misinformation.").

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.

D. The District Court Failed to Evaluate Whether the Means Are Actually Related to the Ends

The court did not address any of Minerva's due process arguments. Instead, it held without analysis that Wisconsin has an interest in ensuring its citizens were not "duped" into buying "'mealy,' musty' or 'scorched' butter" and that the "state could believe that required butter grading would result in better informed consumers." APP122.

This conclusory statement flies in the face of even rational basis review. Rational basis does not mean that the government, by merely asserting "consumer protection," can circumvent any analysis into whether its law actually furthers those ends. In *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), the Supreme Court recognized that to ignore facts during the rational basis inquiry would "deny due process," thereby flipping the Fourteenth Amendment on its head. Even in its laxest formulations, rational basis establishes a rebuttable presumption that can be overcome by record evidence. *Id.* (plaintiffs may prevail in rational basis challenge "by proof of facts tending to show that the statute . . . is without support in reason.").

Under rational basis scrutiny, therefore, 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). Some meager connection between the two is not enough. *See Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (although there may be some rational relationship between owning land and understanding local issues because land ownership is not necessary to understand local issues, because land-ownership requirement for local office is irrational). Thus, federal courts have struck down laws under rational basis scrutiny either on the grounds that laws are, in reality, furthering an *illegitimate* state purpose (like economic protectionism), or because they do not actually further the state's asserted interest. *See, e.g., St. Joseph Abbey*, 712 F.3d 215.

In *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009), the Tenth Circuit held that the government could not evade 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 either of those purposes. The court disposed of the predatory selling argument on the basis that there was no evidence that casket sellers were engaged in deceptive sales practices. Moreover, the training required to obtain a funeral director's license did not pertain to casket selling, and such predatory tactics were already prohibited by the state consumer protection statute. *Id.* at 223. Next, the court held that 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.*; s*ee also Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (same).

In both cases, the courts deferred to the legislature and presumed the statute constitutional. But after considering the evidence, they held that the plaintiffs were able to rebut that presumption. Here, the district court did not address any of the facts or Minerva's substantive arguments. It concluded summarily that the law was rational because the state might have thought it so. Even if a state may think a law furthers a legitimate state end, courts must consider whether the facts contradict that assertion. By refusing to consider Minerva's facts and arguments, the district court did not properly apply rational basis scrutiny.

E. The Butter Grading Requirement Violates Due Process As Applied to Minerva Dairy Butter

Even if the butter grading requirement were rational on its face, it would not be rational as applied to Minerva, which makes artisanal butter that is not intended to taste, look, or feel like commodity butter. That is, grading ranks butters according to how well they conform to government-approved commodity butter standards. And because grading is optional at the federal level, it is largely utilized by, and therefore associated with, big commodity butter makers. But Minerva Dairy is not a commodity butter, it does not advertise itself as a commodity butter, and it does not advertise itself as tasting like commodity butter.

Unlike large commodity butter makers, Minerva Dairy produces its Amish-style butters in small, slow-churned batches using fresh milk supplied by pasture-raised cows. APP001, APP003. The process results in butter that is unique in consistency and flavor. APP008-009. Minerva believes its artisanal butter is *better* than commodity butter. Whether a consumer considers Minerva butter to taste better than commodity butter will depend on the consumer's taste. But it is arbitrary for the government to require it to label its butter as "worse." And it is irrational to subject a product to mandatory taste-testing in the first place, when it does not seek to hold itself out as conforming to commodity standards.

The effect is much like Wisconsin's and other states' attempts to mandate that makers of butter substitutes like oleomargarine color their products pink. The Supreme Court recognized that such a requirement "naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to

purchase the article at any price." *Collins v. State of New Hampshire*, 171 U.S. 30, 33 (1898). But just as the State could not outright ban the sale of a healthful product, it could not discourage its purchase by forcing it to wear a scarlet—or rather, pink—letter for benefit of commodity butter makers who wanted to hamper their competitors. Here, the State wants Minerva to wear a scarlet letter to denote that it doesn't taste how the government think it should taste. Again, the winners are commodity butter makers who benefit from having their competitors labeled as inferior. Such a purpose and effect is arbitrary and unconstitutional.

