STATE OF WISCONSIN CIRCUIT COURT OZAUKEE COUNTY

JEAN SMITH, et al.,
Plaintiffs,

Case No. 17-CV-120

-vs-

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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS CLAIMS ONE AND TWO OF THE COMPLAINT

According to Defendant, Wisconsin's butter labeling requirement is rationally related to the legitimate government objective of providing consumers with information about the quality of the product for sale. Def. Br. at 1. But there are at least three problems, each of which lead to the same uncomfortable question for Defendant – what is it exactly about butter – as opposed to other products – that require a government taste test and how does this compulsory food review serve the general welfare?

First, the requirement of butter grading does not communicate anything about the product's "quality" that consumers could not ascertain for themselves. Wisconsin's grading requirements do not relate to public safety or health. They are not concerned, for example, with whether the graded butter is adulterated or possesses some characteristic – say nutritional value or caloric content – that cannot be as readily ascertained by the consumer. It "protects" the public against nothing other than the possibility that a consumer might buy something that a government food critic does not like. If the state's police power extends to mandatory

government taste tests that must be communicated to the consumer by sellers, then it is truly unlimited.

Second, there is no reason to believe that the vague, subjective and multiple "qualities" that these government tasters must consider will actually communicate anything of value to consumers. It at best conveys the subjective opinion of a government taster. There is no reason to believe that a bureaucrat's belief that a butter is sufficiently creamy, properly salted, too crumbly or possesses a "culture" flavor to a "slight" degree or a "cooked flavor" to a "definite" degree, *see* pp. 3-4, i*nfra*, communicates any information of value to consumers. It is unlikely that a taste test, like this one, which considers thirty-five vague and subjective characteristics can result in anything other than an idiosyncratic judgment of no use to anyone.

Finally, the police power – whatever its scope – must be exercised in a way that is consistent with the constitutional command that all receive equal protection of the law. If consumers should be protected from buying something that a government critic does not like, why stop at butter? Is the risk from poorly "graded" cookies, fruit, vegetables, or yogurt any less dangerous than an overly salted batch of butter? Why not require that wine be labeled with a government oenophile's views or that pastas be scored on a scale of one to five? And why stop with food? Under Defendant's theory, cell phones, home cleaning products, vehicle tires, and clothing are all products that should be "graded" in accordance with the government's view of their desirability so that consumers are provided with "information about the quality of the product for sale." Def. Br. at 1.

Although regulation need not be perfectly consistent, singling out the sellers and consumers of butter needs at least some justification. This is particularly so given Wisconsin's

long history of acting to protect the local dairy industry – a government purpose that the Wisconsin Supreme Court has long held to be illegitimate.

This is not a harmless bit of busybodiness. While the state has broad police powers and ample room for economic regulation, there is a long history in Wisconsin of giving a hard look at restrictions on the right to earn a living and to engage in an otherwise lawful business or consumer decision. While the legislature may pass "silly laws," there must be a rational argument that a purported exercise of the police power serves the general welfare and that the means chosen might serve that end. When there is reason to doubt such a rational basis, courts must consider whether there is enough evidence to support it, i.e., to regard it as sufficiently plausible to survive review.

FACTUAL BACKGROUND

Plaintiffs' civil rights lawsuit challenges the constitutionality of Wis. Stat. § 97.176, a regulation relating to the grading and labeling of butter (the "butter law"). Complaint, ¶ 1. Butter is to be graded as Wisconsin AA, A, B, or undergrade.[1] Wis. Stat. § 97.176(1)(a)-(d); *Id*. The grades must be communicated on the packaging. Wis. Stat. § 97.176(5); *Id*., ¶ 16; ATCP 85.06(2); *Id*., ¶ 19.

These grades do not relate to whether butter is safe or nutritional or contains some ingredient or possesses some characteristic not readily apparent to consumers. Rather, they relate to taste and appearance – matters that are not only subjective but which consumers are better positioned to judge for themselves. For example, Wisconsin Grade AA butter must, among other factors, "possess a fine and highly pleasing butter flavor", it may "possess a feed or culture flavor to a slight degree or cooked flavor to a definite degree, or any combination of these

[1] The law accepts voluntary United States AA, A, and B grades in lieu of the corresponding Wisconsin AA, A, and B grades. Wis. Stat. § 97.176(2); *Id*.

characteristics", and "shall be made from sweet cream of low natural acid to which a starter culture may or may not have been added." ATCP 85.03(1)(a)-(c); *Id*., ¶ 22. The "score or grade means the grading of butter by its examination for flavor and aroma, body and texture, color, salt, package and by the use of other tests or procedures approved by [DATCP] for ascertaining the quality of butter in whole or in part." Wis. Stat. § 97.176(3); *Id*., ¶ 23.

The applicable administrative code directs that, "[f]or grading purposes, the flavor of a sample of butter shall be based upon the presence or absence of one or more of the following characteristics, organoleptically determined by taste and smell." ATCP 85.04(1)(a); *Id*., ¶ 26. The code lists 35 characteristics. *Id*. With respect to flavor, the characteristics that may be considered and listed by butter graders include acid, aged, bitter, coarse, cooked, culture, feed, flat, malty, musty, neutralizer, old cream, scorched, smothered, storage, utensil, weed, and whey. ATCP 85.04(1)(a)1.-18; *Id*., ¶ 27. With respect to body, the characteristics that may be considered and listed by butter graders include crumbly, gummy, leaky, mealy or grainy, ragged-boring, short, sticky, and weak. ATCP 85.04(1)(b)1.-8; *Id*., ¶ 28. With respect to color, the characteristics that may be considered and listed by butter graders include mottled, speckled, streaked, and wavy. ATCP 85.04(1)(c)1.-4; *Id*., ¶ 29. With respect to salt, the characteristics that may be considered and listed by butter graders include sharp and gritty. ATCP 85.04(1)(d)1.-2; *Id*., ¶ 30. With respect to intensity, the characteristics that may be considered and listed by butter graders include slight, definite, and pronounced. ATCP 85.04(2)(a)-(c); *Id*., ¶ 31.

