No. 18-1145

In the

Supreme Court of the United States

MINERVA DAIRY, INC. and ADAM MUELLER,

Petitioners,

v.

BRAD PFAFF, in his official capacity as Secretary-Designee of the Wisconsin Department of Agriculture, Trade and Consumer Protection, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

JOSHUA L. KAUL
Attorney General of Wisconsin

GABE JOHNSON-KARP
Assistant Attorney General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-8904
johnsonkarpg@doj.state.wi.us

QUESTIONS PRESENTED

1. The dormant Commerce Clause prohibits state laws that discriminate against or pose an unjustified burden on out-of-state commerce. Wisconsin's butter-grading law requires all butter sold at retail in the state to display a grade, which may be issued either by a state-licensed butter grader or a grader with the United States Department of Agriculture. The Seventh Circuit held that Wisconsin's butter-grading law did not violate the dormant Commerce Clause because the law does not impose any unique burdens on out-of-state commerce. Did the Seventh Circuit err in concluding that Wisconsin's butter-grading law does not violate the dormant Commerce Clause?

2. Substantive due process challenges to economic regulations are subject to rational-basis review, under which the law will be upheld if there is any conceivable basis on which the state Legislature could have validly adopted the law. States need not present evidence about the actual basis for the law or how it functions in practice. Here, the Seventh Circuit concluded that Wisconsin's butter-grading law survived rational-basis review, since the law could reasonably be understood to serve the state's legitimate interests in consumer protection and promoting economic activity. Did the Seventh Circuit err by applying the well-established rational basis review standard?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Minerva Dairy and its president, Adam Mueller (collectively, "Minerva"), ask this Court to take up this case to expand the role of courts under two constitutional doctrines. For one, under the banner of the dormant Commerce Clause, Minerva asks the Court to resolve an alleged circuit split by requiring a more searching inquiry into otherwise valid state laws if the laws impose *any burden* on commerce, regardless of whether that burden is felt equally by in- and out-of-state firms. For the other, Minerva asks the Court to expand the role of courts when evaluating economic legislation within the substantive-due-process framework.

Neither of these issues warrants this Court's review. As to the dormant Commerce Clause issue, this case simply does not present the circuit split that Minerva suggests. And as to the substantive due process issue, this Court's precedents squarely foreclose the type of heightened scrutiny that Minerva now urges. And as to both, the Seventh Circuit's analyses were consistent with this Court's precedents, and its conclusions were correct.

The petition should be denied.[1]

---

[1] Troy Sprecker is now the Director of the Bureau of Food and Recreational Businesses. Pursuant to Rule 35.3, Mr. Sprecker should be substituted for Peter Haase.

STATEMENT OF THE CASE

I. History of Butter Grading in the United States.

Butter grading in the United States began with the simple purpose of informing the consumer about the quality of small-batch, locally made butter. *See* Ralph Selitzer, *The Dairy Industry in America* 41, 88 (1st ed. 1976); Edward Wiest, *The Butter Industry in the United States: An Economic Study of Butter and Oleomargarine* 124 (1916). Farmers brought their butter to market, and grocers sampled the product and graded it for sale to customers. *See* Wiest, *supra*, at 124. Grades were simple but nondescriptive: for example, fair, good, and prime. *See* Edward Sewall Guthrie, *The Book of Butter*; *A Text on the Nature, Manufacture and Marketing of the Product* 189 (1918).

As production shifted from the farmer to the local creamery, organized butter markets developed under the auspices of local boards of trade or mercantile exchanges. *See* Wiest, *supra*, at 123, 143, 145, 148; Guthrie, *supra*, at 202–03. Central to these markets was the development of systematic grading criteria, which would allow the markets to "establish, for each grade, a market price commensurate with quality." Wiest, *supra*, at 119. These grading systems addressed a reality of butter making: that even slight variances in any of the multiple steps of production could yield widely divergent results. *See* Selitzer, *supra*, at 85; Wiest, *supra*, at 119;

see E.H. Farrington, *A Guide to Quality in Dairy Products; A Reference Book for the Butter Maker, the Cheese Maker, the Ice Cream Maker and the Dairy Farmer* 26 (1927).