II

MINERVA SHOULD HAVE PREVAILED ON ITS EQUAL PROTECTION CLAIM

A. The Law Irrationally Discriminates Among 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 graded and labeled 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 floodplain, 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 that 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." APP 073. They are not harmed by having to make that determination for themselves.

B. The Law Irrationally Discriminates Among 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, since the law 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. Wis. Admin. Code ATCP § 87.04; APP043. There is no reason for this differential treatment. If consumers need more information about a common product like butter, they are in need of even more information about commodities like cheese, which include several varieties with which the public is unfamiliar, or syrup, which is less commonly consumed and therefore less well-known. The Department itself testified that consumers would be more informed if other dairy commodities, like ice cream and yogurt, likewise required grading. APP078. As in *Merrifield*, this Court cannot uphold the requirement as applied to one class on a theory that applies equally, if not more, to an exempted class.

C. The District Court Failed to Properly Apply Rational Basis Scrutiny to Minerva's Equal Protection Claim

Because Minerva's due process and equal protection claims were both subject to rational basis scrutiny, the district court dismissed them for the same reason. But equal protection scrutiny requires both that the court engage meaningfully with the facts, but also that the court determine whether there is a rational basis *for the*

state's discrimination. This is a different from the due process inquiry, which asks whether there is a rational basis for the law's existence. The district court therefore failed to properly evaluate Minerva's equal protection claim.

III

MINERVA DAIRY SHOULD PREVAIL ON ITS COMMERCE CLAUSE CLAIMS

The Department's butter grading law erects a fence around the State of Wisconsin. Butter that may be legally sold in 49 other states is halted at the Wisconsin border. No business may have the key to Wisconsin's butter market unless it first conforms the taste of its butter to what Wisconsin has determined to be "highly pleasing," proves that it has conformed to that taste through an onerous grading exercise, and then labels its product accordingly.[9] While the butter taste test provides no legitimate benefit to Wisconsin consumers, it imposes significant costs on interstate butter makers like Minerva Dairy. As a result, the law violates the dormant Commerce Clause under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In addition to violating *Pike*, the Department—prior to this lawsuit—enforced the butter grading law in a manner that facially discriminated against out-of-state businesses. Namely, the Department would not permit out-of-state businesses to employ Wisconsin-licensed butter graders at their out-of-state butter making facilities. After the filing of this lawsuit, however, Wisconsin abandoned its

[9] If a butter business like Minerva Dairy chooses to maintain its unique flavor profile, it still needs to go through the grading process, only then it must label its butter as inferior to the commodity taste mandated by the Department.

overtly discriminatory practice and began allowing licensed butter graders at out-of-state facilities. The Department internally reversed its policy without any regulatory or statutory change in the law. Once this lawsuit ends, the Department is free renew its discriminatory treatment of out-of-state businesses. Accordingly, notwithstanding whether the butter grading law violates *Pike*, Minerva Dairy asks this Court to declare the Department's past discriminatory behavior unconstitutional under *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (laws that discriminate against out-of-state businesses are subject to a virtually per se rule of invalidity).

A. The Butter Grading Law Violates *Pike* Because the Burdens On Interstate Commerce Significantly Outweigh the Local Benefits

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*, 397 U.S. at 142. 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).

Pike balancing applies to "laws that are facially nondiscriminatory but have 'mild disparate effects and potential neutral justifications.'" *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017). This Circuit has also further uniquely restricted *Pike* to laws that have a disparate impact on businesses located out-of-state. *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995); *see also Park Pet Shop*, 872 F.3d at 501.[10] Laws that are not facially discriminatory, and do not have a disparate impact on out-of-state businesses, are analyzed under rational basis. *National Paint*, 45 F.3d at 1131.