The plaintiff Ozslo Foods is a small health food store doing business in Grafton, Wisconsin as "Slow Pokes Local Food." *Id*., ¶ 53. Among the dairy products it has sold in the past is Kerrygold butter. *Id*., ¶ 55. Approximately two years ago, the Department of Agriculture,

Trade and Consumer Protection ("DATCP") began enforcing Wis. Stat. § 97.176 which, as we have seen, prohibits the sale of untasted (and graded) butter in Wisconsin. *Id*., ¶ 56. Kerrygold butter is made in Ireland and, therefore, is not graded in Wisconsin or the United States. DATCP's enforcement harmed Ozslo Foods by reducing its sales volume, and thereby its profit. *Id*. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Ozslo Foods would sell Kerrygold butter to all willing customers and thereby increase its revenue and profit. *Id*., ¶ 57.

Plaintiffs Jean Smith, Amber Marzahl, Nicole Batzel, and Kathleen McGlone all prefer Kerrygold butter over other alternatives available in Wisconsin. *Id*., ¶¶ 58, 60, 62, 64. Because it is unavailable for *legal* sale in Wisconsin, Ms. Smith brings back as much Kerrygold butter with her as possible when she visits family in Nebraska. *Id*., ¶ 58. Plaintiffs often keep large amounts of the butter in their respective home refrigerators in the hopes that they will have enough to last until friends and family make out-state trips to obtain the butter. *Id*., ¶¶ 58, 60, 62, 64. Plaintiffs are harmed by Kerrygold's unavailability in Wisconsin, since they are forced to spend more time and resources locating Kerrygold butter. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Plaintiffs could purchase Kerrygold butter more easily and conveniently near their respective homes. *Id*., ¶¶ 59, 61, 63, 65.

ARGUMENT

Defendant argues, among things, that no "right to buy a particular brand of unregulated butter of one's choosing" exists under the Wisconsin Constitution. Def. Bf. at 10. This is a bit of reductionism that ignores how and why the state is restricting the Plaintiffs' choices. There is, for example, no "right" to buy margarine or the frozen desert product of one's choosing. There is no right to sell and buy liquor at a grocery store. Yet, as we will see, state and local laws that previously prevented Wisconsin's citizens from doing each of these things have been held to

violate the constitutional guarantees embodied in Art. I, Sec. I of the Wisconsin Constitution. *See* pp. 10-12, *infra*.

Article I, Section I of the Wisconsin Constitution, through its guarantees of due process, imposes on the state a requirement that it not impair the Plaintiffs' right to earn a living and enter into otherwise lawful transactions simply to favor some competitors over others or for reasons that are arbitrary, and irrational. It also guarantees the equal protection of the law. Plaintiffs allege the butter law violates *these* constitutional guarantees. Plaintiffs also allege that by forbidding the sale or purchase of butter that does not communicate a compelled government message, the butter law violates the Plaintiffs' right of free speech under Art. I, Sec. 3 of the Wisconsin Constitution. The Defendant has moved to dismiss the first two claims, but not the third.

I. Defendant Fails to Meet Its Burden under Wisconsin's Motion to Dismiss Standard

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. "Upon a motion to dismiss, we accept as true facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id*. (citing *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205). However, a court cannot add facts when analyzing the sufficiency of the complaint. *Id*. The alleged facts must "plausibly suggest [the plaintiff is] entitled to relief." *Id.*, ¶31. Whether a complaint adequately pleads a cause of action is a question of law. *Hermann v. Town of Delevan*, 215 Wis. 2d 370, 378, 572 N.W.2d 855 (1998).

"The court is not to be concerned with whether the plaintiff can actually prove the allegations…The underlying facts alleged are taken as true, and only the legal premises derived

therefrom are challenged." *Keller v. Welles Dept. Store of Racine*, 88 Wis. 2d 24, 29, 276 N.W.2d 319 (1979). Because the allegations of the Complaint must be taken as true, the Defendant, at this stage, cannot prevail by simply contradicting them. A motion to dismiss must argue that, even if true, the allegations of the complaint do not state a claim. Whether they are true is a question for another day.

A. This case is controlled by Wisconsin law.

The Defendant concedes that, whether analyzed under the due process or equal protection guarantees of Art. I, Sec. 1, the butter law must survive rational basis review. Oddly, his discussion of what such review entails emphasizes federal law. But Plaintiffs' claims are made under the Wisconsin Constitution and are controlled by the decisions of the Wisconsin Supreme Court. As we will see, the federal picture is more complicated than the Defendant's assemblage of pull quotes might suggest. But whatever one makes of the shifting sands of federal rational basis review, that law is only instructive, not controlling. The rights of Wisconsin citizens under their own Constitution are not necessarily limited or subject to the same limitations as those rights protected under the Fourteenth Amendment to the U.S. Constitution. As the Wisconsin Supreme Court has explained:

> It is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment.