By the early twentieth century, national consensus began to emerge in the butter markets. Wiest, *supra*, at 135. Graders zeroed in on the "peculiar characteristics of butter," which the markets demonstrated could "be regarded as objective." *Id.* at 136. The elements of those early grading systems—flavor, body, color, salt, and package—are familiar today. *See id.* at 134–35. So, too, are many of the descriptors, including flavors like "clean," "old cream," "bitter," "whey," or "musty"; mottled, streaked, or discolored appearance; and high or low salt. *Compare* Guthrie, *supra*, at 191–93 (discussing early grading criteria), *with* Wis. Admin. Code § ATCP 85.04–.05 (Wisconsin's current regulations governing butter characteristics).

In 1919, the United States Department of Agriculture (USDA) introduced a voluntary grading system with specifications and classifications based "largely on existing standards and the best commercial practices." Bureau of Markets, USDA, Service and Regulatory Announcements No. 51, *The Inspection of Butter Under the Food Products Inspection Law* 2 (1919). The USDA grades adopted the existing elements of flavor, body, color, salt, and package. *Id.* at 4. The agency updated its grades in 1939 to reflect "a more unified, accurate, and useful

grading service." Bureau of Agricultural Economics, USDA, *Official United States Standards for Quality of Creamery Butter* 11 (1938).

Although still voluntary, these uniform grading standards served at least two purposes. First, the uniform standards "provid[ed] a common language for wholesale trading and a means of measuring value or a basis for establishing prices." USDA, *USDA Grade Standards for Foods—How They are Developed and Used* 4 (1973); Selitzer, *supra*, at 299. Second, and relatedly, the standards afforded consumers assurances about the quality of the butter they were buying, allowing them to choose the quality of butter for which they were willing to pay. *See* Selitzer, *supra*, at 299–300; Production and Marketing Administration, USDA, Leaflet No. 264, *Know Your Butter Grades* (1949). With these uniform standards in place, producers and consumers each benefitted, with producers able to advertise high-quality butter, and consumers able to choose the quality of their butter based on standard measures. *See* Selitzer, *supra*, at 299.

II. Wisconsin's Butter-Grading Law.

Despite the rise of uniform standards for butter grading at mid-century, the standards remained voluntary, and therefore butter quality continued to vary greatly within the market. (*See* Dkt. 28-1:6–7 (reprint of Legislative Dep't, Wis. Farm Bureau Fed'n, *A Butter Grading Law: Yes or No* 1 (1953)).) As a result, nationwide per capita consumption of butter "was suffering badly," with many consumers turning

to oil-based margarine for consistency in quality. (*See* Dkt. 28-1:7.)

To address these problems, in 1953 the Wisconsin Farm Bureau proposed a mandatory butter-grading law intended to reinvigorate sales of high-quality butter in Wisconsin and beyond. (*See* Dkt. 28-1:6–7.) Under the law, all butter sold at retail in the state—regardless of where it was produced—would have to be graded and include that grade on its packaging. (*See* Dkt. 28-1:6.) The Bureau's express goal in proposing the law was to "stimulat[e] consumer demand for butter of a high uniform quality." (*See* Dkt. 28-1:6.) Grades under the proposal would correspond to existing USDA grades, which were already familiar to the industry and consumers. (*See* Dkt. 28-1:6.)

The Wisconsin Legislature adopted the mandatory butter-grading law that year. *See* 1953 Wis. Laws ch. 638; Wis. Stat. § 97.43 (1953–54). That law has remained largely unchanged for over 65 years. *Compare* Wis. Stat. § 97.43 (1953–54), *with* Wis. Stat. § 97.176 (2017–18).

Wisconsin's mandatory butter-grading law provides that "[i]t is 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). Grades range from "Wisconsin, AA" to "Wisconsin, undergrade," based on the butter's score as ascertained by licensed graders. *See id.* § 97.176(1)(a)–(c), (6). USDA grades "shall be

accepted in lieu of the corresponding Wisconsin . . . grades," and all USDA grades below "B shall . . . correspond to Wisconsin undergrade." *Id.* § 97.176(2).

The Legislature further directed the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) to develop "[d]etails for methods and procedures to be used for ascertaining quality, for labeling, and for arbitrating disputes with respect to grades." *Id.* § 97.176(4). These grading methods and procedures were required to take into account input from public hearings "held at a convenient location in the state." *Id.*

DATCP's first regulations under the law codified the same long-recognized grading standards used by the USDA: flavor, body, color, and salt. *See* Wis. Admin. Code § Ag 85.01 (Jan. 1956). The classifications within those categories have remained largely unchanged. *Compare id.*, *with* Wis. Admin. Code ch. ATCP 85 (Jan. 2017.)

