No. 18-1520

United States Court of Appeals for the Seventh Circuit

MINERVA DAIRY, INC., ET AL.,
PLAINTIFF-APPELLANT

v.

BEN BRANCEL, ET AL.,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 17-CV-299-JDP, HON. JAMES D. PETERSON, PRESIDING

BRIEF *AMICUS CURIAE* FOR THE CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1520

Short Caption: Minerva Dairy v. Brancel

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Attorney's Signature: s/ Ilya Shapiro Date: 4/23/2018

Attorney's Printed Name: Ilya Shapiro

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

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n/a

Attorney's Signature: s/ Matthew Larosiere Date: 4/23/2018

Attorney's Printed Name: Matthew Larosiere

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

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because laws that abrogate constitutional rights warrant meaningful judicial oversight. Wisconsin's law directly burdens the right to participate in the state's butter market and thus the right to earn a living—"the most precious liberty that man possesses" *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting)—for no sane or rational reason.

Of course, state codes are chock full of stupid laws. While it has been said that "[t]he Constitution does not prohibit legislatures from enacting stupid laws," *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring), it does not follow that the judiciary must rubber-stamp every legislative folly. This butter law is just such a nonsensical enactment worthy of judicial rebuke.

[1] Fed. R. App. P. 29 Statement: Plaintiff-Appellant consented to this filing, while Defendant-Appellee, pursuant to its longstanding policy, took no position on *amicus*'s request for consent. Accordingly, a motion for leave to file is being filed in conjunction with this brief. No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* and its members made a monetary contribution to fund its preparation and submission.

SUMMARY OF THE ARGUMENT

Wisconsin's requirement that all butter sold in-state bear a state-specific grade is not simply a stupid law, but an arbitrary, irrational, and discriminatory interference with interstate commerce that stumbles on multiple constitutional cornerstones. Taking just the Fourteenth Amendment, the law irrationally discriminates between butter producers and products in violation of the Equal Protection Clause and is enforced via unintelligible jargon in violation of the Due Process Clause.

Wisconsin asserts that requiring butter to be "graded" is needed to properly inform consumers. But this information is not produced without cost. The regulatory burden makes it more expensive—in some cases prohibitively so—to sell butter in America's Dairyland. Because that affects the right of Minerva Dairy, and others, to engage in their trade and earn a living, it must bear a rational relationship to a legitimate state interest. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("[A] law enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the . . . disadvantages they impose on certain persons," but it must nonetheless "bear a rational relationship to a legitimate government purpose"). Wisconsin wants the Court to believe that bearing a "rational relationship" is no test at all, but that idea has long passed its expiration date.

Indeed, courts invalidate statutes under rational-basis review in two circumstances: (1) when there is no logical connection between the challenged law

and any legitimate government interest, *see, e.g.*, *Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) (disparities in tax rates so large as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985) (home size not logical basis for permit denial when identical homes received permits); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car purchased out-of-state); and (2) when the proffered justifications for a law are a pretext and the government is actually trying to advance an illegitimate interest. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013) (rejecting stated public-health and consumer-protection rationales in a casket-making regulation); *Craigmiles v. Giles*, 312 F.3d 220, 225–28 (6th Cir. 2002) (considering, and rejecting, six purported state rationales).

Wisconsin's butter-grading scheme is both irrational, as will be discussed in Part I, and uses the "consumer-information" interests as pretext, as will be discussed in Part II. Accordingly, this Court should fulfill its duty to "substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims" *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring) by helping clean up the horrible mess Wisconsin has made of the dairy aisle.

ARGUMENT

I. WISCONSIN'S IRRATIONAL BUTTER-GRADING SCHEME VIOLATES DUE PROCESS AND EQUAL PROTECTION

In analyzing a statute's rationality, courts commonly refer to record evidence in concluding that a purported justification is too implausible to credit. *City of Cleburne*, 473 U.S. at 449 (citing evidence that a middle school had 30 mentally disabled students to refute the government's assertion that junior-high students might cross the street to tease the mentally disabled); *Craigmiles*, 312 F.3d 225 (public-health justification for restrictions on who may sell a casket refuted by evidence that retailers do not handle remains). Here, the Court need not milk the record for such evidence, because it's readily apparent that any "information" produced by the grading scheme does not help consumers.