The butter grading law has a disparate impact on interstate commerce. There are many Wisconsin butter makers that are not USDA-approved for selling their butter interstate. While there are fourteen butter manufacturers located in Wisconsin, only four are capable of shipping interstate. *Compare* Wisconsin Department of Agriculture, Trade and Consumer Protection: Division of Food and Recreational Safety, *Wisconsin Dairy Plant Directory 2016-2017* (Oct. 2016)[11], *with* 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/. For the remaining Wisconsin-

[10] *But see Park Pet Shop*, 872 F.3d at 504 (Hamilton, J., dissenting in part) (noting that the Court's disparate impact requirement is "difficult to reconcile" with the Supreme Court's latest *Pike* decisions).
[11] https://datcp.wi.gov/Documents/DairyPlantDirectory.pdf.

only butter makers, compliance with Wisconsin's butter grading law is far easier and far less costly than becoming USDA-compliant. For example, to ship interstate, USDA 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. *See* United States Department of Agriculture: Agriculture Marketing Service, *supra*. Wisconsin has no such equivalent.

But while the butter grading law provides Wisconsin businesses a streamlined process for selling butter in the state, it disparately affects interstate butter makers like Minerva Dairy. To sell butter in Wisconsin, an Ohio-based business like Minerva Dairy must have already gone through the rigorous USDA-approval process for selling butter interstate. Once it has, it can create its unique-tasting product for uniform sale throughout the nation, create uniform labels, and contract with distributors that sell butter across multiple states and regions. That is, of course, until the product arrives at the Wisconsin border. That same product is illegal in Wisconsin unless it first goes through the Wisconsin taste test and affixes a Wisconsin label denoting how "pleasing" Wisconsin deems it to be.

For the many Wisconsin-based butter makers that do not ship interstate, the butter grading law provides a safe harbor against competition. For out-of-state butter makers, only those businesses willing to go through the USDA approval process, *and* conform their butter to the Department's preferred taste, may sell

their butter within Wisconsin's borders. Thus, the butter grading law disparately affects interstate businesses like Minerva Dairy, and *Pike* analysis should apply.[12]

1. There Is No Evidence That the Butter Grading Law Provides Any Local Benefits

There is no evidence in the record that the butter grading law provides a single public benefit. None. The Department did not, and could not, provide any evidence that the law benefits Wisconsin consumers. To start, the Department unequivocally agrees that the law does not further any health or safety goal. APP091-093; APP108. While the Department suggested alternative, non-health and safety related, rationales for the law, it admitted that no evidence for those rationales exists. APP091-092 (showing the Department is "unaware" of any evidence that the butter grading law "informs consumers" or "supports local business").

Speculation about a law's benefits will not sustain a law under *Pike*, and, as this Court has made repeatedly clear, the government's asserted benefits must be proven with actual evidence. *See Baude v. Heath*, 538 F.3d 608, 611-12 (7th Cir. 2008); *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704-05 (7th Cir. 2009) (remanding because of the "evidentiary vacuum" noting that "that there may be nothing at all to justify [the law]"); *see also Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007) (remanding case because the district court failed to "engage in any meaningful examination of the claimed local benefits"); *Blue Circle Cement, Inc. v.*

[12] Of course, if the Court does not find that the butter grading law disparately affects interstate commerce, it would still violate the dormant Commerce Clause under rational basis scrutiny for the same reasons discussed in Arg. I and II.

Bd. of County Comm'rs of County of Rogers, 27 F.3d 1499, 1512 (10th Cir. 1994) (remanding because district court failed in its *Pike* analysis by not examining local benefits).

The "local benefits" asserted by the Department in justifying its commerce-burdening restrictions must be real and must find at least some support in the evidentiary record. *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981) (plurality opinion); *see also R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002); *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013), *Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 985 F.2d 164, 167 (4th Cir. 1993). The Department has not, and cannot, provide any evidence that the butter grading law provides a public benefit. To the contrary, throughout this litigation, Minerva Dairy has presented evidence that specifically undercuts the Department's purported benefits of the law.

Minerva Dairy has shown that the butter grading requirement does not inform consumers. As a logical matter, even if consumers understood the information a butter grade was *intended* to convey, butter grades unequivocally fail at conveying that information. Butter grades are composite scores based on 32 technical butter grading criteria. Wis. Admin. Code ATCP § 85.04. Each of these 32 criteria is scored based on four "intensity" metrics, which means that each is separately determined to either be: (1) absent; (2) slight; (3) pronounced; or (4) definite. *Id.* Then, a composite score is produced which determines the "pleasingness" of a particular butter. Because the "pleasing spectrum" represents a

composite score from a particular taste tester's evaluation, the grade does not tell the consumer anything about her particular purchase. Any "AA" graded butter could have any number of defects of varying intensity level. The same is true of "A," "B," and undergrade butter. Wis. Admin. Code ATCP § 85.05.