Under Wisconsin's current regulations, relevant flavor characteristics include "[a]ged," "[f]eed," "[m]usty," "[o]ld [c]ream," "[w]eed," or "[w]hey." *See* Wis. Admin. Code § ATCP 85.04(1)(a)2., 7., 10., 12., 17., 18. Narrative descriptions of the 18 relevant flavor characteristics are set forth in the regulations. *See id.* § ATCP 85.04(1)(a)1.–18. For example, "'[m]usty' means a flavor which is suggestive of the aroma of a damp vegetable cellar." *Id.* § ATCP 85.04(1)(a)10. Body characteristics

relevant to grade include "[c]rumbly," "[g]ummy," "[m]ealy," and "[s]ticky." *Id.* § ATCP 85.04(1)(b)1., 2., 4., 7. These, too, are defined in the regulations, as are color and salt characteristics. *See id.* § ATCP 85.04(1)(b), (c), (d). Each of the four characteristics is also rated by intensity (slight, definite, pronounced).

To arrive at a grade, licensed butter graders begin with "a representative butter sample, tested and rated according to the following sequential steps." *Id.* § ATCP 85.02.

(1) Identify each applicable flavor characteristic and its relative intensity. Certain characteristics warrant "disratings," all of which are set forth in the regulations. This flavor analysis results in a preliminary letter grade according to a table in the administrative regulations. *See id.* §§ ATCP 85.02(1), .05(1).

(2) Identify each applicable body, color, and salt characteristic of the sample, along with their intensities; again, certain characteristics will warrant additional disratings. *See id.* §§ ATCP 85.02(2), .04(1)(b), (c), (d), (2).

(3) The sample's final Wisconsin grade is established based on the ratings for flavor, as adjusted by disratings for body, color, and salt, and in accordance with the narrative grade descriptions set forth in the regulations. *See id.* §§ ATCP 85.02(3), .03.

Wisconsin regulations recognize four butter grades. First, Wisconsin Grade AA butter must be made from sweet cream of low natural acid, and will have "a fine and highly pleasing butter flavor." *Id.* § ATCP 85.03(1)(a), (c). Wisconsin Grade AA butter may possess a "slight" degree of "feed or culture flavor," or a "definite degree" of "cooked" flavor, but may have only minimal disrating points (one-half of one point). *Id.* § ATCP 85.03(1)(b), (d).

Second, Wisconsin Grade A butter will have "a pleasing and desirable butter flavor," but may possess "definite" flavors of "culture" or "feed," as well as a "slight" flavor of "acid, aged, bitter, coarse, flat, smothered [or] storage." *Id.* § ATCP 85.03(2)(a)–(c). Depending on the flavor classification, Wisconsin Grade A butter may have up to one point in disratings. *Id.* § ATCP 85.03(2)(d).

Third, Wisconsin Grade B butter will have "a fairly pleasing butter flavor," but may possess heightened characteristics found in Grade A butter, as well as "slight" flavors of "malty, musty, neutralizer, scorched, utensil, weed [or] whey." *Id.* § ATCP 85.03(3)(a)–(d).

Finally, Wisconsin Undergrade Butter is any butter that "fails to meet the requirements for Wisconsin Grade B." *Id.* § ATCP 85.03(4).

Wisconsin's butter grading procedures are materially identical to the USDA's. All but one of the relevant characteristics are the same (Wisconsin

includes "cultured," which the USDA standards omit). *Compare id.* § ATCP 85.04, *with* AMS, USDA, *United States Standards for Grades of Butter* 1–4 (1989), https://www.ams.usda.gov/sites/default/files/media/Butter_Standard%5B1%5D.pdf [https://perma.cc/K2JC-EY65]. And while USDA grading is voluntary, the Federal Government has recognized by administrative rule that USDA grading "will significantly aid the operators to manufacture more consistently, uniform high-quality stable dairy products." 7 C.F.R. § 58.122(a). USDA grades are available only from graders employed by USDA (*see* 7th Cir. Dkt. 15:73 (7th Cir. App. 71)), whereas anyone may become a Wisconsin licensed butter grader, *see* Wis. Stat. § 97.175(2).

