

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

JEAN SMITH
439 Kimberly Drive
Waukesha, WI 53188,

SUMMONS

AMBER MARZAHL
1004 Monroe Street, Apt. 1
Fort Atkinson, WI 53538,

NICOLE BATZEL
107 South 6th Street
Cedar Grove, WI 53013,

KATHLEEN MCGLONE,
1947 Cedar Drive
Grafton, WI 53024,

and

Ozslo Foods, Inc.
d/b/a Slow Pokes Local Foods
1947 Cedar Drive
Grafton, WI 53024,

Plaintiffs,

-vs-

Case No. 17-CV-
Case Code: 30701
Case Type: Declaratory Judgment

BEN BRANCEL, Secretary,
Wisconsin Department of Agriculture, Trade and Consumer Protection
(in his official capacity)
2811 Agriculture Drive
Madison, WI 53708,

Defendant.

THE STATE OF WISCONSIN

To the above named Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Ozaukee County, 1201 South Spring Street, Port Washington, WI 53074**, and to the Wisconsin Institute for Law & Liberty, Plaintiffs' attorneys, whose address is: **1139 E. Knapp Street, Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs

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Defendants.

COMPLAINT

Plaintiffs, Jean Smith, Amber Marzahl, Nicole Batzel, Kathleen McGlone and Ozslo Foods, Inc. d/b/a Slow Pokes Local Foods, through their counsel, Wisconsin Institute for Law & Liberty, as and for their complaint against Defendant Ben Brancel, allege as follows:

INTRODUCTION

1. This civil rights lawsuit challenges the constitutionality of Wis. Stat. § 97.176, a regulation relating to the grading and labeling of butter. That statute makes it unlawful to sell, offer or expose for sale, or have in possession with intent to sell, any butter at retail unless it has been graded. As a direct and necessary result of this command to publicize the results of a government mandated “taste test,” retailers who wish to sell certain brands of butter are prohibited from doing so, and consumers of certain butters are forced to travel to other states, or rely on others to travel to other states, in order to secure the brands they most enjoy.

2. This lawsuit seeks to vindicate the rights of Wisconsin citizens to enter into mutually desired transactions that pose no risk to the public morals, safety or welfare. It seeks to vindicate the right of businesses to serve their customers free of anticompetitive, arbitrary, and irrational government regulation, and of consumers not to have their choices limited by such regulations. It seeks to establish the right of sellers of a product not to be compelled to engage in speech that advances no substantial state interest.

3. Wisconsin businesses and consumers are more than capable of determining whether butter is sufficiently creamy, properly salted, or too crumbly. To require a government taste test simply serves no rational public purpose.

4. Wisconsin is the *only* state in the country with specific and onerous labeling requirements that prevent the sale of Kerrygold and other similarly produced butters. Wisconsin has no genuine safety reason or other legitimate governmental interest in maintaining what is essentially a ban on selling certain brands of butter that are not hazardous or deceptive. Preventing the sale of certain brands of butter that are safe and marketed in a non-deceptive way for no reason other than a government bureaucrat has not sampled it and expressed his or her opinion as to its quality is irrational and in violation of Article I, Section 1 of the Wisconsin Constitution. To force sellers of butter to publicize the results of a government “taste test” violates Article I, Section 3 of the Wisconsin Constitution.

JURISDICTION AND VENUE

5. Pursuant to Wis. Stat. § 806.04, Plaintiffs seek a declaration that Section 97.176 of the Wisconsin Statutes violates their due process, equal protection, and free speech rights under the Wisconsin Constitution, and is therefore void and unenforceable.

6. This court has jurisdiction pursuant to Wis. Stat. § 806.04(1) and (2).

7. Venue is proper pursuant to Wis. Stat. § 801.50(3)(a), as the sole defendant is a state officer in his official capacity, and Plaintiffs designate Ozaukee County as the venue.

THE PARTIES

8. Plaintiff Ozslo Foods is a Wisconsin corporation having its principal place of business at 1947 Cedar Drive, Grafton, WI. Ozslo Foods, Inc. is authorized to conduct business in the State of Wisconsin and operates a single store in downtown Grafton at 1229 12th Avenue, doing business as Slow Pokes Local Foods. Ozslo would like to offer certain imported butters that are not graded according to Wisconsin's onerous requirements, but is prohibited from doing so.