In addition, Minerva Dairy provided evidence establishing that even the Department's own experts have no idea what butter grades are intended to convey. *See* APP066-067; APP073-074; APP107. The Department also readily concedes that consumers' taste preferences may differ from the Department's, APP068, which is particularly curious given that the grading law is supposed to inform consumers about the "pleasingness" of a particular butter. Any information conveyed by a butter grade is further undercut by the revelation that the Department's own butter graders routinely disagree about the "pleasingness" of butter, that licensed graders regularly grade "incorrectly," and that the Department has an adjudicatory process set up to resolve "pleasingness" disputes. APP045-047.

Minerva Dairy has also shown that the butter grading law fails to prevent deceptive advertising. Of course, the law cannot prevent deceptive advertising, since there is nothing inherently misleading about selling ungraded butter. Ungraded butter satisfies Wisconsin's standard of identity for butter, Wis. Stat. § 97.01, and nearly every non-Wisconsin-based grocery store in the nation sells ungraded butter. Nor can selling ungraded butter be misleading because Wisconsin consumers "expect" butter to meet the Department's "pleasing" standard. *See* APP068. The government cannot mandate what butter must taste like, and then justify the

mandated taste by saying the consumers now expect it. *See Byrum*, 566 F.3d at 447; *see also Ocheesee Creamery*, 851 F.3d 1228 ("[W]hat consumers believe to be" the attributes of a given commodity "does not make [a seller's truthful representation] misleading."); *Mason*, 208 F.3d at 957 ("Unfamiliarity is not synonymous with misinformation.").

Aside from the Department's speculation that the butter grading law provides benefits to Wisconsin consumers, there is absolutely nothing in the record that demonstrates or proves a local benefit. The opposite is true. All evidence in the record indicates that the Department's speculative benefits are demonstrably false.

2. The Butter Grading Law Imposes Significant Costs on Interstate Commerce

In the court below, Minerva Dairy identified four significant costs to interstate commerce that result from the butter grading law: (1) damage to brand equity; (2) the costs to become a licensed butter grader; (3) the costs of employing a licensed butter grader; and, (4) the costs to supply chain management. Each of these costs is significant and each applies to butter makers nationwide.

For over 100 years, Minerva Dairy has been producing an artisanal butter in the Amish style. APP003. Its butter is slow-churned and made in small batches. *Id.* Its product tastes unique. But to enter the Wisconsin market, Minerva Dairy must identify its butter as "graded," which, to consumers of Amish-churned butter, means indistinguishable from all other commodity butters. Artisanal butter makers like Minerva are unwilling to saddle their butter with a "graded" label because of the

damage it would cause to their brand. To date, no artisanal butter maker who uses a slow churn has hired Wisconsin-licensed graders. APP040.

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.

Another cost of the butter grading law is the time and money spent to become a licensed butter grader. Learning how to grade butter is not done overnight. It takes study. Usually butter graders work in commodity butter plants for years. APP040. Then they often take a butter grading course that lasts two days at the University of Wisconsin. *Id.* 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. *Id.* 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. APP039-041.

After spending 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. APP076. 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 after it was kicked out of the Wisconsin market. APP039. 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.

Lastly, the butter grading law imposes significant costs attendant to the supply chain. Because artisanal butter makers that want to enter the Wisconsin market would need to create Wisconsin-specific labels for butter sold in the state, the butter makers would need to contract with a new supplier that was willing to limit its shipments to Wisconsin stores. 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. Moreover, 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. APP001-002; APP075.

B. The Court Should Declare the Department's Past Facially Discriminatory Enforcement of the Butter Grading Law Unconstitutional

The Department has, for years, enforced its graded butter requirement in a manner that facially discriminates against out-of-state butter makers. Namely, it prohibited out-of-state butter makers from having their butter graded by Wisconsin-licensed graders. APP111. Peter Haase, who was designated by the Department as the Person Most Knowledgeable about enforcement of the butter grading law, admitted that the Department's policy prior to Minerva Dairy's lawsuit was "that individuals outside of Wisconsin could not hold a Wisconsin butter graders license." *Id.* Only after Minerva Dairy filed this lawsuit did the Department authorize Wisconsin-licensed butter graders to grade out-of-state.