The steps to become a Wisconsin-licensed butter grader are set forth in Wisconsin's statutes and regulations. *See* Wis. Stat. § 97.175; Wis. Admin. Code § ATCP 85.07. Individuals seeking licensure must apply to DATCP, pay $75, and pass a butter-grading exam. (Pet. App. A:3–4.) The exam includes a written portion and a practical test in which the applicant must grade a sample of butter in front of DATCP's licensed grader. (*Id.* at 4.) Approximately 90% of applicants pass the exam. (*Id.*) Licensure is valid for two years, renewable by payment of another $75. (*Id.*)

DATCP enforces the butter-grading law and ensures the accuracy of grades by conducting unannounced inspections of creameries, as well as conducting random testing of butters sold at retail outlets. (Pet. App. C:3.) When DATCP sanitarians learn of a violation, such as mis-graded butter or the

sale of ungraded butter, DATCP typically sends a letter to the manufacturer or retail outlet; enforcement efforts typically end at this step. (*Id.*) Although Wisconsin law authorizes DATCP to seek fines or imprisonment for noncompliance, *see* Wis. Stat. § 97.72, current DATCP leadership is not aware of any such measures being necessary (*see* 7th Cir. Dkt. 15:44 (7th Cir. App. 42.)

III. Facts and Procedural History.

A. Background.

Minerva Dairy is a family-owned Ohio company that makes a variety of butters and cheeses. (Pet. App. C:4.) Adam Mueller is the president of Minerva Dairy, Inc. (Pet. App. A:6.) Minerva produces its butter in "small, slow-churned batches using fresh milk supplied by pasture-raised cows." (*Id.*) For decades, Minerva sold its butter in Wisconsin without labels identifying a Wisconsin or USDA butter grade, in violation of Wisconsin's butter-grading law. (*See id.*) In February 2017, DATCP received an anonymous complaint about ungraded Minerva butter being sold at a retail store in southeastern Wisconsin. (*Id.*) After verifying the complaint, DATCP sent Minerva a warning letter informing the company of its noncompliance. (*Id.*) Soon thereafter, Minerva stopped selling its butter at retail in Wisconsin. (*Id.*)

This lawsuit followed. (Dkt. 1.)

B. District court proceedings.

In its complaint, Minerva contends that Wisconsin's butter-grading laws constitute an "artisanal butter ban" depriving Minerva of due process and equal protection, and violating the dormant Commerce Clause. (Dkt. 1:4–6, 12–16.)

Following Minerva's unsuccessful motion for a preliminary injunction (*see* Dkt. 24 (order denying motion)), both sides moved for summary judgment. The district court granted summary judgment for the defendants on all claims. (Pet. App. C.) The court concluded that the butter-grading laws served the legitimate state interest of consumer protection, and that it was not irrational for the state to require grading of butter but not other products, like honey. (*See id*. at 6.) The court also rejected Minerva's dormant commerce clause claim, since Minerva all but conceded that the law did not affect in- and out-of-state butter makers differently. (*See id*. at 8.)

C. The Seventh Circuit's decision.

The Seventh Circuit affirmed summary judgment for the defendants. (*See* Pet. App. A.) After describing the background and legal framework, the court first addressed Minerva's due process challenge. (*See id.* at 8.)

1. Rational-basis/substantive due process analysis.

Acknowledging the "notoriously 'heavy legal lift'" challengers bear when attacking economic legislation, the court confirmed that laws like Wisconsin's will survive a due process challenge as long as there exists a "'reasonably conceivable state of facts that could provide a rational basis' for the classification." (*Id.* (quoting *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 681 (7th Cir. 2017), and *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015)).) At least two conceivable bases support Wisconsin's law, the court held. (*Id.*)

First, the court agreed that Wisconsin's interest in consumer protection is valid, and held that the grading law reasonably advances Wisconsin's purpose of informing consumers about the quality of butter for sale at retail. (*Id.* at 8–9.) The court specifically noted that courts have consistently upheld labeling laws like Wisconsin's as providing consumers relevant product information to inform their purchasing decisions. (*See id.* at 9 (discussing *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23–26 (D.C. Cir. 2014)).) The court also rejected the notion that the labeling requirement is irrational because not everyone would find it helpful, or even care about the information conveyed. (*See id.*) Rather, the law's rationality is satisfied by its conceivable utility for some consumers. (*See id.*)

Second, the Seventh Circuit held that Wisconsin's interest in promoting commerce was also sufficient to sustain the butter-grading law. (*Id.* at 9–10.) On this point, the court found the "historical pedigree" of the Dairy State's butter-labeling law "telling." (*Id.* at 9–10 (quoting *Am. Meat Inst.*, 760 F.3d at 23–24.) Here the court again noted that other courts had sustained other similar labeling laws based on their "historical backdrop" and their "common sense" for consumers. (*See id.* at 10 (quoting *Am. Meat Inst.*, 760 F.3d at 23–24).) The court thus affirmed the law's grounding in a legitimate desire to "stimulat[e] consumer demand for butter of a high uniform quality" and promote Wisconsin's "national reputation" for butter. (*Id.* at 11 (alteration in original) (quoting Legislative Dep't, Wis. Farm Bureau Fed'n, *supra*).)

