STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 OZAUKEE COUNTY

JEAN SMITH, et al.,

Plaintiffs,

v. Case No. 17-CV-120

BEN BRANCEL, Secretary, Wisconsin Department Of Agriculture, Trade, and Consumer Protection,

Defendant.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS CLAIMS ONE AND TWO OF THE COMPLAINT

Plaintiffs take issue with the state legislature's policy decision to require that certain information about the butter available for purchase be made available to consumers in the State of Wisconsin. Plaintiffs argue primarily that because the law is not a safety regulation, it is not a constitutionally proper exercise of the legislature's power and must be struck down as unconstitutional in all respects. But whether the butter grading law is a good idea is a matter for elected representatives, not this Court, to decide. That Plaintiffs believe the law is unnecessary does not make it unconstitutional. Because Plaintiffs cannot prove beyond a reasonable doubt that the law violates either the substantive due process or the equal protection clauses of the Wisconsin Constitution, these two claims should be dismissed.

I. The rational basis standard applies, and none of the cases plaintiffs cite change the scope of the court's inquiry.

The constitutionality of a statute is a question of law. *State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63 (citing *State v. Hansford*, 219 Wis. 2d 226, 234, 580 N.W.2d 171 (1998)). Rational basis review dictates that legislation will upheld "unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶¶ 35-36, 366 Wis. 2d 1, 878 N.W.2d 109 (internal quotation omitted). "The presumption of statutory constitutionality is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature." *Aicher ex rel. LaBarge v. Wis. Patients' Comp. Fund*, 2000 WI 98, ¶ 20, 237 Wis. 2d 99, 613 N.W.2d 849.

Plaintiffs rely heavily on a single Wisconsin case, *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, to argue for a heightened rational basis standard, or "rational basis with teeth," in this case. But *Ferdon* did not overrule or change the standard from any of the cases Defendant cites, and in fact quotes many of the very same statements included in other cases cited in Defendant's brief related to the standard of review and Plaintiffs' burden of proof, including but not limited to the presumption of constitutionality afforded legislative enactments, Plaintiffs' obligation to prove unconstitutionality beyond a reasonable doubt, and the court's obligation to locate or even construct a rationale that might have influenced the legislative determination in order to save the statute. *Id.*, ¶¶ 67-68, 71, 74 (citations omitted).

In fact, the "rational basis with teeth" standard described by the *Ferdon* court "simply requires the court to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose." *Id.* at 78. It does not raise the level of scrutiny to intermediate or strict scrutiny, nor does *Ferdon* alter the basics of what this Court must ultimately determine, namely whether "a plausible policy reason exists" for the classification and that the law's classification "is not arbitrary in relation to the legislative goal" of the statute. *Id.* at ¶ 73. Because the grading requirement is rationally related to providing customers with information (and resulting purchasing power) about the product that they would not otherwise have, the butter grading law meets this standard and Plaintiff cannot prove beyond a reasonable doubt that the law violates either the substantive due process or equal protection clauses of the Wisconsin Constitution beyond a reasonable doubt. Plaintiffs urge this Court to deny the motion and to decide the issues based upon a developed record, but because the connection between the law's purpose (providing consumers with information) and the means by which the law does so (requiring a label on a product providing this information) is self-evident, further development of a record is unnecessary and dismissal is proper.

II. None of the authority plaintiffs cite supports the conclusion that the butter grading law violates the substantive due process or equal protection clauses.

Plaintiffs spend much of their brief laying out the history of Wisconsin cases under a broad umbrella of "economic liberty," but this background does nothing to

advance Plaintiffs' argument that the law actually at issue violates that clause of the Constitution. For example, while Plaintiffs are correct that the Wisconsin Supreme Court is *free* to interpret the state constitution's substantive due process and equal protection clauses more broadly than their federal counterpart, the cases Defendant cited in his opening brief demonstrate that Wisconsin Supreme Court has not actually done so. In any event, this case is not about whether any of the plaintiffs has a right to make a living or pursue his chosen calling. The narrow issue here is whether Wisconsin's requirement that butter be graded and labeled with that grade before it may lawfully be offered for sale offends a right implicit in the concept of ordered liberty or discriminates based upon an impermissible classification. *State v. Luedtke*, 2015 WI 422, ¶ 74, 362 Wis. 2d 1, 863 N.W.2d 592 (quoting citation omitted); *State v. Heidke*, 2016 WI App 5, ¶ 6, 370 Wis. 2d 771, 883 N.W.2d 162 (citations omitted). Because Wisconsin's butter grading statute and regulations are rationally related to the legitimate purpose of providing consumers with information about the products they purchase, Plaintiffs cannot prevail on these claims as a matter of law and they should be dismissed.