A. The State Grades Butter According to Completely Arbitrary, Meaningless Criteria

Wisconsin has conceded that its butter-grading scheme has nothing to do with public health or safety. The state instead contends that the grading informs consumers about the butter they can buy. This might be rational, were Wisconsin to provide information that actually informs consumers. Instead, the butter "grades" are arbitrary and meaningless. They are—pardon the pun—udder nonsense.

The Wisconsin Department of Agriculture disclaims knowing whether consumers even understand—much less rely on—the grading information. Ingham

Depo. 40:8-15. On the Department's website, the grade is said to "allow[] the buyer and seller of that butter to have a mutual understanding of its properties and thereby avoid conflict." State of Wisconsin Dep't of Agric., Trade & Consumer Protection, "Butter Grading & Labeling," https://bit.ly/2EDFihX (last visited Apr. 19, 2018). If butter is graded based on a morass of qualities nobody understands, however, what mutual understanding can exist? The impressive irrationality of the grading invites an exploration of the scheme and its criteria.

The law sets out the grades as "undergrade" through "AA." Wis. Stat. § 97.176. Grades are determined by testing a sample batch based on "the flavor classification, subject to disratings for body, color[,] and salt characteristics." Wis. Admin. Code ATCP § 85.02(3). So the grading process starts by identifying flavor characteristics that the government finds not very tasty. *The core of the grade is thus the government's idea of what butter is supposed to taste like.*

How curating taste is relevant to informing consumers is anyone's guess, but even if ensuring that all butter tasted the same—in the same "buttery" way—were a legitimate government interest, Wisconsin's law would not be rationally related to that end, because its criteria for discerning taste are arbitrary, if not meaningless. The statute lays out flavor characteristics such as "cooked" (a "smooth, nutty-like character resembling a custard flavor"), "flat" ("the absence or lack of a natural butter flavor"), "neutralizer" ("suggestive of bicarbonate of soda or the flavor of

similar alkaline compounds"), and "smothered" ("a bland flavor suggestive of improperly cooling the cream prior to churning"). *Id*. at § 85.04(1)(a). Most inventively, "utensil" means "a flavor suggestive of unclean utensils and equipment." *Id*. With respect, this terminology hearkens to a freshman—not even sophomore—term paper on the semiotics of postmodern agrarian literature.

Moreover, the statute lists 18 flavor characteristics even as the grading scheme is only capable of taking one into account. *Id*. at § 85.02(1) ("When more than one flavor characteristic is discernible in a sample of butter, the flavor classification of the sample shall be established on the basis of the flavor that carries the lowest grade."). This means that 17 of the 18 characteristics by which Wisconsin allegedly grades butter are meaningless with respect to any given grade. Is it that unusual for butter to have more than flavor component? Can a butter not be both "musty" and "old cream," with perhaps a soupçon of "utensil"?

Anyway, after the grader determines the flavor profile, that base grad is subject to subtractions based on "body, color[,] and salt characteristics." *Id*. at § 85.02(3). These characteristics are a similar mad-lib of meaningless jargon. The body characteristics include butter that is "leaky," "weak," and "ragged-boring" ("a sticky-crumbly condition"). *Id*. at § 85.04(1)(b). As to color, butter that appears "mottled," "speckled," "streaked," or "wavy" is inferior, in the state's opinion. *Id*. at § 85.04(1)(c). Finally, the grade of butter with "salt characteristics" of being "sharp"

or "gritty" also gets skimmed. *Id*. at § 85.04(1)(d). Oh, and lest we forget, any of the taste, body, color, or salt characteristics may appear in intensities ranging from "slight" to "pronounced." *Id*. at §85.04(2). It all reminds *amicus* of the fictional poetry-grading scale of one J. Evans Pritchard, Ph.D.: "I like Byron. I give him a 42, but I can't dance to it." *Dead Poets Society* (Buena Vista Pictures 1989) (paraphrase by John Keating, played by Robin Williams).