9. Plaintiff Jean Smith is a Wisconsin citizen residing at 439 Kimberly Drive, Waukesha, WI. Ms. Smith is forced to regularly travel outside Wisconsin to legally purchase butter that she considers superior in taste and texture to the butter produced or sold in Wisconsin.

10. Plaintiff Amber Marzahl is a Wisconsin citizen residing at 1004 Monroe Street, Apt. 1, Fort Atkinson, WI. Ms. Marzahl wishes to legally purchase butter in Wisconsin that she considers superior in taste and texture to the butter produced or sold in Wisconsin.

11. Plaintiff Nicole Batzel is a Wisconsin citizen residing at 107 South 6th Street, Cedar Grove, WI. Mrs. Batzel wishes to legally purchase butter in Wisconsin that she considers superior in taste and texture to the butter produced or sold in Wisconsin.

12. Plaintiff Kathleen McGlone is a Wisconsin citizen residing at 1947 Cedar Drive, Grafton, WI. Ms. McGlone wishes to legally purchase butter in Wisconsin that she considers superior in taste and texture to the butter produced or sold in Wisconsin.

13. Plaintiffs challenge the constitutionality of Wis. Stat. § 97.176. Defendant Ben Brancel is the Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"). DATCP is the state agency responsible for the enforcement of Wis. Stat. § 97.176, the statute challenged in this action. Defendant Brancel is sued in his official capacity. Defendant Brancel's offices are located at 2811 Agriculture Drive, Madison, WI 53708.

STATEMENT OF FACTS

The Butter Law

14. Wisconsin is the *only* state in the country with specific and onerous labeling requirements that prevent the sale of Kerrygold and other similarly produced butters.

15. Wis. Stat. § 97.176 traces its history back to 1953 (Laws of 1953, Chapter 638). Mandatory compliance with the grading regime became effective July 1, 1954, thus Wisconsin retailers and consumers have been forced to comply with the anticompetitive, arbitrary, and irrational government regulation for almost 63 years.

16. The statute has been modified over the years to reflect a reorganization of DATCP, including a name change, and reassignments of responsibility within DATCP. Overall, the statute reflected today in Chapter 97 remains remarkably similar to when it was first enacted in 1953.

17. The law makes it “unlawful to sell, offer or expose for sale, or have in possession with intent to sell, any butter at retail unless it has been graded.” Wis. Stat. § 97.176(1). Butter is to be graded as Wisconsin AA, A, B, or undergrade. Wis. Stat. § 97.176(1)(a)-(d). The law does accept United States AA, A, and B grades in lieu of the corresponding Wisconsin AA, A, and B grades. Wis. Stat. § 97.176(2).

18. The exception is reiterated in the applicable administrative code, where the provisions of the code are not “applicable to any butter, the label of which bears the grade U.S. Grade AA, U.S. Grade A, or U.S. Grade B, determined by official inspection under federal regulations and standards.” ATCP 85.06(5).

19. In addition to the prohibition on the sale of ungraded butter, Wis. Stat. § 97.176(5) provides that “[b]utter from outside of the state sold within the state shall be provided with a label which indicates that it complies with the state grade standards as provided in this section and which indicates the grade in a manner equivalent to the requirements for butter manufactured and sold within the state.” DATCP has extended this mandatory labeling to butter produced in Wisconsin by administrative rule. ATCP 85.06(2). Thus no one may sell butter produced outside of Wisconsin without communicating the government’s preferred message on its packaging.

20. Wis. Stat. § 97.176(7) provides that “[n]o person, for himself or herself, or as an agent, shall advertise the sale of any butter at a stated price, unless the grade of the butter is set forth in such advertisement in not less than 10-point type.” Thus no person may advertise butter for sale without including the government’s preferred message.

21. It might be one thing if the grading of butter ensured public health or safety, or determined the presence or absence of a characteristic not readily ascertainable by the consumer. But this is not the case.

22. According to the applicable administrative code, 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 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).

23. 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).

24. Specifically, the “Wisconsin grade of butter shall be determined on the basis of a representative butter sample, tested and rated” according to a series of sequential steps. ATCP 85.02.