The court then went on to dispose of Minerva's arguments that the law was not rationally related to serving either of these legitimate state interests. (*Id.* at 12.) First, the court rejected Minerva's argument that Wisconsin had failed to provide evidence that the butter-grading law actually served the proffered ends, noting the well-established rules that a state need not provide evidence in support of a law's means-ends relationship, and that a state's proffered rationale for a law may be "based on rational speculation unsupported by evidence or empirical data." (*Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).) Moreover, even if evidence were required, the court noted that Wisconsin *had* presented evidence to support its

rationales for the butter-grading law. (*See id.* at 12–13.) The court concluded that Minerva therefore failed to support its due process challenge to Wisconsin's butter-grading law. (*Id.*)

2. Equal protection analysis.

The court next addressed Minerva's Equal Protection claim, beginning by noting that the due process rationality analysis applied here, and that much of their claim failed for reasons previously discussed. (*See id.* at 14–15.) The court rejected Minerva's claim that it is irrational for Wisconsin to regulate butter differently from honey, cheese, and maple syrup, given that (1) there was evidence that consumers had different taste expectations for butter than for these other foods; (2) Minerva had failed to present any evidence of a historical practice of regulating those other foods like what exists for butter; and (3) rational basis review affords states leeway to regulate incrementally, so that a state "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." (*Id.* at 14–16 (quoting *Clements v. Fashing*, 457 U.S. 957, 969–70 (1982)).)

The court also rejected Minerva's suggestion that its challenge to the butter-grading law found support in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). That decision, the Seventh Circuit stated, is "better understood as [an] extraordinary rather than [an] exemplary

rational-basis case." (Pet. App. A:17 (alteration in original) (quoting *Monarch Beverage Co.*, 861 F.3d at 685).) Without any indication that butter makers face the same systemic, irrational discrimination as do those with intellectual disabilities, the court concluded that *City of Cleburne* did not support Minerva's claim. (*See id.* at 17–18.)

3. Dormant Commerce Clause analysis.

Having rejected Minerva's Due Process and Equal Protection claims, the court proceeded to reject Minerva's dormant Commerce Clause claim, as well. (*Id.* at 18–24.) The court began by summarizing the traditional three-tiered inquiry for dormant Commerce Clause claims: first, laws that are facially discriminatory are presumptively unconstitutional; second, laws that are facially neutral but which have a clear and powerful discriminatory effect on interstate commerce will also be treated as presumptively unconstitutional; and third, facially evenhanded laws that have only mild disparate effects on interstate commerce will be evaluated under this Court's balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). (Pet. App. A:19.) Under that balancing test, those laws will be upheld unless the challenger shows that the burden on interstate commerce outweighs the putative local benefits. (*See id.*)

The court also recognized that the Commerce Clause does not demand inquiry into *every law* that implicates interstate commerce; instead, inquiry may

be reserved for those laws that, "either expressly or in practical effect," actually have some disparate effect on interstate commerce—as opposed to those that simply impact commerce, generally. (*See id.* at 20 (quoting *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017)).) For those laws that simply impact commerce without "giv[ing] local firms any competitive advantage" over out-of-state firms, courts apply "the normal rational-basis standard." (*Id.* (quoting *Park Pet Shop*, 872 F.3d at 502).)

Applying this framework to Wisconsin's butter-grading law, the court held that Wisconsin's law does not discriminate either on its face or in practical effect. (*See id.* at 20–21.) The law, the court determined, does not distinguish between butter produced in- or out-of-state—all must be graded to be sold at retail. (*See id.*) Likewise, the law draws no distinction between in- and out-of-state grading-license holders. (*See id.*)

The court then noted that most of Minerva's complaints about alleged difficulties for "artisanal" butter makers did not even trigger Commerce Clause concerns. (*See id.* at 21–22.) Rather, Minerva's complaints about the law's alleged damaging effects on "brand equity of artisanal butter-makers" and the "cost-prohibitive [effect] for artisanal butter makers like Minerva" are simply "irrelevant under [the] dormant Commerce Clause," since the Clause protects interstate commerce, not artisanal commerce. (*See id.* at 21.)