State v. Doe, 78 Wis. 2d 161,171 (1977).[2] Indeed, as the court itself has noted, at the time the Wisconsin Constitution was ratified in 1848 it was generally understood that the State's own Constitution and courts were an important independent guarantee of the liberty of its citizens:

[2] *See also* John D. Sundquist, *Construction of the Wisconsin Constitution: Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 534 (1979) (noting the Wisconsin Supreme Court's willingness to interpret the guarantees of the state constitution independent of federal guarantees).

> A mere glance at the history of the times . . . will suffice to convince us that the respective states were regarded as the essential, if not the sole guardians of the personal rights and liberties of the individual citizens.

In re Sherman M Booth, 3 Wis. 13, 87 (1854) (Smith, J., concurring). Prior to the adoption of the Fourteenth Amendment, it was only the Wisconsin Constitution that protected Wisconsin citizens from the usurpation of their rights by the State itself.

Even after the Fourteenth Amendment was ratified, the United States Supreme Court recognized that state courts and constitutions remained an independent source of protection for individual liberties. While the oft-criticized and questioned *Slaughter-House Cases*, 83 U.S. 36 (1873) held that the federal Privileges and Immunities Clause only protects rights that are federal in character, the U. S. Supreme Court recognized the obligation of the state courts and constitutions to protect the privileges and immunities of state citizens, including all "privileges of trade and commerce." *Id*. at 74-78.

B. Economic liberty has long been protected in Wisconsin.

Article I, Section 1 of the Wisconsin Constitution, ratified in 1848, provides that "all people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." These words give rise to the due process and equal protection safeguards that protect Wisconsin citizens from the power of the State.

Although Wisconsin courts have sometimes looked to the federal rational basis test as a guidepost, the Wisconsin Supreme Court has never adopted the *Carolene Products* rule. To the contrary, it has specifically declined to do so. In *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 478 (1952), the court stated:

> It is urged that the decision[] of the United States Supreme Court in *Carolene Products Co.* . . . require us to hold sec. 97.025 valid. We prefer to abide by the rule of the *Jelke* case and to conclude that if a law creating, maintaining or sustaining a monopoly and purporting to prevent the sale of a wholesome product

> under circumstances which will not deceive the public, and to be sold without injury to any group except the monopoly is to be declared a valid enactment, **some other court be called upon to do so.** (emphasis added)

In cases stretching from 1859 to 2017, Wisconsin courts have long understood the Constitution, including the concept of "liberty," to secure and protect the right of citizens to engage in lawful and productive commerce as a "fundamental right." As early as *Maxwell v. Reed*, 7 Wis. 582 (1859), the court characterized the right to earn a living as "one of the great bulwarks of individual freedom" that was "guarded by [the State's] fundamental law" of the Constitution. *Id.* at 594. Other early Wisconsin cases also recognized the importance of economic liberty under the Constitution. *See, e.g., Taylor v. State*, 35 Wis. 298 (1874) (right to engage in business is a fundamental right under the Wisconsin Constitution); *State v. Benzenberg*, 101 Wis. 172 (1898) (Constitution protects right of a citizen to pursue his calling).

From these early days, Wisconsin courts have evaluated allegations of economic protectionism and impairment of the right to earn a living with a form of scrutiny that considers evidence and requires a "real and substantial justification" for the restrictions. In *State ex rel. Zimmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098 (1902), the court plainly stated that, while the legislature should be afforded the "fullest exercise of discretion within the realm of reason," *id.* at 1105, economic regulation must still bear a "real [and] substantial" relationship to the objectives that it purports to secure, *id.* at 1102. Furthermore, the law must not "under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." *Id.* at 1102 (citations omitted).

In *State v. Redmon*, 134 Wis. 89 (1907), the Wisconsin Supreme Court stated that if a regulation purporting to have been enacted to protect the public welfare has no **real or substantial relation** to its object, it is the duty of the courts to give effect to the constitutional

guarantee of liberty by striking it down. Anticipating Justice Stevens' observation many years later, *see* p. 17, *infra*., it noted that complete deference to whatever purpose might be hypothesized to possibly serve some laudatory purpose (such as that advocated here by Defendant) would result in:

> one [being] placed in such a straight–jacket, so to speak, that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property, - those things commonly supposed to make a nation intelligent, progressive, prosperous and great, - would be largely impaired and in some cases destroyed.

114 N.W. at 141. These early cases establish that, in Wisconsin, "[t]here must be a **reasonable ground for the police interference** and also **the means adopted must be reasonable** for the accomplishment of the purpose in view." *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882, 885 (1914) (emphasis added).

Thus, Wisconsin courts have struck down laws designed to favor one class of competitors at the expense of another. In *John F. Jelke v. Emery*, 193 Wis. 311, 214 N.W. 369 (1927), the court dealt with the legislature's decision, presumably at the behest of the dairy industry, to ban the sale of oleomargarine and other substitutes for butter in Wisconsin. Substitute Kerrygold butter, or any other internationally produced butter, for oleomargarine and the *Jelke* case and the one currently before this court are nearly identical.