25. A “butter grader” means a person who grades butter. In order to obtain a license from DATCP as a butter grader, DATCP requires “the applicant to demonstrate his or her competence to act as a butter grader ... in a manner determined by [DATCP].” Wis. Stat. § 97.175(2).

26. 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). The code lists 35 characteristics.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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).

32. These grading requirements, therefore, go well beyond a determination that a particular butter offered for sale is safe or even that it meets some commonly accepted definition of butter.

33. In fact, these grading requirements appear to be wholly unconcerned with safety and are simply a vehicle for mandating that government bureaucrats be permitted to conduct a taste test – to express an opinion as to the quality of a particular butter and to compel the seller of that butter to express that opinion on the butter’s packaging.

34. Any person who is convicted of selling unlabeled or ungraded butter “shall be fined not less than \$100 nor more than \$1,000 or imprisoned for not more than 6 months, for the first offense; and for each subsequent offense, fined not less than \$500 nor more than \$5,000, or imprisoned for not less than 30 days nor more than one year in the county jail or both.” Wis. Stat. § 97.72(1).

35. In lieu of the above criminal penalty, “a person who violated [the] chapter may be required to forfeit not more than \$1,000 for each violation.” Wis. Stat. § 97.72(2).

36. If that weren’t enough, “[i]n addition to penalties applicable to [the] chapter, [DATCP] may apply to any court of competent jurisdiction for a temporary or permanent injunction restraining any person from violating provisions of [the] chapter and rules or orders issued under [the] chapter.” Wis. Stat. § 97.73.

37. In other words, one who is convicted of selling unlabeled butter on more than one occasion faces up to **\$5,000** in fines, **one year** in the county jail, and a **permanent injunction**.

The Butter Law Follows a Pattern of Wisconsin Protectionism

38. Wis. Stat. § 97.176 does not support any legitimate health and safety concern Wisconsin might have regarding butter sold in Wisconsin. Rather, Wis. Stat. § 97.176 sets forth subjective quality-related standards for which the state has no rational basis.

39. Wis. Stat. § 97.176 is only one example of the Wisconsin dairy industry's attempts to arbitrarily control and restrict sale of products that compete with those manufactured by the Wisconsin dairy industry.

40. In *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369 (1927), the Wisconsin Supreme Court dealt with the legislature's decision, at the behest of the dairy industry, to ban the sale of oleomargarine and other substitutes for butter in Wisconsin. 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." 214 N.W. at 373. The Court stated, "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.*

41. Some 25 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. *See Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 477 (1952). Several *amicus* organizations, including about 85 Wisconsin manufacturers of ice cream, 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.

42. The court rejected their concerns. *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 were 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.

43. Similar to the Wisconsin dairy industry sponsored protectionism struck down in *Jelke* and *Dairy Queen*, the protectionist and anti-competitive requirements of Wis. Stat. § 97.176 serve no purpose but to perpetuate an industry-controlled market that prohibits the sale of butter and threatens the Wisconsin dairy industry's cartel.

The Drive to Secure and Sell Kerrygold Butter

44. Kerrygold butter, made in Ireland and sold by Irish dairy corporation Ornuia, comes in both salted and unsalted varieties.

45. On its website Kerrygold claims that “[t]he winds, rain and warming influence of the Gulf Stream all contribute to the lush grass our cows feed on year-round. They produce the sweetest, richest milk in the world, which makes our grass-fed cow’s milk Irish butter taste silky and creamy and glow a healthy, golden yellow.”

46. Kerrygold butter has limited labeling on its packaging, all of which is sufficient for every state in the union, but for Wisconsin. Below the nutritional facts section of a block of butter bought in Illinois, the packaging notes the butter was “PACKED FOR THE IRISH DAIRY BOARD, INC., EVANSTON, IL 60201”, that the butter is a “PRODUCT OF IRELAND”, and “IN IRELAND, COWS GRAZE ON THE GREEN PASTURES OF SMALL FAMILY FARMS. THIS MILK IS CHURNED TO MAKE KERRYGOLD BUTTER.”

47. On the underside of the package, an oval symbol notes “IE 1024 EC”. Upon information and belief, the symbol generally relates to the Milk & Dairy Establishment’s listing of approved and/or registered dairy establishments. Specifically, the symbol noted on the Kerrygold butter package represents the Lakeland Dairies Co-Operative Society Limited, an entity which has five locations in Ireland.