"Minerva's best argument," the court wrote, is that the law imposes a disparate cost on out-of-state firms and individuals who must travel to Wisconsin to obtain licensure. (*See id.* at 22–23.) But like Minerva's complaint about burdens on artisanal butter makers, this complaint also has no inherent connection to interstate commerce. Rather, as the district court recognized, this complaint related to "long-distance commerce," without regard to the state of origin, with many far-off in-state firms experiencing any burden at a greater degree than nearby out-of-state firms. (*Id.*) For example, Wisconsin firms located in the northern corners of the state would face higher travel costs than, for example, residents of Illinois, Iowa, or Minnesota living relatively close to Madison where the licensure testing locations are located. (*See id.*)

Because the butter-grading law does not impose any inherent burden on out-of-state commerce, the court held, "the dormant Commerce Clause does not come into play and *Pike* balancing does not apply."[2] (*Id.* at 23 (quoting *Park Pet Shop*, 872 F.3d at 502).) The court therefore affirmed summary judgment for the defendants, upholding Wisconsin's butter-grading law. (*See id.*)

---

[2] In closing, the court rejected Minerva's request for a retroactive declaration about the defendants' allegedly discriminatory enforcement of the law before 2017. (*See* Pet. App. A:23–24.) The court agreed with the district court, which had found that Minerva failed to present sufficient evidence to support its assertions about past discriminatory enforcement. (*See id.*)

REASONS FOR DENYING THE PETITION

Minerva's petition should be denied on both questions.

First, the alleged circuit split about how courts analyze claims under the *Pike* test is not a split at all. For one thing, Minerva confounds the analysis by loosely framing its first Question Presented in terms of "alleged" burdens that a challenged law caused. This case is far beyond *allegations*—Minerva lost on summary judgment after having a full opportunity to present *evidence* about supposed burdens that Wisconsin's butter-grading law imposes on interstate commerce. And, separate from the procedural posture here, Minerva's focus on "allegations" conflates the discussions in court decisions from all along the procedural spectrum: some decisions addressed preliminary injunctions or motions to dismiss (in which case the court might have properly considered "allegations" about a law's burden), whereas other decisions addressed summary judgment or trial outcomes (in which case "allegations" about burden would have been irrelevant).

And most important, the cases Minerva cites do not support their conclusion that there is a wide rift in how courts are approaching the *Pike* test. Rather, Minerva's cited cases make clear that while courts might differ in the depth of discussion about the *Pike* inquiry, all are consistently applying the same analytical approach that the Seventh Circuit did here. Under this approach, if a challenger cannot show that a law imposes some unique burden on out-of-state

commerce, no *Pike* balancing is necessary and the law will survive under the dormant Commerce Clause.

Second, Minerva's attempt to reinvigorate heightened scrutiny for economic regulations should be rejected out of hand. This Court's post-*Lochner*-era precedents reject the notion that substantive due process is properly expanded to economic matters. The Seventh Circuit rightly concluded that Wisconsin's butter-grading law is rational and therefore passes muster under the due process clause. Nothing Minerva has presented provides any reason to disturb that court's decision.

I. This case does not present the dormant Commerce Clause issues Minerva suggests.

A. Minerva's first Question Presented does not accurately frame the issue presented and conflates the case law discussing dormant Commerce Clause claims.

A fundamental flaw in Minerva's first Question Presented infects their entire discussion of the dormant Commerce Clause issue: by framing the Question Presented in terms of what challengers must *allege* to state a claim under the dormant Commerce Clause (*see* Pet. i.), Minerva proposes an issue that is not actually presented, and one that is not found in the supposed split among the circuits.

To the first point, Minerva's reference to "allegations" is meaningless in this case. Minerva's dormant Commerce Clause challenge did not fail based on what they *alleged* about Wisconsin's butter-grading law; their challenge failed because they did not present *evidence* that the law imposed any burden on interstate commerce. Because their claim was rejected on summary judgment, rather than at the pleadings stage, their "allegations" about Wisconsin's law were irrelevant. Minerva therefore asks this Court to take up an illusory controversy regarding which "allegations" are sufficient to trigger a *Pike* inquiry. (*See id.*) This case does not actually present this question, and the petition should be denied on this basis alone.

Second, Minerva's reference to "allegations" also results in their conflating principles in the cases they cite. In their comparison of how the circuits treat dormant Commerce Clause claims, some of their cited cases discuss dismissals on the pleadings or grants of preliminary injunctions. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535 (4th Cir. 2013); *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018). Other cases, however, arose after summary judgment or a bench trial, where mere allegations are never sufficient to sustain a

claim, regardless of the alleged burden imposed on interstate commerce. *See, e.g.*, *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011); *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230 (11th Cir. 2012); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560 (4th Cir. 2005); *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491 (5th Cir. 2004); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992); *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987).