In other words, regardless of the particular taste, mouth-feel, or salt preferences of any particular consumer—including members of this Court—a butter that doesn't meet some Platonic ideal decreed by Wisconsin's dairy czars may be labeled subpar. This is cheesehead charlatanry.

B. The People Wisconsin Deems Most Knowledgeable About Butter Don't Even Know What the Grades Mean

It's hard to imagine consumer protests over butter that tastes "smothered" and absurd to think that Wisconsin believes boiling down an incoherent mess of incomprehensible jargon to a letter grade could possibly provide consumers with useful information. (As previously stated, the state disclaimed knowing whether consumers rely on the grading process at all. Ingham Depo. 40:8-15.) But it gets worse: the people in charge of the overripe scheme don't even know what the grades mean.

For example, Steve Ingham, the administrator of the Department's Division of Food and Recreational Safety and thus the person in charge of the butter-grading

scheme, seemed unable to clearly articulate what the grades stand for, including the meaning of the characteristics "stale," "smothered," "ragged-boring," or "utensil." Ingham Depo. at 44:7-47:4. He likewise pled literal ignorance of consumer knowledge of the grading scheme. *See, e.g., id.* at 44:21-22 ("the Department is ignorant of whether consumers know that."). Meanwhile, the Director of the Department's Bureau of Food and Recreational Businesses was unable to describe the meaning of "ragged-boring" and "flat." Haase Depo. at 14:13-15:1. All this even though the statute says in no uncertain terms that butters must be graded by a licensed butter grader who has been tested to "demonstrate his or her competence to act as a butter grader . . . in a manner determined by the department." Wis. Stat. § 97.175.

Where the people designated by the state as experts have no idea what the factors are in the butter-grading process—a process in which they have years of experience—it's suspect to call the product of such a scheme "information." It's certainly no great leap of mind to determine that, if the persons deemed most knowledgeable about the law cannot articulate what goes into a butter's grade, that the ultimate grade is a cipher. To put a sharper point on it, an arbitrary grade stamped on a package is not "information" if it carries with it nothing meaningful to a consumer. Indeed, the butter grades are *dis*information, likely leading consumers to think that low-graded butters are unhealthy or of lower quality.

"The great deference due state economic regulation . . . does not require courts to accept nonsensical explanations for regulations." *St. Joseph Abbey*, 712 F.3d at 226. Wisconsin justifies its burdens on butter producers by claiming that a long and expensive process—the result of which is an arbitrary letter grade—somehow informs consumers. That nonsensical explanation fails the smell test.

II. FAR FROM INFORMING CUSTOMERS, THE LAW INSULATES LARGE WISCONSIN BUSINESSES FROM COMPETITION

By now it's clear that either informing consumers is a pretextual justification or the law is not rationally related to a legitimate government interest. While Wisconsin asserts consumer-information as its interest, the law's actual purpose is something else. This plays on the subtext underlying *Lochner*, and many cases since, that "[i]t is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives." *Lochner v. New York*, 198 U.S. 45, 64 (1905). Here, it seems that Wisconsin is engaged in "the favored pastime of state and local government," simple economic protectionism. *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

A. The Regulation Protects a Large Local Industry, Which Is Not a Constitutionally Sufficient Purpose

When a regulation billed as a consumer benefit makes no sense in that or any other context, it pays to look at producer interests. *See, e.g.*, Sam Peltzman, *Toward*

a More General Theory of Regulation, 19 J.L. & Econ. 211, 212 (1976) ("[A]s between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest."); Milton Friedman, *Capitalism & Freedom* 140 (1962) ("[T]he pressure for [restrictive licensing] invariably comes from members of the occupation itself and not consumers or the public."). But that producer interest, without more, cannot justify a law that burdens others' rights. *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

While Wisconsin's butter-grading law does nothing for consumers, there is a clear class it does benefit: the state's massive butter churners. *See* State of Wisconsin Dep't of Agric., Trade & Consumer Protection, "Wisconsin Dairy Plant Directory 2017-2018," https://bit.ly/2F0DEGZ (last visited Apr. 19, 2018). A single firm in Wisconsin, Grassland Dairy Products, produces a third of the nation's butter. Brendan Coffey, *Americans Eating More Butter Made Dallas Wuethrich a Billionaire*, Bloomberg.com, Oct. 5, 2017, https://bloom.bg/2xTvrFh. The grading rule functions as a substantial barrier to entry, insulating large, state-owned business from competitors who can't afford to submit to an expensive, arbitrary scheme.

