No. 18-1145

In The

Supreme Court of the United States

MINERVA DAIRY, INC., ET AL.,

Petitioners,

v.

BRAD PFAFF, IN HIS OFFICIAL CAPACITY AS SECRETARY-DESIGNEE OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

May the state impose "quality" standards on a product based exclusively on the subjective tastes of government inspectors and to the detriment or exclusion of out-of-state producers, consistent with both *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) and the rational basis test?

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INTEREST OF THE *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*, and files *amicus* briefs.

This case concerns Cato because the free flow of goods between states is an essential virtue of our Constitution. Wisconsin's butter grading law is an irrational restraint on interstate commerce that serves only to insulate large businesses from competition.

INTRODUCTION AND SUMMARY OF ARGUMENT

State codes are chock full of inane laws, many of which foster laughter on first reading. Although "[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), the judiciary must not simply rubberstamp the irrational products of state legislatures. Courts must consider seriously challenges to laws that abrogate constitutional rights. The law here directly affects the right to earn a living—"the most pre-

[1] Rule 37 statement: Both parties were notified of and consented to the filing of this brief. No party's counsel authored any of this brief, and *amicus* alone funded its preparation and submission.

cious liberty that man possesses," *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting)—which has deep roots in this nation's history and thus merits meaningful judicial protection.

Wisconsin asserts that requiring the grading of all butter sold in-state is done as a mechanism of informing consumers. But the law does not provide information without cost; it makes it more expensive—in some cases prohibitively expensive—to sell butter in the Wisconsin. Because the law burdens the right of Minerva Dairy, and others, to engage in their trade, it must bear a rational relationship to a legitimate state interest. *See*, *e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("[While 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" it must nonetheless "bear a rational relationship to a legitimate government purpose").

While Wisconsin seeks to convince the Court that bearing a rational relationship is no test at all, that idea has long gone sour. 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 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. Ver-*

mont, 472 U.S. 14, 24-25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car previously purchased out-of-state) and (2) when the proffered justifications for a law are a pretext and the government is in actuality attempting to advance an illegitimate interest. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (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) (rejecting six purported state rationales).

Wisconsin's requirement that all butter sold in-state bear a state-specific grade is not simply a stupid law, but an arbitrary and discriminatory interference with interstate commerce that runs afoul of multiple cornerstones of our Constitution. It irrationally discriminates among butter producers and products in violation of the Fourteenth Amendment's Equal Protection Clause and constitutes an unintelligible mad lib of meaningless jargon in contravention of the Due Process Clause.

The Court should grant this petition and direct the lower court to fulfill its duty and not "substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims" *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring) so it can finally clean up the horrible mess Wisconsin has made of the dairy aisle.

ARGUMENT

Wisconsin's scheme is both irrational and based on a pretextual purpose of "consumer information" that hides base protectionism.

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 for law is too implausible to credit. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449 (1985) (citing evidence that a middle school had 30 mentally disabled students to refute the government's assertion that 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 endeavor to milk the record for such evidence, as it is swelling with evidence that any "information" produced by the grading scheme is pure noise.

A. The Law Requires Butter to Be Graded on Arbitrary, Meaningless Criteria

Wisconsin has conceded that butter grading has nothing to do with public health or safety. It instead contends that its scheme informs consumers about the butter available for purchase in the state. This would be rational had Wisconsin bothered to provide consumers any information whatsoever as part of its grading requirement. Instead, the grades are a product of udder nonsense. The Wisconsin Department of Agriculture disclaims knowing whether consumers understand, much less rely on in their purchasing decisions. 7th Cir. App. 066-067; 073-74. On the Department's website, the grade is said to "allow[] the buyer and seller of that butter to have a mutual understand-

ing of its properties and thereby avoid conflict." "Butter Grading & Labeling," State of Wis. Dep't of Agric., Trade & Consumer Protection, https://bit.ly/2EDFihX. But if butter is graded on a morass of qualities nobody understands, what mutual understanding is there? The impressive irrationality of the grading scheme necessitates an exploration of its criteria.

The law makes it illegal to sell non-graded butter, and the grades range from "undergrade" to "AA." Wis. Stat. § 97.176. Butters must be graded by a licensed butter grader who has been tested in Wisconsin to "demonstrate his or her competence to act as a butter grader . . . in a manner determined by the department." Wis. Stat. § 97.175. The grade is determined from testing a sample batch based on "the flavor classification, subject to disratings for body, color, and salt characteristics." Wis. Admin. Code ATCP § 85.02.

The grading process starts with identification of flavor characteristics deemed not very tasty by the department. *The core of the grade, then, is the government's idea of how butter is supposed to taste.* How mandating taste is relevant to informing consumers is anyone's guess, but even if ensuring that all butter tasted the same were a legitimate interest, the law would not be rationally related to that end, because the criteria for discerning taste are arbitrary.

The statute lays out flavor profiles like "cooked" (a "smooth, nutty-like character resembling a custard"), "flat" ("the absence or lack of a natural butter flavor"), "neutralizer" (a flavor "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"). Wis. Admin. Code ATCP § 85.04. The statute lists 18 such flavor characteristics, but the grading scheme is only capable of taking a single characteristic into account. Wis. Admin. Code ATCP § 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 Wisconsin allegedly measures are meaningless with respect to any given grade.