The Department has not adopted any new regulation, and the state has not passed any new statute. The Department's enforcement reversal is wholly litigation-prompted. As such, absent a declaration that its previous discriminatory enforcement of the butter grading law is unconstitutional, the Department may revert to its prior interpretation.

The law here is clear. "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 v. Cnty. of*

DuPage, 375 F.3d 542, 550 (7th Cir. 2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 999 (7th Cir. 2002) (the government must make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

The lower court declined to issue the declaration because, according to it, Minerva Dairy failed to "adduce evidence sufficient to establish that the pre-April 2017 understanding [of the butter grading law] violated . . . the Commerce Clause." APP126. But the Court got the standard backwards. Laws that discriminate against out-of-state businesses are subject to a virtually *per se* rule of invalidity. *City of Philadelphia*, 437 U.S. at 624. 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). [13] It is the Department that bears the burden of proving the constitutionality of its discriminatory conduct; it is not Minerva Dairy's burden to prove unconstitutionality. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986).

There is no dispute that: (1) the Department enforced the butter grading law in a facially discriminatory manner prior to Minerva Dairy's lawsuit (APP111); (2) Minerva Dairy challenged the law as facially discriminatory under the dormant

[13] The Department's prior enforcement was facially discriminatory. It permitted Wisconsin businesses to employ Wisconsin-licensed graders. It openly denied that option to out-of-state butter makers.

Commerce Clause (APP012); (3) the Department changed its enforcement practice after Minerva Dairy filed its lawsuit (APP111); (4) Minerva Dairy sought a declaration from the Court that the past discriminatory enforcement was unconstitutionally discriminatory (APP016); and, (5) the Department produced no evidence that the law, when enforced in a discriminatory manner, satisfies the Constitution. The lower court got it wrong. Minerva Dairy is entitled to a declaration that the Department's past enforcement of the butter grading law violates the Constitution's dormant Commerce Clause.

CONCLUSION

This Court should reverse the order of the district court, and direct the lower court to enter judgment in favor of Plaintiffs Adam Mueller and Minerva Dairy, Inc.

DATED: April 16, 2018.

Respectfully submitted,

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FORM 6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: April 16, 2018.

s/ Joshua P. Thompson
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CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated: April 16, 2018

/s/ Joshua P. Thompson

Joshua P. Thompson

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on April 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Joshua P. Thompson
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Attorney for Plaintiffs-Appellants
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No. 18-1520

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINERVA DAIRY, INC., et al.,

Plaintiffs - Appellants,

v.

SHEILA HARSDORF,
in her official capacity as the Secretary of
the Wisconsin Department of Agriculture,
Trade and Consumer Protection, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin
Honorable James D. Peterson, District Judge

APPELLANTS' REQUIRED SHORT APPENDIX

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Index to Short Appendix

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

MINERVA DAIRY, INC., and ADAM MUELLER,

Plaintiffs,

v. OPINION & ORDER

BEN BRANCEL, BRAD SCHIMEL, and PETER J. HAASE,

Defendants.

Plaintiff Minerva Dairy, Inc., under its president, plaintiff Adam Mueller, produces Amish butter and cheese in small, artisanal batches at its Ohio dairy. It filed this lawsuit challenging the constitutionality of Wis. Stat. § 97.176, which requires all butter offered for sale within Wisconsin to be graded by the U.S. Department of Agriculture or a Wisconsin-licensed butter grader. Minerva Dairy alleges that this statute violates the Commerce Clause, Equal Protection Clause, and Due Process Clause of the U.S. Constitution. Defendants, several Wisconsin officials whom the court will refer to as the state, disagree. Both sides move for summary judgment. Dkt. 25 and Dkt. 33. Because the statute is rationally related to Wisconsin's legitimate interest in helping its citizens make informed butter purchases, the court will grant summary judgment to the state and dismiss Minerva Dairy's claims.

UNDISPUTED FACTS

Except where noted, the following facts are undisputed.