The court rejected the idea that the legislature, "in order to protect the Wisconsin dairy industry from unfair competition, may prohibit the manufacture and sale of oleomargarine. There is no basis in the evidence upon which a claim of unfair competition can be based." *Id.*, 214 N.W. at 373. Observing that the State "has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef cattle industry, or to prohibit the manufacture and sale of cement for the

benefit of the lumber industry, it noted that "courts will look behind even the declared intent of Legislatures, and relieve citizens against oppressive acts, where the primary purpose is not to the protection of the public health, safety, or morals." *Id.*

It has been said that history does not repeat itself, but it often rhymes. Some twenty-five years after *Jelke*, the Wisconsin dairy industry again sought the assistance of the State to ban a new soft-serve frozen dairy product by Dairy Queen. Based on the facts, the Supreme Court concluded that the statutes the State was attempting to enforce did not ban the sale of the product. "[T]he general welfare does not require prohibition of the manufacture and sale of the product here in question." *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 477 (1952).

Several *amicus* organizations, including about 85 Wisconsin manufacturers of ice cream, sought rehearing of the Supreme Court's decision in favor of Dairy Queen. 52 N.W.2d 791. They claimed that enforcement of the statutes in question by the State was necessary to preserve "a generation's work in fixing dairy product standards" and that failure to enforce them would result in "the destruction of the reputation of the state" which was of great importance to its economy. The court rejected their concerns, reiterating the rule established in *Jelke* (simultaneously rejecting the rule of *Carolene Products*). *Id.* at 478. Based on "experience [and] logic" the Court concluded that the introduction of Dairy Queen would open a "new market and new demand" for Wisconsin dairy farmers. *Id.* at 477. In contrast, if the statute in question actually was interpreted to ban the sale of Dairy Queen, it would promote a restricted market and encourage monopoly by preventing the introduction of a wholesome product. In the latter case, *Jelke* would require that it be held invalid as being unduly restrictive and therefore unreasonable. *Id.* at 478.

While not involving the dairy industry, in *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203 (1982), the Wisconsin Supreme Court reviewed a Milwaukee ordinance requiring that a Class "A" liquor license applicant receive at least 50 percent of its income from the on-the-premises sale of intoxicants. Reversing the Court of Appeals, the Wisconsin Supreme Court held the ordinance to be constitutionally infirm. It specifically noted that "the Court should receive with some skepticism post hoc hypotheses about legislative purpose unsupported by legislative history." *Id*. at 211 (citation omitted). In discussing the proper test to apply, the court stated,

> Although the rational-basis standard of review of the instant ordinance forbids us from substituting our notions of good public policy for those who adopted the ordinance, this does not mean that our evaluation is limited to form and not substance. As the [United States] Supreme Court has very recently opined: The rational-basis standard of review is 'not a toothless one.'

Id. at 209.

> Similarly, in *Wisconsin Wine & Spirit Institute v. Ley*, the court of appeals noted:
>
> While the rational-basis standard of review forbids us from substituting our notions of good public policy for those of the legislature, and, if necessary, requires that we construct a rational basis for a statute, this does not mean that our evaluation is limited to form and not substance. . . . The rational-basis standard of review is "not a toothless one."

141 Wis. 2d 958, 964 (Ct. App. 1987). The Court of Appeals went on to strike down the exception in the liquor law being challenged, characterizing the exception as a subversion of the State's police power. *Id.* at 971.

Wisconsin courts have variously called this standard "rational basis with teeth," "rational basis with bite," or "meaningful rational basis." Although the rational basis with teeth standard was most recently and fully explained in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005), *Ferdon* was by no means the first case to articulate or

apply this standard. In *Doering v. WEA Ins. Group*, after noting that, under the rational basis standard, a court must exercise judicial restraint, the Wisconsin Supreme Court went on to say that "the rational basis test is not a toothless one." 193 Wis. 2d 118, 132 (1995). The proper test, the court stated, "allows the court to probe beneath the claims of the government." *Id.*

In *Ferdon*, after reciting the familiar requirements of the federal rational basis test, the court held that nevertheless, in Wisconsin "there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." 2005 WI 125, ¶77. "The court must probe beneath the claims of the government to determine if the constitutional requirement of some rationality in the nature of the class singled out has been met." *Id.* As in the cases cited above, the *Ferdon* court effectively looked behind the purposes stated by the legislature and those defending the statute to determine if there was an "objectively reasonable basis" to support the law. *Id.*, ¶165. Finding that there was no objectively reasonable basis, the *Ferdon* court invalidated the law. *Id.*, ¶188.

A Wisconsin circuit court employed a comparable analysis in striking down a City of Milwaukee ordinance limiting the number of taxi cab medallions, favoring a privileged class of incumbents and impairing the ability of new entrants to start taxi businesses and earn a living. In the face of the city's "conceivable assertions" that the ordinance served administrative goals and increased professionalism in the market, citing cases like *Metropolitan Life Insurance v. Ward* (*see*, p. 18, *infra*.), *Craigmiles* (*Id*.) and *Grand Bazaar* (*see*, pp. 11-12, *supra*.), Judge Jane Carroll observed that "[t]he City can't simply articulate a reason without its ability to show that this is – that it does that, that this cap and this system of making these permits available on the private market does something to create additional professionalism in the market" and concluded that "[t]he City states it, but doesn't really convince me that this law was intended to

do that or had that effect." *Ibrahim v. City of Milwaukee*, Case No. 11-CV-15178 (Transcript of April 13, 2013 Hearing, p. 55).[3]

Finally, and most recently, the Circuit Court in Lafayette County, Wisconsin, held that a ban on grandmothers selling cookies at bake sales was an unconstitutional infringement. *Lisa Kivirsit, et al. v. Wisconsin Dept. of Agriculture*, Case No. 16-CV-06 (Transcript of May 31, 2017 Hearing).[4] The plaintiffs in the case sold baked goods up until the point where they became aware that their practice of selling such baked goods was prohibited under Wisconsin statute unless they first obtained food establishment or food processing plant licenses, which in turn would have required the installation of a commercial grade kitchen separate from their respective home kitchens. *Id*. at pgs. 4:24-5:8. Plaintiffs argued that a rational basis for the stated purpose of the statute did not exist and that as applied to them, was a violation of their equal protection rights. *Id*. at 5:13-16.