Minerva does not recognize these meaningful distinctions when discussing how the various courts disposed of the cases before them. (*See* Pet. 8–18.) By framing their Question Presented in terms of a single standard (i.e., how courts treat a plaintiff's *allegations* about burdens on out-of-state commerce), Minerva ignores the meaningful distinction courts draw when discussing "allegations" and "evidence" at the motion-to-dismiss and summary-judgment stages. This error permeates Minerva's entire comparison of how the circuits treat this type of challenge, and thus provides further reason to decline review.

B. There is no meaningful split among the circuits in their treatment of dormant Commerce Clause challenges to similar laws, or to the *Pike* test generally.

Putting aside Minerva's conflating of applicable standards of review, the supposed split they point to does not actually exist. First, Minerva makes no effort to show a split in how courts are analyzing similar food-grading or labeling laws. (*See* Pet. 8–18.) No such split exists. Second, the cases they do cite don't actually illustrate a meaningful split in how courts are deciding cases under *Pike*. Rather, where courts have found that a law does not impose any unique burden on out-of-state commerce, the law will be sustained under *Pike*. The Seventh Circuit's approach is consistent with these cases.

1. Minerva points to no split among courts deciding dormant Commerce Clause claims about food-grading or labeling laws.

Minerva's supposed circuit split paints too broadly, and ignores that there is no split in how courts are treating dormant Commerce Clause challenges to laws comparable to Wisconsin's butter-grading law. The states impose a variety of labeling requirements related to safety and quality, and courts have consistently upheld these statutes in

the face of dormant Commerce Clause challenges. *See, e.g., Int'l Dairy Foods Ass'n*, 622 F.3d at 647–48 (rejecting dormant Commerce Clause challenge to state milk labeling law); *see also, e.g.*, *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 110–12 (rejecting dormant Commerce Clause challenge to state labeling law for lightbulbs); *Am. Fuel & Petrochemical Mfrs.*, 903 F.3d at 911–15 (upholding Oregon law requiring fuels to be labeled with a "carbon intensity score[ ]" which incorporates distance the fuel was transported to the end user); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1103–04 (9th Cir. 2013) (upholding California regulation requiring grading of fuels based on "carbon intensity").

To illustrate, in *International Dairy Foods Ass'n v. Boggs*, the Sixth Circuit upheld a labeling law that controlled what information had to be included for certain dairy products. 622 F.3d at 644–50. In its discussion of the *Pike* test, the court effectively upheld the law on simple rational basis review, recognizing that, because the law's burdens on interstate commerce were minimal (at worst), there was "a rational basis to believe that the [law's] benefit outweighs any burden that it imposes." *Id.* at 650.

For purposes of the dormant Commerce Clause inquiry, Wisconsin's butter-grading law is comparable to this and numerous other "state laws imposing product labeling requirements for in-state sales, even when the product is produced

out-of-state." *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 832 (7th Cir. 2017) (favorably citing *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d 104) (upholding light-bulb labeling law), and *Int'l Dairy Foods Ass'n*, 622 F.3d 628 (upholding milk-labeling law). Minerva neglects to address any of these cases upholding comparable laws, and certainly points to no split among them.

2. Minerva's cited cases do not demonstrate a meaningful split in how courts are deciding cases under *Pike*.

More generally, there also is no meaningful split in how courts are actually deciding cases involving the *Pike* test. This is illustrated in the cases upon which Minerva relies. (*See* Pet. 8–18.)

As an example, in *Pharmaceutical Research & Manufacturers of America v. Concannon*, the First Circuit evaluated a dormant Commerce Clause challenge to a Maine law that required pre-authorization from the state Medicaid director to dispense drugs made by certain pharmaceutical companies (namely, those which had not entered into a rebate agreement with the state Medicaid program). 249 F.3d at 79, *aff'd sub nom. Pharm. Research & Mfrs. of Am.*, 538 U.S. 644. In applying *Pike*, the court noted that it was "forced to balance the *possible* effects, instead of the *actual* effects of the statute in action," since the case was before the court on appeal from a preliminary injunction. *Id.* at 84. And even under this approach, the only *possible* burden of

which the court could conceive was that the law would decrease the profits of certain noncompliant manufacturers. *See id.* But as the court also acknowledged, such firm-specific harm is not even "sufficient to rise to a Commerce Clause burden." *Id.* (quoting *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 827 (3d Cir. 1994)), ("stating that 'the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" (alteration in original) (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127–28 (1978))). Thus, although the court discussed the *Pike* inquiry, its reasoning demonstrated that no balancing was actually needed: without any showing of burden on the interstate market (as opposed to pharmaceutical manufacturers generally), there was no burden against which to balance the law's local benefits. *See id.*