Plaintiffs raise the scepter of *Dairy Queen of Wis. v. McDowell* case, 260 Wis. 471, 478-79, 52 N.W.2d 791 (1952), and its quotation of *John F. Jelke Co. v. Emery*, 193 Wis. 311, 323, 214 N.W.2d 369 (1927), in the hope that the Wisconsin Supreme Court's decision assailing the protectionist motives of the dairy industry in another context will compel this Court to strike down the butter grading law. But in point of fact, *Dairy Queen* does not help Plaintiffs and actually helps Defendant. In that

case, the Wisconsin Supreme Court found that the challenged statute did not prohibit the sale of Dairy Queen's ice cream substitute product in Wisconsin, and therefore the Court need not reach the constitutionality of the statute. The court went on to state that it was within the state's authority "to so regulate [Dairy Queen's] sale that the public may know it is not ice cream," and that it was permissible to do so in order "that the public is not subjected to the injury of buying a product different from that which is intended to be bought." *Dairy Queen*, 260 Wis. 2d at 476, 478 (citations omitted). This is precisely the ill that the butter grading law is intended to address—when the consumer buys a butter labeled Wisconsin Grade AA, he or she can be assured that it possesses certain color, texture and flavor characteristics.

Plaintiffs also cite to a number of decisions that are not binding on this Court, including two Wisconsin circuit court decisions dealing with taxi regulation and bake sale laws, and a South Carolina case where a court there rejected the state's vague assertion that a limitation on the number of liquor stores "support[ed] small businesses." (Pl. Br. at 13-15.) In addition to carrying no precedential value, they are easily distinguished; Defendant in this case does not maintain that the justification for the butter law is a safety concern (as in the bakery case), nor is providing consumers with information about products available for sale at all comparable to the amorphous justification of supporting small businesses or promoting "professionalism." Nor is Plaintiffs' reference to cases involving laws that work economic discrimination against nonresidents (such as the *Metropolitan Life*

case, 470 U.S. 869 (1985)) persuasive; nothing in the butter grading statute or regulations (or in Plaintiffs' own complaint) supports a conclusion that the law imposes obligations on non-Wisconsin companies that it does not impose upon domestic corporations. In short, none of these cases compel the conclusion that the butter grading law at issue in this litigation is unconstitutional.

III. Wisconsin's butter grading law is rationally related to the public interest of providing consumers with additional information about products available for purchase.

Plaintiffs also assail the butter grading law as unnecessary or unwise. Although framed as an argument that the law does not bear a real and substantial relation to a legitimate government purpose, these criticisms are, in truth, policy arguments that do not belong in this Court. The Wisconsin Supreme Court "has long held that it is the province of the legislature, not the courts, to determine public policy." *Flynn v. DOA*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998). While the court should not abdicate its responsibility to review the constitutionality of statutes, the court's function "is to interpret and give effect to the statutes, not to rewrite them on the grounds of public policy." *Oneida Cty.v. Wis. Employment Relations Comm'n*, 2000 WI App 191, ¶ 23, 238 Wis. 2d 763, 618 N.W.2d 891.