Echoing the Supreme Court's finding that preferring some competitors over others is not a legitimate government purpose, the court acknowledged that the "stated purpose of the Food Code is to assure public health and safety when consumers purchase foods produced…by a food processor." *Id*. at 11:24-12:2. However, it refused to simply accept that claim at face value. It went on to examine "whether the statutory scheme is rationally related to public health, safety, morals or general welfare." *Id*. at 14:15-19. "Simply stating it is not sufficient." *Id*. at 14:19-20. In the Court's view, the state's position "unraveled." *Id*. at 15:8.

Noting that Wisconsin was one of only two states to have such a regulation, it found "virtually no evidence" to show that the safety concerns…are of a concern and a real problem that requires the intervention of the State." *Id*. at 17:11-15, 18. Citing to *Ferdon*, the Court

[3] Curtis Aff. Ex. 1.
[4] Curtis Aff. Ex. 2.

noted it must ask itself "at what point does the proffered concern become fanciful…" *Id*. at 19:13-22. The Court concluded by holding "[b]ecause the statutory scheme does not have a rational connection with the stated objective of the statute, its application to the Plaintiffs has what the Court views as the unintended consequence of economic protectionism." *Id*. at 20:21-21:1. Instead, the "regulations burden the Plaintiffs without any corresponding benefit." *Id*. at 21:2-3.[5]

Recent cases in other jurisdictions have followed Wisconsin's approach. In *Retail Services & Systems v. S.C. Dep't of Revenue and ABC Stores*, 419 S.C. 469, 799 S.E.2d 665 (2017)[6] the South Carolina Supreme Court struck down a state law limiting how many liquor retail outlets an individual or business could own within the state. The law limited individual owners to operating no more than three liquor retail stores in South Carolina – Total Win & More wished to operate a fourth. *Id*. at 666. It was denied a permit under the statute. *Id*. While the court acknowledged the South Carolina legislature has the ability to exercise its police powers, it emphasized those powers are not unlimited. The court recognized the state could use the police powers to "regulate any trade, occupation or business" but in so doing, must articulate a proper rationale, such as the protection of "public health, morals, safety or comfort." *Id*. at 667 (quoting *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 98, 596 S.E.2d 917, 924 (2004)). The only justification offered for the limitation was that they "support small businesses" and lacked any evidence of safety concerns. *Id*. "Without any other supportable police power justification present, economic protectionism for a certain class of retailers is not a constitutionally sound basis for regulating liquor sales." *Id*.

[5] Applying the three-prong *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) test, the Court similarly found an equal protection violation. *Id*. at 25:4-30:8.
[6] Curtis Aff. Ex. 3.

The more exacting *Ferdon* rational basis review under Wisconsin law is similar to what the Texas Supreme Court applied in *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015),[7] when it held that under the Texas Constitution economic regulation is unconstitutional if when considered as a whole, the statute's **actual, real-world effect** could not arguably be rationally related to the asserted governmental interest. The court rejected a claim that Texas should simply follow *Carolene Products* and uphold the statute in question (which involved licensing of "hair threaders") and defer to "any conceivable basis" for the law.

It noted that "[a]lthough whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties. *Id.* Three concurring justices further noted that the case was "about whether government can connive with rent-seeking factions to ration liberty unrestrained, and whether judges must submissively uphold even the most risible encroachments." *Id.*; see also *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017) (although decided on the commercial speech theory that the Defendant here has not moved to dismiss, the court found that the "informational" interest advanced by Florida was not sufficiently weighty to justify banning the sale of the creamery's skim milk as in fact "skim milk").

C. Federal rational basis review is not as forgiving as the State claims.

While Wisconsin law controls the rational basis standard this court must apply, Plaintiffs emphasize federal rational basis review is not as forgiving as the Defendant wants this court to believe it is. Defendant opens its analysis by citing to what would seem to be the more lenient federal rational basis standard for the proposition that "[a]s long as there is some conceivable,

[7] Curtis Aff. Ex. 3.

legitimate basis for the law, courts will not invalidate the law." Def. Br. at 4-5 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

Relying on *FCC*, it argues that a statute can survive rational basis review even where the reasons given by the legislature do not support it, so long as the court itself can imagine some basis on which the legislature could have acted. A challenged statute, it claims, must be upheld even if it is based only on "rational" speculation unsupported by evidence or empirical data. *Id.* In other words, the legislature can set almost whatever goal it wants – save, perhaps, those explicitly prohibited by the Constitution – and the state will win whether or not there is any evidence that the challenged regulation is likely to meet that goal. Indeed, it wins unless achieving the goal would be physically impossible.