A. The butter-grading law

In 1953, the Wisconsin legislature enacted a butter-grading law now codified at Wisconsin Statute section 97.176. The law requires butter offered for retail sale within the state to be labeled with a grade: either a Wisconsin grade or a USDA grade. The grade must be determined through an "examination for flavor and aroma, body and texture, color, salt, package and . . . other tests or procedures . . . for ascertaining the quality of butter." 97.176(3).

The Wisconsin Department of Agriculture, Trade, and Consumer Protection (DATCP) provides standards for the Wisconsin butter grading system. Wis. Stat. § ATCP Ch. 85. These standards mirror the USDA standards. U.S. Dep't of Agric., *U.S. Standards for Grades of Butter*.[1] For example, Grade AA butter must "be made from sweet cream of low natural acid," "possess a fine and highly pleasing butter flavor," have no more than a "slight" "feed or culture flavor," and have no more than a one-half "disrating[] in body, color and salt characteristics." § ATCP 85.03(1).

Butter that bears a Wisconsin grade label must be graded by a Wisconsin-licensed butter grader, who must sample each batch. To obtain a license, an individual must send the DATCP $75 and a written form listing, among other things, "the location where the grading is to be done." § ATCP 85.07. The individual must then appear at "a location in Wisconsin, as convenient to the applicant as possible," to take written and practical examinations to demonstrate proper grading of butter. Dkt. 48, ¶ 78. The individual must answer at least 70 percent of the written examination correctly and perform at least 70 percent of the practical examination correctly (as measured against the examiner's grading of the same samples) to

[1] *Available at* https://www.ams.usda.gov/sites/default/files/media/Butter_Standard%5B1%5D.pdf.

obtain a license. Once licensed, the individual must "pay a biennial license fee of $75." § ATCP 85.07(2). Before April 2017, the DATCP did not have an official policy about whether Wisconsin-licensed butter graders could grade butter at out-of-state facilities, but it had "a nonwritten understanding" that they could not do so. Dkt. 42 (Haase Depo. at 28:24-29:2). It now allows that practice.

The DATCP ensures compliance with the butter-grading law in several ways. If the DATCP learns of a retail store offering ungraded butter for sale, it sends a warning letter to the store. Stores generally comply with the law by removing the ungraded butter from their shelves after receiving a warning letter. The DATCP's sanitarians also randomly sample butter at manufacturing plants and stores within the state to confirm that the labeled grade is correct. If there is a discrepancy between the grade assigned by the sanitarian and the labeled grade, the DATCP sends a warning letter to the butter manufacturer. Because of the "inherently subjective" nature of butter grading, the DATCP allows for arbitration of discrepancies by a panel of graders. Dkt. 50, ¶ 19.

B. Minerva Dairy

Minerva Dairy is a family-owned dairy company that has been operating since 1884, when it first opened in Wisconsin. It moved operations to Ohio in 1935. Today, its 75 employees produce Amish butter and cheeses. It produces butter in "small, slow-churned batches using fresh milk supplied by pasture-raised cows." Dkt. 50, ¶ 4.

Minerva Dairy sold its butter in Wisconsin without incident until early 2017, when the DATCP received an anonymous complaint about ungraded Minerva Dairy butter being sold at a Wisconsin retail store, Stinebrink's Lake Geneva Foods. A DATCP sanitarian went to Stinebrink's, verified that ungraded butter was being offered for sale, and asked that it be

removed. On February 28, 2017, the DATCP followed up with a warning letter to Stinebrink's and Minerva Dairy notifying them of the butter-grading law and asking for "your future compliance with the State of Wisconsin related to butter grade labeling requirements." Dkt. 19-1. As a result, Minerva Dairy stopped selling its butter at retail stores in Wisconsin. A few months later, Minerva Dairy filed this lawsuit, alleging that Wisconsin's butter-grading law violates its rights under the Commerce Clause, Equal Protection Clause, and Due Process Clause. The court has subject matter jurisdiction over Minerva Dairy's claims under 28 U.S.C. § 1331 because they arise under federal law.