48. According to Lakeland Dairies’ website, it is “a leading provider of dairy produce to Ireland’s Kerrygold brand”. It further notes “[a]ll of Lakeland Dairies’ processing facilities operate to the most stringent international standards of quality and sustainability” and “[t]o ensure customer satisfaction, we rigorously test all raw materials, in-line processes and finished products.”

49. Upon information and belief, the state of Wisconsin has provided no practicable way for imported butters such as Kerrygold to be graded.

50. Notwithstanding the assurances regarding the quality and safety of Kerrygold butter outlined above, Kerrygold cannot be sold in Wisconsin, even though it is sold without incident and with a high degree of consumer satisfaction in every other state in the country.

51. Jean Smith, Amber Marzahl, Nicole Batzel and Kathleen McGlone are consumers who enjoy the health benefits of organic products, among them Kerrygold butter.

52. Among other things, Kerrygold butter can be enjoyed in one's coffee or tea, converting it to a "bulletproof" liquid with a number of health benefits. Plaintiffs Smith, Marzahl, Batzel and McGlone believe that Kerrygold's composition and flavor are unique. Commentators and reviewers on organic and gourmet foods across the country and internationally typically laud the qualities of Kerrygold butter which is sold as a premium product in every state of the union other than Wisconsin.

53. Ozslo Foods is an independent, individually owned company based in Grafton, Wisconsin. The company does business as Slow Pokes Local Food and since 2006 has been producing from scratch, delicious, nutrient-dense foods.

54. As one tiny little store with great big hopes, Slow Pokes Local Foods partners with small local farmers that supply it with pastured meats, dairy, eggs, sustainably raised veggies, maple syrup, raw honey, fermented sauerkraut, kombucha plus soaked, sprouted and organic gluten-free breads.

55. Among the dairy products it has sold in the past is Kerrygold butter.

56. Approximately two years ago DATCP began enforcing Wis. Stat. § 97.176 which prohibits the sale of butter in Wisconsin, unless it meets specific and onerous grading and labeling requirements. DATCP's enforcement harmed Ozslo Foods by significantly reducing its sales volume, and thereby its profit.

57. 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.

58. Plaintiff Jean Smith prefers Kerrygold butter over all alternatives available in Wisconsin. Because it is unavailable for legal sale in Wisconsin, Ms. Smith brings back as much Kerrygold butter with her when she visits family in Nebraska. She keeps large amounts of the butter in her home refrigerator in the hopes that she will have enough to last her until her next out-state trip.

59. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Ms. Smith could purchase Kerrygold butter more easily and conveniently near her home.

60. Plaintiff Amber Marzahl prefers Kerrygold butter over all alternatives available in Wisconsin. She keeps large amounts of the butter in her home refrigerator in the hopes that she will have enough to last her until friends and family make out-state trips to obtain the butter.

61. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Ms. Marzahl could purchase Kerrygold butter more easily and conveniently near her home.

62. Plaintiff Nicole Batzel prefers Kerrygold butter over all alternatives available in Wisconsin. She keeps large amounts of the butter in her home refrigerator in the hopes that she will have enough to last her until friends and family make out-state trips to obtain the butter.

63. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Mrs. Batzel could purchase Kerrygold butter more easily and conveniently near her home.

64. Like Plaintiffs Smith, Marzahl, and Batzel, Plaintiff McGlone prefers Kerrygold butter over all alternatives available within the state. She is harmed by Kerrygold's unavailability in Wisconsin, since she is forced to spend more time and resources locating Kerrygold butter.

65. But for Wis. Stat. § 97.176 and DATCP's enforcement of the statute, Ms. McGlone could purchase Kerrygold butter more easily and conveniently near her home.

FIRST CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Substantive Due Process)

66. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

67. Article I, § 1 of the Wisconsin Constitution provides in relevant part that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.”

68. The Wisconsin Supreme Court has tied its interpretation of the due process clause of the Wisconsin Constitution to the federal interpretation of the due process clause in the 14th Amendment. *See Blake v. Jossart*, 2016 WI 57, ¶ 47, 370 Wis. 2d 1 (explaining that the substantive component of the 14th Amendment's Due Process Clause addresses the content of what government may do to people under the guise of law); *see also County of Kenosha v. C. & S. Management, Inc.* 223 Wis. 2d 373 (1999).