To be sure, one can find language in many federal cases to support these assertions rooted in the decisions of the Supreme Court in *Nebbia v. New York*, 291 U.S. 502 (1934), and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Framed in this way, rational basis scrutiny is notoriously lenient and makes challenges to state law virtually impossible, as least as applied to economic regulation. But, as Justice Stevens noted, "this formulation sweeps too broadly for it is difficult to imagine a legislative classification that could *not* be supported by 'a reasonably conceivable set of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all." *FCC*, 508 U.S. at 323 n. 3 (Stevens, J., concurring) (emphasis in original).

As more than one commentator has noted, defining the rational basis test in this exaggerated and formalistic way does not accurately describe what federal courts actually do.[8]

[8] *See, e.g.*, Robert G. Natelson, *Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1175-76 (2004); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512-18 (2004); Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1055, n.35

The Wisconsin Supreme Court has also observed that even federal rational basis review is more rigorous and has "teeth." *See Ferdon,* 2005 WI 125 ¶¶77-79; see also *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, App. No. 2014-AP-2812 (July 5, 2017) (recommended for publication)[9] (the court, looking at the record facts and not just speculation about what might be true, refused to accept the purported connection between the law and its claimed benefits simply on the government's say so). In fact, if the Defendant's description of rational basis review were correct and complete, Plaintiffs would almost never win such cases. But plaintiffs have won them – many times.[10] The United States Supreme Court has examined evidence – not stopping at "any conceivable basis" – on a number of occasions. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

It has even done so in cases involving economic regulation. For example, in *Metropolitan Life Insurance v. Ward*, 470 U.S. 869 (1985), the Court held that promotion of domestic businesses by discriminating against non-residents was not a legitimate state purpose and remanded for an evidentiary hearing on whether or not the law could be justified in some other way. As Justice Kennedy remarked in a different context, "[a] court confronted with a plausible accusation of impermissible favoritism to private parties ought to treat the objection as a serious one and review the record to see if it has merit." *Kelo v. New London*, 545 U.S. 469, 490-93 (2005) (Kennedy, J., concurring).

(1979) (citing cases); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416-17 (1999) (same).

[9] Curtis Aff. Ex. 3.

[10] Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary Perplexity*, 25 GEO. MASON CIV. RTS J. 1, 8 (2013). Sandefur notes that "Robert McNamara and Clark Neily of the Institute for Justice estimate that the United States Supreme Court has ruled in favor of plaintiffs in 21 out of 105 rational basis cases filed between 1970 and 2010, which is about 17 percent of the cases." *See* Brief of Appellants at 23, *Flynn v. Holder*, No. 10-55643 (9th Cir. Sept. 1, 2010). *Id*. at 8 n.8.

In two relatively recent cases, federal courts struck down economic regulations under rational basis scrutiny. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2015) (rejecting the notion that "economic protection of a particular industry is a legitimate public purpose" and striking down a Louisiana law providing that only licensed funeral directors could sell caskets.); *Craigmiles v. Gilbert*, 312 F.3d 220 (6th Cir. 2004) (also recognizing that economic protectionism was not a legitimate state interest and striking down Tennessee's prohibition of casket sales by anyone other than funeral directors.)[11]

A number of other federal courts have since engaged in more exacting rational basis scrutiny of economic regulations alleged to be protectionist. See *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (striking down a California licensing requirement for "non-pesticide animal damage prevention and bird control" for failing to satisfy the rational basis standard, noting that the regulation "was designed to favor economically certain constituents at the expense of others similarly situated"); *Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) (state regulations of entry into a profession must be not merely related to a legitimate state interest, but also specifically related to the applicant's fitness or capacity to practice the profession); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (overturning Kentucky law establishing a license requirement for new moving companies); *Cornwall v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (overturning California law requiring African hairbraiders to obtain full cosmetology license).

[11] Even in a case like the recent *Monarch Beverage Co., Inc. v. Cook*, No. 15-3440, 2017 WL 2821877, *6 (7th Cir. June 30, 2017, modified, July 11, 2017) (see Curtis Aff. Ex. 3) decision, where the court ultimately upheld the government regulation, it nevertheless went through a thorough analysis in concluding Indiana's law separating beer and liquor wholesaling is rationally related to the state's clearly stated interest in encouraging temperance.

D. The law must have a real and substantial relationship to a legitimate state purpose that advances the general welfare.

The cases discussed above, taken together, establish the following propositions as a matter of Wisconsin law on matters of economic regulation. First, that the Wisconsin Constitution protects economic liberty and prohibits the State from exercising its police power to restrict that liberty unless, **based on evidence**, there is an **"objectively reasonable basis"** to conclude the statutes in question are **reasonable** and bear a **real and substantial relationship** to some legitimate public welfare justification. To be sure, the state has room to regulate. But that space is not unlimited. Courts will not substitute their own judgment for that of the legislature, but they will insist that the relationship between a legitimate state purpose is sufficiently plausible.

And they will consider whether there is support for that relationship in the record. See *State ex re. Grand Bazaar Liquors, Inc.*, 105 Wis. 2d at 212 (noting a "glaring absence **in the record** of any public health, safety, morals, or general welfare problem or concern"); *Dairy Queen of Wis.*, 260 Wis. at 478 (concluding, **based on the facts**, that the general welfare does not require prohibition of the manufacture and sale of the desert); *Ferdon,* 2005 WI at ¶ 171 (**relying on state and federal government reports, scientific studies and papers, and individual testimony** to conclude the cap furthered none of the stated legislature purposes). In other words, when the Plaintiffs allege that the facts do not support a conclusion that there is a rational basis for a law, courts must look at the evidence – not to make their own judgment on the wisdom of a policy, but to determine whether a rational basis can be found in the record.