"Regulation of a business's trade practices is a rational function of government, irrespective of any regulation of that business's customers." *State v. LaPlant*, 204 Wis. 2d 412, 424-25, 555 N.W.2d 389 (Ct. App. 1996). Wisconsin's butter grading law is a consumer information law, providing customers with information about the product that they would otherwise have available to them

prior to purchase.[1] The Wisconsin Supreme Court has long held that such consumer protection and information legislation passes constitutional muster. *See*, *e.g.*, *LaPlant*, 204 Wis. 2d at 424-25 (state regulations imposing disclosure requirements on residential landlords but not commercial landlords or tenants did not violate Equal Protection Clause); *State v. Amoco Oil Co.*, 97 Wis. 2d 226, 259, 293 N.W.2d 487 (1980) (requiring business to disclose total purchase price in combination sale reasonably related to preventing deception and does not violate Due Process Clause); *see also Coffee-Rich, Inc. v. Wis. Dep't of Ag.*, 70 Wis. 2d 265, 273-74, 234 N.W.2d 270 (1975) (prevention of deception to consumers is a valid and "constitutional purpose," though statute held unconstitutional on other grounds).

Plaintiffs ask "why butter?" and ask this Court to assume that the motive for the legislation must be to protect Wisconsin's dairy industry from competition, an illegitimate objective. There is no denying that Wisconsin has a nationwide reputation as America's Dairyland, and that this reputation is important to the state economy. But the legislature's decision to enact grading standards for a category of dairy products does not compel the conclusion that the law is a prohibited protectionist measure, or that it cannot be enforced under any circumstances such that the law must be struck down as facially unconstitutional. Many other states have similar quality grading laws for products closely associated with their state that also provide information to their consumers. *See*, *e.g.*, Wash.

[1] Plaintiffs argue that the only information not available to consumers and included in the grade is taste information, but this argument ignores that other information is factored into

Rev. Code §§ 16-403-034, 16-403-215, 16-403-280 (grading and labeling requirements for apples); Vt. Stat. Ann Tit. 6, §§ 487, 490 (grading and labeling requirements for maple syrup); Idaho Code §§ 22-901-22-904 (grading and labeling requirements for potatoes). Like Wisconsin with butter[2], these laws impose requirements on food products closely associated with the state. And unlike the anti-competitive laws under attack in a number of cases Plaintiffs cite, the butter grading law applies just as much to in-state producers as it does to out-of-state (or international) producers, and does not act as a prohibition on an otherwise wholesome product. It merely regulates the information that must be provided to consumers if the product is to be sold.

Plaintiffs also make a "slippery slope" policy argument in an effort to convince this Court that the butter grading law—which has been on the books for over sixty years—portends the rise of a regulatory state that could place an onerous burden on the sale of any other food product. But the same argument could be made for any law or regulation that may or may not be passed by the legislature in the future. Taking this rationale to its logical conclusion, pointing broadly to the concept of economic liberty means that any law that might interfere with, regulate, or touch on one's business could be held unconstitutional—from the state's authority to tax to Wisconsin's law requiring all businesses to follow Central Time

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the grade and would not be evident to the consumer without it, such as color, aroma, and texture. *See* Wis. Admin. Code §§ ATCP 85.04(b), (c).

[2] At least two other states have a nearly identical butter grading law on their own books—dairy rival California and neighboring Minnesota. *See* Cal. Food & Agric. § 37131; Minn.

when posting hours of business. *See generally* Chs. 70-71, 73, 75, Wis. Stats.; Wis. Stats. § 175.09(2). But Plaintiffs' argument does not address the question actually at issue in this litigation, namely, whether the butter grading law is rationally related to a legitimate government objective. Because providing consumers with information about the products they buy is undisputedly a valid government objective, and the butter grading law provides such information to consumers, the statute satisfies the rational basis standard and must be upheld.

Plaintiffs are free to dispute whether the law in place is the most effective method of providing consumers with this information, or to argue that the law is unnecessary because butter that receives a "B" or "undergrade" designation may not present a safety concern—but these are matters of public policy, not constitutionality. They are properly reserved for debate and appropriate action in Wisconsin's Assembly and Senate and do not require this Court to take the extreme step of striking down a valid law as unconstitutional.

Stat. § 32.475. The United States Department of Agriculture grades butter as well, albeit on a voluntary basis, and Wisconsin accepts those grades. *See* Wis. Stat. § 97.176(2).

CONCLUSION

For these reasons and those set forth in his opening brief, Defendant respectfully requests that this Court DISMISS claims one and two of the complaint with prejudice.

Dated this 4th day of August, 2017.

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