After determining the flavor profile, a chosen characteristic determines the base grade, which is subject to subtractions based on "body, color and salt characteristics." *Id.* These characteristics are a similar mad lib of meaningless jargon. The body characteristics include butter which is "leaky," "weak," and "raggedboring" ("a sticky-crumbly condition"). Wis. Admin. Code ATCP § 85.04(b). After being dinged for its body, the butter is subject to additional disrating for its color. Butter which appears "mottled," "speckled," "streaked," or "wavy" is inferior, in the state's opinion. Finally, we have the "salt characteristics": whether the butter is "sharp" or "gritty", as far as saltiness goes, presents a final opportunity to reduce its grade.

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

It is hard to imagine consumers protesting that their butter tastes "smothered," and absurd to think

Wisconsin believes boiling an incoherent mess of jargon nobody understands down to a letter grade could possibly provide consumers with more information. As previously stated, the Department has explicitly disclaimed consumer understanding of or reliance on the grading process at all. 7th Cir. App 073-074; 107. Moreover, Steve Ingham, the person deemed most knowledgeable about the butter grading scheme, seemed unable to articulate what the grades stand for—and admitted that consumers are likely no better informed. *Id*. ("[T]he Department is ignorant of whether consumers know that."). The administrator of the Department's Division of Food and Recreational Safety was likewise unable to describe the meaning of the characteristics "stale," "smothered," "ragged boring," or "utensil." And the director of the Bureau of Food and Recreational Businesses was unable to describe the meaning of "ragged boring" and "flat." *Id.*

Where the people designated most knowledgeable by the state have no idea what the factors are in the butter grading process—a process in which they have years of experience—it is certainly suspect to call the product of such a scheme "information." It is certainly no great leap of mind to determine that, if those deemed most knowledgeable cannot articulate what goes into a butter's grade, then the system's ultimate grade is utterly meaningless. An arbitrary grade stamped on a package is not "information," as it carries with it nothing meaningful to a consumer. "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 seeks to justify its interference with the interstate dairy trade by invoking consumer information. That explanation is "udder" nonsense.

II. FAR FROM INFORMING CUSTOMERS, THE BUTTER GRADING SCHEME INSULATES LARGE WISCONSIN BUSINESSES FROM COMPETITION

Either informing consumers is a pretextual justification here, or the law is not rationally related to a legitimate government interest. While Wisconsin asserts information as its interest, the actual purpose of the law is something else. This plays on the subtext underlying *Lochner*, and many others other cases, 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, "America's Dairyland," 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 Law Protects Large Local Industry at the Expense of Small Business

"[T]he pressure for [restrictive licensing] invariably comes from members of the occupation itself and not consumers or the public." Milton Friedman, *Capitalism & Freedom* 140 (1962). Wisconsin's butter grading law can be said to do no good for the consumers, but there is a clear class it does benefit: Wisconsin's massive in-state butter churners. "Wisconsin

Dairy Plant Directory 2018-2019", State of Wis. Dep't of Agric., Trade & Consumer Protection, https://bit.ly/2F0DEGZ. A single firm in Wisconsin, Grassland Dairy Products, Inc., produces one-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 butter grading requirement functions as a substantial barrier to entry to Wisconsin's butter market, insulating large, state-owned business from competition who cannot afford to submit to Wisconsin's expensive, arbitrary scheme. "[A]s between the two main contending interests in regulatory processes, the producer interest tends to prevail over the consumer interest." Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211, 212 (1976).

Yes, Wisconsin has an interest in protecting its local business from competition, but this is not a legitimate 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"); *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.").

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 completely unlike those borne in-state. As of April 2019, there were a grand total of 67 licensed Wisconsin butter graders, and all but 15 are located within the state of Wisconsin (six in neighboring Illinois). "Butter Grader License Holders," State of Wis. Dep't of Agric., Trade & Consumer Protection, https://bit.ly/2FLqjES (accessed Apr. 1, 2019).[2] Petitioner 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 as against the "putative local benefits" of the regulation. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). What makes such analysis difficult here is that the numerator is completely missing from the equation: there simply are no benefits to Wisconsin consumers flowing from forcing butter producers to pay considerable sums to have an irrational process deposit a meaningless letter on product packaging.

The butter grading requirement is not unlike occupational licensure rules that 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). This Court, and others, have struck down many of these laws, recognizing

[2] Nine of the 15 out-of-state licensees were added in the last year.

their anticompetitive effects and often irrational mechanisms. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S.Ct. 1101, 1109 (2015) (siding with the FTC who alleged "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. Va. 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 & Regulation*, 469 S.W.3d 69, 93-94 (Tex. 2015) (invalidating eyebrow-threading licensure, because "simply stated: Laws 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) ("where 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 bland and uninspired butters that taste vaguely how the state thinks butter ought to. This irrational discrimination among butter producers indefensibly violates

equal protection. In *City of Cleburne*, the city mandated that that homes for the mentally handicapped must have a special permit, but not other group homes. 437 U.S. at 440. Although 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 the City of Cleburne, Wisconsin exempts other dairy products from mandatory grading. Cheese, milk, and yogurt are all subject to a voluntary grading scheme, but only butter *must* be graded. Yet there is nothing about butter that mandates such differential treatment, especially where the only thing Wisconsin could possibly be protecting the public from diverse or interesting tasting butters.

CONCLUSION

Because judicial deference does not require judicial abdication, and because it is the judiciary's duty to invalidate arbitrary and irrational laws like the one Wisconsin churned out here, this Court should grant the petition.

Respectfully submitted,

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