Second, the public welfare justification must be legitimate. It must itself be rational. While the state has broad police power to promote "public health, safety morals or general welfare," there must be some rational argument that the stated objective actually does that. See

City of Madison v. Reynolds, 48 Wis.2d 156, 160 (1970) (noting that the police power is not without limits); *Just v. Marinette County*, 56 Wis.2d 7, 19-20 (1972) (citing examples of the unreasonable exercise of the police power). Courts look with a particularly high degree of skepticism on regulatory schemes that appear to restrict competition in favor of one business interest over another and treat "post hoc hypotheses with skepticism." For example, as we have seen, favoring one group of competitors over another is not a legitimate state interest in Wisconsin.

In years past, the requirement that a posited justification actually state the goal that would serve the general welfare was addressed as a function of the limits of the police power. The Supreme Court articulated those limits in *State v. Redmon*, 134 Wis. 89, 142 (1907), noting that a "police regulation, in form or pretense, to be one in fact must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter." See also *State ex rel. Fisher v. Commissioner of Ins*., 166 Wis.2d 2 *2 (1991) (unpublished decision)[12] (applying the same criteria for evaluating legislation enacted pursuant to the police power).

In modern cases, this inquiry is more often subsumed in the rational basis test but no matter the doctrinal formulation, the state must articulate not only a connection between a restriction on liberty (or a classification of persons or groups), but the stated goal must somehow advance public welfare. In *Ferdon*, the Wisconsin Supreme Court concluded that, even if burdening severely injured plaintiffs would save the Patients Compensation Fund money, it was irrational. *See*, p. 13, *supra*. Similarly, the Court in *Grand Bazaar* concluded that prohibiting

[12] Curtis Aff. Ex. 3.

sale of liquor in grocery stores, even though it might tend to help smaller liquor stores, was irrational. *See,* pp. 11-12, *supra*. In *Dairy Queen*, it rejected the notion that consumers needed to be protected from an ice cream substitute. *See,* p. 11, *supra*.

II. Government Has No Interest In Providing Opinions on Consumer Products

The initial question is whether the law even seeks to serve an objective within the scope of the police power. As illustrated by the recent case involving home bakers, the state will typically assert a health or safety rationale when defending a statute like this. That it makes no such attempt here makes this case unusual. Of course, it can't make such an argument because, as we have seen, Wis. Stat. § 97.176 has nothing to do with health or safety. Nothing in the grading process addresses such concerns. Complaint, ¶¶ 26-31, 38.

The state argues, instead, that the statute is designed to provide information about the quality of the product for sale" (Def. Br. at 1), "exists to ascertain[] the quality of butter" (Def. Br. at 11), exists to "promote honesty and fair dealing in the interest of consumers" (Def. Br. at 12), and "protect[s] the public from the sale of adulterated or misbranded foods" (*id*.). Additionally, "[b]y grading butter according to flavor, aroma, texture, and other factors, Wisconsin provides consumers with information to ascertain the quality of their butter relative to the cost that would not be available absent the grading system." *Id*. This "[p]ublic awareness of the quality and composition of the foods consumers purchase" is in the eyes of Defendant a legitimate government interest. *Id*.

It is clear, however, that the statute does not do all of these things. For example, grading butter as to taste has nothing to do with "honesty or fair dealing" or protecting the public from "adulterated or misbranded food." The grading system does not distinguish products that are butter from those that are not or test any claim as to the nature of a butter's taste made by the

manufacturer. Complaint, ¶¶ 26-31. It is not seeking to determine whether the product is adulterated. *Id*. It does not provide information that would not be available absent the grading system. *Id.*, ¶ 21. Consumers are able to form their own judgment as to the appearance and taste of butter. *Id.*, ¶ 3. In fact, their own opinion on these matters – as opposed to that of the government – is the *only* opinion that matters. *Id.*, ¶¶ 4, 33, 86. To the contrary, it is placing the government in the position of a food critic.

Defendant's argument can be reduced, therefore, to a claim that consumers require some "warning" or government "review" as to the taste of butter before they buy it. (Its appearance and aroma can be determined prior to purchase.) This does not even theoretically serve the public welfare. The government has no interest – in the absence of some concern about health, safety or the communication of information that a consumer might not be in a position to determine – in making the ability to sell a safe and lawful product contingent on the government's insistence that it be permitted to opine on its taste. *Id.*, ¶ 71. The Defendant cites to no cases that place such an intrusion within the police power. Instead, Defendant cites to two *federal* cases dealing with strictly informational requirements. Def. Br. at 12 (citing *American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014) (requiring the labeling of meat to include a country of origin) and *Philip Morris Inc. v. Harshberger*, 122 F.3d 58 (1st Cir. 1997) (discussing disclosure requirement relating to additives and nicotine-yield ratings in cigarettes, with a particular emphasis on the **health risks** associated with smoking)). The first discloses information that a consumer could not determine for herself as does the latter which, of course, addresses health.

Based on Wisconsin law as set forth in the cases above, it is obvious that a law establishing a Government taste test cannot serve the general welfare. The taste of butter does

not "so concern [public] welfare…as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment" such that the public must be protected against even a butter patty that has not been sampled by the government. This is so implausible – it is quite frankly silly – as to be arbitrary and irrational.