69. Part of the pursuit of happiness includes the rights of consumers to make their own economic decisions unless the government has a valid reason to interfere with those rights, which in this case Wisconsin does not have. In the same way, retailers, in pursuit of their inherent right to economic liberty are entitled to make economic decisions as to the products they

intend on selling, products that presumably consumers desire, in order to earn a profit. The only limitation on the inherent right for a retailer to sell a product and earn a profit is the government's need to interfere with the right based on some rational basis serving the traditional police power of the state. Such a rational basis is completely lacking in this case.

70. Since the earliest days of our State, the Wisconsin Supreme Court has recognized the right to earn a living as a fundamental right. *See State v. Benzenberg*, 101 Wis. 172 (1898) (Constitution protects right of a citizen to pursue his calling); *Taylor v. State*, 35 Wis. 298 (1874) (right to engage in business is a fundamental right under the Wisconsin Constitution); *Maxwell v. Reed*, 7 Wis. 582 (1859). In order to pass constitutional muster, economic regulation must have a "real [and] substantial relation" to the purported government objectives. *State ex rel. Zimmer v. Kreuzberg*, 114 Wis. 530, 90 N.W. 1098, 1102 (1902).

71. The Butter Law arbitrarily and irrationally prevents Plaintiff Ozslo Foods, in connection with its business, from selling the brands of butter its customers desire and from freely operating an otherwise lawful business in a manner that is in its own best interest and the best interest of its customers. Wisconsin has no compelling, substantial, or legitimate government interest in regulating the availability of an otherwise safe product. The Butter Law is far more restrictive than necessary to prevent any purported risk or to support any legitimate health or safety concerns of the state and therefore simply restricts legitimate and pro-competitive practices in a way that is irrational, arbitrary, and oppressive.

72. The Butter Law prevents free and open competition among domestic and international producers of butter. Absent the statutory prohibition, Ozslo Foods would be free to provide additional butter options to its customers, and would choose to more freely do so.

73. The Butter Law prevents Plaintiffs Jean Smith, Amber Marzahl, Nicole Batzel and Kathleen McGlone from reaping the benefits of free and open competition by irrationally and arbitrarily restricting their legitimate choices and forcing them to travel to other states, or to rely on others to travel to other states, to obtain the butter they desire or to pay higher than competitive prices to obtain product on the "butter black market."

74. The Butter Law is arbitrary and irrational, in that in order to purportedly protect consumers it prevents retailers from offering a full menu of butter products that otherwise would be offered by retailers and bought by consumers.

75. The Butter Law violates the Wisconsin Constitution's guarantee of due process in that it denies Wisconsin citizens the benefits of free and open competition, denies Wisconsin businesses the right to earn a living and engage in lawful commerce, and does not further any legitimate, substantial, or compelling governmental interest.

76. Plaintiffs have suffered harm as a result of the Butter Law.

SECOND CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Equal Protection)

77. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

78. Article I, § 1 of the Wisconsin Constitution also guarantees equal protection of the law.

79. The Wisconsin Supreme Court has tied its interpretation of the equal protection clause of the Wisconsin Constitution to the federal interpretation of the equal protection clause in the 14th Amendment, labeling the Wisconsin equal protection clause the functional equivalent of the equal protection clause in the 14th Amendment. *See Reginald D. v. State*, 193 Wis. 2d 299, 306 (1995); *see also County of Kenosha v. C. & S. Management, Inc.* 223 Wis. 2d 373 (1999).

80. The Butter Law creates irrational and arbitrary classifications. Businesses that sell butter may only sell butter labeled in accordance with the law. Businesses that sell any other dairy product do not have to follow such onerous and subjective labeling requirements. There is no rational reason for forcing retailers to comply with a burdensome and subjective state-sponsored grading process when other dairy products do not have the same requirements. There is no reasonable basis for those classifications and they serve no legitimate government purpose.