While Wisconsin has an interest in the economic health of its local businesses, that is not a legitimate governmental purpose as far as establishing a regulation's

constitutionality. *See e.g.*, *St. Joseph Abbey v. Castille*, 700 F.4d 154, 161 (5th Cir. 2012) ("As we see it, neither precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose").

B. The "Putative Local Benefits," If Any, Are Discriminatory and Do Not Outweigh the Strain on Interstate Commerce

Every batch of butter must be graded to comply with Wisconsin's law, which poses significant costs on out-of-state businesses. As of April 2018, there are a grand total of 55 licensed butter graders, and all but six are located in Wisconsin (the other six in neighboring Illinois). State of Wisconsin Dep't of Agric., Trade & Consumer Protection, "Butter Grader License Holders," https://bit.ly/2qqP7KN (last visited Apr. 19, 2018). Appellant makes clear the extent to which interstate businesses are burdened by the grading requirement, but what needs highlighting is the fact that, under *Pike* balancing, these substantial costs are to be weighed against the "putative local benefits" of the regulation. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). What makes such an analysis difficult here is that the numerator is completely missing from the equation. There are simply no benefits to consumers flowing from forcing producers to pay considerable sums to have a wholly irrational process deposit a random letter on product packaging. It curdles the mind to argue otherwise.

The butter-grading requirement is not unlike occupational licensure rules that serve to protect industry incumbents from competition. "[P]olitical institutions such as state legislatures or city councils . . . control initial entry and in-migration, thereby

restricting supply and raising the wages of licensed practitioners." Morris M. Kleiner & Alan B. Krueger, *The Prevalence & Effects of Occupational Licensing*, 48 Brit. J. Indus. Rel., No.4, 10 (2010). Courts have struck down many of these laws, recognizing their anticompetitive effects and often irrational mechanisms. *See, e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S.Ct. 1101, 1109 (2015) (siding with the FTC, which alleged that "the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition"); *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members."); *Clayton v. Steinagel*, 885 F.Supp.2d 1212, 1215 (D. Utah 2012) (invalidating Utah's protectionist hair-braiding regulations which "irrationally squeezed 'two professions into a single, identical mold'"); *Patel v. Tex Dep't of Licensing & Reg.*, 469 S.W.3d 69, 93–94 (Tex. 2015) (invalidating eyebrow-threading licensure statute because "[l]aws that impinge your constitutionally protected right to earn an honest living must not be preposterous."); *see also FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 229 (2013) ("[W]here the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that

scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.").

The exclusive beneficiaries of the butter-grading requirement are Wisconsin-based producers of uninspired and bland butters that taste vaguely how the state thinks butter ought to. This insipid discrimination among butter producers violates equal protection. In *City of Cleburne*, the city mandated that homes for the mentally disabled must have a special permit, but not other group homes. 437 U.S. at 440. Though homes for the mentally disabled were, in some ways, different from apartments, they were not different in a sense that justified their disparate treatment. *Id*. at 442, 48. Like Cleburne with respect to housing, Wisconsin exempts other dairy products from regulation. Cheese, milk, and yogurt all have voluntary grading schemes, but only butter *must* be graded. There is nothing about butter that mandates such differential treatment, especially when the only thing Wisconsin could possibly be protecting the public from is diverse and interesting-tasting butters.

CONCLUSION

Because judicial deference does not require judicial abdication, and because it is the constitutional duty of the judiciary to invalidate arbitrary and irrational laws like the one churned out by Wisconsin, this Court should reverse the court below.

Respectfully submitted,

April 23, 2018

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CERTIFICATE OF COMPLIANCE

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,133 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, 14-point font.

/s/ Ilya Shapiro
April 23, 2018

CERTIFICATE OF SERVICE

I hereby certify that, I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Ilya Shapiro
April 23, 2018