Wisconsin's Butter Law does nothing more than condition the sale of a product on the government's desire to opine on the flavor, body, color, saltiness, and intensity of butter sold in Wisconsin. Complaint, ¶¶ 26-31. It fails to offer any rational basis for requiring sellers to allow the government to place its weighty boot on the scale, preferring one competitor to another and making it more difficult for foreign butter to be sold here. The public is more than capable of making determinations, both from the standpoint of the retailer and consumer, relating to "the quality of their butter relative to the cost." Def. Br. at 12. It is not the government's grading system that makes such a determination possible – it is the collective and learned experience, preferences, and desires of the retailers and consumers that make the determination possible. The proof of the butter (like the pudding) is in the eating and only consumers can decide whether they like the taste of the butter they buy.

But even if the police power was broad enough to include compelled government taste tests, it is completely implausible that this taste test would convey any useful information to consumers. Plaintiffs allege that there is no reason to suppose – and can be no evidence to establish – that consumers care whether butter possesses "a feed or culture flavor to a slight degree [whatever that is] or cooked flavor to a definite degree [whatever that means], or any combination of these characteristics [so perhaps it doesn't matter]." ATCP 85.03(1)(a)-(c); Complaint, ¶ 22. There is no reason to suppose – and can be no evidence to establish – that the state has any better command of the "Platonic Ideal of Butter" than anyone else or that a

bureaucrat's opinion as to whether something has "a fine and highly pleasing butter flavor," *id*., is likely to be the same as consumers or helpful to them.

The applicable administrative code goes on to direct that, "[f]or grading purposes, the flavor of a sample of butter shall be based upon the presence or absence of one or more of the following characteristics, organoleptically determined by taste and smell." ATCP 85.04(1)(a); Complaint, ¶ 26. The code then lists 35 characteristics focused on flavor, body, color, saltiness, and intensity. *Id*., ¶¶ 27-31. Perhaps a subjective judgment made on 35 vague and obscure factors could communicate something of value to a consumer. But that too is implausible.

There are a number of factual questions that must still be answered. For example, is there any reason to suppose – supported by the record – that the grading system actually captures differences in butter taste and appearance and whether the state's judgment on these matters bears any relation to that of consumers? Is there any reason to suppose that consumers understand what the mandated communication of a grade actually means? As in *Ferdon* and the other cases cited above, allegations that the grading system is irrational and serves no legitimate state interest cannot be assumed away. Indeed, based on the vague and convoluted description of what the "taste test" involves, it seems clear that it could not.

Whether it is rational to suppose that this grading information could provide useful information to consumers about the quality of butter that advances the general welfare cannot be resolved on a motion to dismiss. The Plaintiffs have alleged facts that, if true, support a conclusion that it does not. Complaint, ¶¶ 3, 4, 21, 32, 33, 38, 71, 74, 89. Whether or not they are true is a question for another day.

III. Defendant Also Fails Under Its Equal Protection Analysis

Defendant correctly sets forth the test for evaluating an Equal Protection claim under Wisconsin law:

> 1) the classification is based on substantial distinctions which make one class really different from another;
>
> 2) the classification is germane to the purpose of the law;
>
> 3) the classification is not constituted to preclude addition to the numbers included in a class;
>
> 4) the law must apply equally to each member of the class; and
>
> 5) the characteristics of the class should be different enough to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Kohn v. Darlington Cmty. Schools, 2005 WI 99, ¶ 48, 283 Wis. 2d 1, 698 N.W.2d 794 (citations omitted). However, under this test, the State's regulatory scheme for butter similarly fails.

Defendant has offered no explanation why butter is distinguishable from the almost countless number of other products that are not subject to mandatory taste tests. Is there a reason – other than the power of the dairy lobby – that fish and sausage or wine and beer are not subject to grading requirements that make it more difficult for foreign competitors, like Kerrygold, to enter the market? What "substantial distinction" makes butter different from anything – or, closer to the mark, everything – else? What is it about butter that might "reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation"?

The Defendant offers no answers. He misses the point when he argues, "[t]he law regulates stores that sell butter in a manner that does not apply to stores that do not." Def. Br. at 17. This begs the question. Why is butter different? The law regulates the sale of butter in all stores, but the state only seems to regulate butter in this way. Those who wish to sell and purchase butter are treated differently from those who wish to sell and purchase other products.

However deferential the rational basis test might be, the state has to offer *some* justification for the distinction. It has not even tried.

CONCLUSION

The Defendant's Motion can be granted only if the due process and equal protection guarantees can be interpreted to require no more than the state give some reason for a restriction on liberty or an unequal treatment of persons no matter how irrational or insubstantial that might be served by the restriction no matter how unlikely or unsupported in the record. The case law – particularly where the right to earn a living or engage in lawful business is at issue – does not support that claim. If the Defendant is right, cases like *Jelke*, *Dairy Queen*, *Grand Bazaar* and *Ferdon* are wrong. The motion to dismiss should be denied.

Dated this 26th day of July, 2017.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

Electronically signed by Richard M. Esenberg
Richard M. Esenberg, WI Bar No. 1005622
rick@will-law.org
Jacob J. Curtis, WI Bar No. 1072735
jake@will-law.org
Clyde A. Taylor, WI Bar No. 1103207
clyde@will-law.org
1139 East Knapp Street
Milwaukee, WI 53202-2828
414-727-9455; FAX: 414-727-6385