ANALYSIS

Both sides move for summary judgment on all three of Minerva Dairy's claims. Summary judgment is appropriate if a moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When, as here, the parties have filed cross-motions for summary judgment, the court "look[s] to the burden of proof that each party would bear on an issue of trial; [and] then require[s] that party to go beyond the pleadings and affirmatively to establish a genuine issue of material fact." *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). If either party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment against that party is appropriate. *Mid Am. Title Co. v. Kirk*, 59 F.3d 719, 721 (7th Cir. 1995) (quoting *Tatalovich v. City of Superior*, 904 F.2d 1135, 1139 (7th Cir. 1990)). "As with any summary judgment motion, this [c]ourt reviews these cross-motions 'construing all facts, and drawing all reasonable inferences from those facts, in favor of . . . the non-moving party.'" *Wis.*

Cent., Ltd. v. Shannon, 539 F.3d 751, 756 (7th Cir. 2008) (quoting *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 748 (7th Cir. 2007)).

Minerva Dairy contends that the butter-grading law deprives it and all artisanal butter makers of their rights without due process of law and denies them equal protection of the laws, in violation of the Fourteenth Amendment. The parties agree that both claims "trigger[] only the most lenient form of judicial review: the law is valid unless it lacks a rational basis." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 681 (7th Cir. 2017). So the court will analyze them together.

Rational-basis review is "a notoriously 'heavy legal lift for the challenger.'" *Id.* (quoting *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015)). The challenged law comes "with 'a strong presumption of validity." *Id.* at 683 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993)). Minerva Dairy, as the challenger, "must shoulder the heavy burden 'to negative every conceivable basis which might support it.'" *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315)).

The state may require grade labels on retail butter packages so that consumers could purchase butter with confidence in its quality. Consumer protection is a legitimate governmental interest. More specifically, Wisconsin has a legitimate interest in ensuring that its citizens aren't duped into buying "mealy," "musty," or "scorched" butter (to name a few of the characteristics included in the grading system). The state could believe that required butter grading would result in better informed butter consumers. Minerva Dairy argues that some might disagree with the state's preferences and that it would be better to label butters according to their characteristics, rather than a composite grade. It also points out that Wisconsin doesn't require grading of other packaged products sold at retail, such as honey. Wisconsin's consumer-protection regulations may not be perfect, but "[t]he fact that other means are better suited to

the achievement of governmental ends . . . is of no moment under rational basis review." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 77 (2001). Minerva Dairy has not shown that the butter-grading law lacks a rational basis, so the law does not violate the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

That leaves Minerva Dairy's Commerce Clause claim. The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. It does not explicitly limit state regulation, "but the Supreme Court has long held that a "dormant" or "negative" component of the Clause implicitly limits the states from 'erecting barriers to the free flow of interstate commerce' even where Congress hasn't acted." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978)).

The Seventh Circuit has explained that state laws "fall into one of three categories for purposes of dormant Commerce Clause analysis." *Id.* First are those laws that discriminate on their face against interstate commerce. They are "presumptively unconstitutional." *Id.* Second are those laws that indirectly or incidentally discriminate against interstate commerce. These facially neutral laws are analyzed under the *Pike* test, which balances "the burden imposed on [interstate] commerce" against "the putative local benefits." *Id.* at 502 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The third category consists of "laws that affect commerce without any reallocation among jurisdictions." *Id.* (quoting *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995)). "In this third category, 'the normal rational-basis standard is the governing rule.'" *Id.* (quoting *Nat'l Paint*, 45 F.3d at 1131). Or as Judge Easterbrook explains, "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Nat'l Paint*, 45 F.3d at 1132.

Minerva Dairy contends that Wisconsin's butter-grading law belongs in the second category. But it does not argue that the butter-grading law discriminates against interstate commerce. Instead, it argues that the butter-grading law discriminates against "artisanal butter makers" like itself, whether in-state or out-of-state. *See, e.g.*, Dkt. 45, at 8 ("Requiring butter to be graded forces artisanal butter makers out of the Wisconsin market . . . ."); *id.* at 21 ("It may be true that [the DATCP] has, at least for now, stopped discriminating against out-of-staters."). In fact, it criticizes the state for "incorrectly focus[ing] on the benefits and burdens of out-of-state versus in-state businesses." *Id.* at 6. But that's exactly what a second-category *Pike* analysis must focus on. "*Pike* balancing is triggered *only* when the challenged law *discriminates* against interstate commerce in practical application. *Pike* is not the default standard of review for any state or local law that affects interstate commerce." *Park Pet Shop*, 872 F.3d at 502; *see also id.* at 502 n.1.