81. Plaintiffs have suffered harm due to the classifications created by the Butter Law.

THIRD CLAIM FOR RELIEF

(Violation of Article I, Section 3 of the Wisconsin Constitution – Free Speech)

82. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

83. Article I, § 3 of the Wisconsin Constitution also guarantees free speech.¹

¹ Free speech; libel. SECTION 3. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech

84. Commercial speech is protected by the First Amendment. The government must show that a restriction on commercial speech directly advances a substantial interest for it to be constitutional. *City of Milwaukee v. Blondis*, 157 Wis. 2d 730, 460 N.W.2d 815 (Ct. App. 1990).²

85. For restrictions on commercial speech to stand a constitutional challenge, the restriction must not be more extensive than is necessary to serve the government's interests. *Central Hudson Gas v. Public Service Commission of New York*, 447 U.S. 557 (1980).

86. Wisconsin's Butter Law creates onerous and arbitrary labeling requirements that fail the test for commercial speech under *Central Hudson*. The law operates merely to require manufacturers and sellers of butter to place the State of Wisconsin's subjective opinion as to the taste of their butter on the packaging.

87. Under *Central Hudson* a court reviewing a restriction on commercial speech is required to examine: (1) whether the regulated speech concerns lawful activity and is not inherently misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest. If the first prong of this test is satisfied, the challenger must only prove that the challenged statute fails to meet one of the other prongs. Wis. Stat. § 97.176 fails under multiple prongs of this test.

88. The Defendant has made no assertion and there is no evidence that commercial speech related to the packaging or labeling of Kerrygold butter, or other similarly produced butter, is in anyway unlawful or misleading. Kerrygold butter contains an inspection label indicating it meets the strict requirements of butter graded in Ireland. The Kerrygold label in no way indicates it has been graded in Wisconsin or by the United States Department of Agriculture. Therefore, the label is not misleading.

89. The Defendants have asserted no governmental interest that the Butter Law purports to advance. As opposed to a presumptively valid health and safety regulation, the Butter Law only attempts to affix labels that subjectively indicate a level of quality and taste – factors that labeling for most every other item of food merchandise sold in Wisconsin lacks. As such the Defendant does not have a substantial government interest in the labeling and grading

or of the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charged as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

² See also *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial advertising is protected free speech).

requirements set forth in Wis. Stat. § 97.176. The Defendant has advanced no reason why it is necessary for the State to place their opinion as to the taste of butter on the packaging.

90. Under *Central Hudson*, the State is required to produce “concrete evidence” that the speech restriction or requirement advances the governmental interest “in a direct and material way.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Mason v. Florida Bar*, 208 F.3d 952, 958 (11th Cir. 2000). Here, since there is no legitimate government interest at stake, whether the statute advances that interest is immaterial.

91. The threshold question under prong four of *Central Hudson* is whether the government has less-burdensome alternatives available. That forty-nine out of fifty states do not require the onerous and arbitrary grading and labeling construct that Wisconsin’s Butter Law sets forth, or have a labeling regime which foreign producers of butter (or domestic sellers of foreign butter) can meet, conclusively establishes that, whatever interest in grading and labeling Wisconsin might have, there are less-burdensome ways to accomplish it.

92. “The party seeking to uphold a restriction on commercial speech carries the burden of justifying it,” and “this burden is not satisfied by mere speculation or conjecture.” *Mason*, 208 F.3d at 958. The Defendant has not met that burden in this case.

93. Kerrygold butter is graded in accordance with Ireland’s strict grading requirements which are necessarily slightly different than Wisconsin’s. To require a manufacturer or retailer to comply with state-sponsored labeling requirements which advance no substantial government interest and, for whatever interests they might advance, are successfully advanced by the Plaintiff’s own choice of speech is a violation of their Freedom of Speech.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

A. Enter a declaratory judgment that the Butter Law violates the due process guarantee set forth in Article I, Section 1 of the Wisconsin Constitution;

B. Enter a declaratory judgment that the Butter Law violates the equal protection guarantee set forth in Article I, Section 1 of the Wisconsin Constitution;

C. Enter a declaratory judgment that the Butter Law violates the free speech guarantee set forth in Article I, Section 3 of the Wisconsin Constitution;

D. Enter an order permanently enjoining Defendant from enforcing the provisions of the Butter Law;

- E. Enter an order awarding Plaintiffs their reasonable costs and fees allowed by law;
and
- F. Enter an order granting Plaintiffs such other and further relief as the Court deems appropriate.

**PLAINTIFFS HEREBY DEMAND A JURY OF 12 PERSONS
ON ALL CLAIMS SO TRIABLE**

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