The best pitch for the second category might go something like this: Out-of-state butter-grading-license applicants must travel to Wisconsin to take the required examination, whereas in-state butter-grading-license applicants don't have to travel outside the state. Minerva Dairy has waived this argument by failing to develop it, *see United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 & n.4 (7th Cir. 2016), but regardless, it would not trigger analysis under *Pike*. The Seventh Circuit addressed a similar argument in *Park Pet Shop*, a case concerning Chicago's "puppy mill" ordinance. The court explained that even if the ordinance resulted in "Chicagoans [preferring] breeders located closer to the city over those that are farther away," that result "would show only that the ordinance may confer a competitive advantage on breeders that are not too distant from Chicago. . . . [T]hose breeders are as likely to be located in nearby Wisconsin or Indiana as they are in suburban Chicago or downstate Illinois." 872

F.3d at 502–03. In other words, the ordinance does not discriminate against interstate commerce; rather, it discriminates against long-distance commerce, which does not trigger *Pike* balancing. The same is true here. A butter-grading-license applicant from Illinois, for example, need only drive over the state border to take the exam; an applicant from California, on the other hand, must spend more time and money to obtain a license, just as they must spend more time and money shipping their product to Wisconsin stores. That's a geographical fact, not discrimination. Just like Illinois pet breeders in *Park Pet Shop*, Wisconsin butter makers do not enjoy a categorical "competitive advantage over their counterparts outside the state[, so] *Pike* balancing does not apply." *Id.* at 502. The butter-grading law belongs in the third category, and as explained above, it survives rational-basis review. Thus, it does not violate the dormant Commerce Clause.

Minerva Dairy also moves for summary judgment that the DATCP's pre-April 2017 "understanding" of the butter-grading law is unconstitutional. Dkt. 35, at 20. It argues that it is entitled to such a declaration under the voluntary-cessation doctrine. The voluntary-cessation doctrine does not render a law constitutional or unconstitutional. Rather, it applies "when a defendant seeks dismissal of an injunctive claim as moot on the ground that it has changed its practice while reserving the right to go back to its old ways after the lawsuit is dismissed." *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016). If the defendant does not meet "[t]he 'heavy burden' of persuading the court that the challenged conduct 'cannot reasonably be expected to start up again,'" the claim is not moot and the court may address the merits of the claim. *Id.* at 545 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Here, the state does not seek dismissal of any claim as moot. If Minerva Dairy wanted a declaration that the pre-April 2017 understanding of the butter-

grading law is unconstitutional, it did not need to invoke the voluntary-cessation doctrine. It needed to adduce evidence sufficient to establish that the pre-April 2017 understanding violated the Equal Protection Clause, the Due Process Clause, or the Commerce Clause. It did not do so. In fact, it did not adduce any evidence or make any argument concerning the pre-April 2017 understanding other than citing the voluntary-cessation doctrine. So for the reasons stated above, the state is entitled to summary judgment in its favor on all claims.

Finally, the state moves the court to dismiss all claims against Haase and Schimel. Because the court will dismiss all claims against all defendants on the merits, it need not reach this issue.

ORDER

IT IS ORDERED that:

1. Plaintiffs Minerva Dairy, Inc., and Adam Mueller's motion for summary judgment, Dkt. 33, is DENIED.

2. Defendants Ben Brancel, Brad Schimel, and Peter J. Haase's motion for summary judgment, Dkt. 25, is GRANTED.

3. The clerk of court is directed to enter judgment in defendants' favor and close this case.

Entered February 5, 2018.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge

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

MINERVA DAIRY, INC. and
ADAM MUELLER,

Plaintiffs,

v.

BEN BRANCEL, BRAD SCHIMEL, and
PETER J. HAASE,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 17-cv-299-jdp

This action came before the court for consideration with District Judge James D. Peterson presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favors of defendants Ben Brancel, Brad Schimel, and Peter J. Haase granting their motion for summary judgment and dismissing this case.

s/V. Olmo, Deputy Clerk
Peter Oppeneer, Clerk of Court

02/05/2018
Date