Other circuits (and not only those that Minerva categorizes as consistent with the Seventh Circuit's approach) are in accord with this approach of upholding laws under which there is no demonstrable burden on out-of-state commerce. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 109 (rejecting challenge to state labeling requirement for mercury-containing headlights, stating that to run afoul of *Pike* standard, the challenged statute must, at a minimum, "impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce"); *Norfolk S. Corp.*, 822 F.2d 388 (rejecting challenge to restriction on coal transferring

in Delaware Bay, stating that "[i]f, as is likely, the principal function of the Commerce Clause today is to prevent discrimination against interstate commerce, then once it is conceded that there is no such discrimination, either facially or in application, the inquiry as to the burden on interstate commerce should end." (quoting *Am. Trucking Ass'n v. Larson*, 683 F.2d 787, 795 (3d Cir. 1982))); *Allstate Ins. Co.*, 495 F.3d 151 (upholding Texas law prohibiting insurance companies from owning auto-body shops, recognizing that law had no bearing on out-of-state interests per se); *Nat'l Solid Waste Mgmt. Ass'n*, 389 F.3d at 502 (upholding trash flow-control ordinance under *Pike*, stating that where a law "'does not have [a] disparate impact on interstate commerce . . . it has not imposed any incidental burdens on interstate commerce' and, therefore . . . passes the *Pike* test" (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998))); *Tenn. Scrap Recyclers Ass'n*, 556 F.3d at 452 (upholding scrap metal "tag and hold" law, stating that "[a]bsent a showing of harm to the national scrap metal market," dormant Commerce Clause claim must fail); *Int'l Dairy Foods Ass'n*, 622 F.3d at 644–50 (upholding dairy labeling law under *Pike*, after concluding that any burdens were marginal); *Am. Fuel & Petrochemical Mfrs.*, 903 F.3d at 913–16 (upholding law under *Pike* after concluding that law did not impose unique burden on out-of-state commerce); *Locke*, 634 F.3d at 1194 (although phrased in terms of *Pike* balancing, effectively holding that without any demonstrated burden on out-of-state firms, no balancing was required).

The Fourth Circuit's decisions in *Colon Health Centers of America, LLC v. Hazel*, illustrate two of the shortcomings in Minerva's argument. For one, the opinion that Minerva cites (*see* Pet. 12), was a preliminary decision only, which arose after a successful motion to dismiss, and the court simply remanded for further proceedings based on *alleged* burdens. *See Colon Health Ctrs. of Am., LLC*, 733 F.3d at 544–46. The court noted, however, that on remand the proper focus would be on the discriminatory effects of the law, since in that inquiry and any *Pike* balancing, "the effect of the challenged statute on out-of-state firms constitutes the principal focus." *Id.*

When the case returned to the Fourth Circuit following summary judgment, the court affirmed judgment upholding the law. *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016). Central to the court's decision was its recognition that the law's impacts on *commerce generally*—as opposed to out-of-state commerce—were insufficient to establish a dormant Commerce Clause claim. *See id.* Rather, the court noted, the "dormant Commerce Clause is exclusively designed to address the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Id.* at 154 (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)).

Like the other circuits' decisions, the *Colon Center* cases simply confirm that the primary inquiry is whether a challenged law imposes *any* burden on "out-of-state economic interests." *See id.* Where there is no burden, the law will be sustained, either without conducting any balancing (as some courts do), or after noting the non-existence of any burden, discussing any benefits, and ultimately upholding the law on what amounts to rational basis review. *See, e.g. Int'l Dairy Foods Ass'n*, 622 F.3d at 650; (*see also* Pet. App. A:20 ("If the state law 'affect[s] commerce without any reallocation among jurisdictions' and 'do[es] not give local firms any competitive advantage over those located elsewhere,' we apply 'the normal rational-basis standard.'" (alteration in original) (quoting *Park Pet Shop*, 872 F.3d at 502))).

In other cases Minerva cites, *Pike* balancing was not actually at issue. For example, in *Yamaha Motor Corp., U.S.A.*, the court acknowledged that the challenged motorcycle dealership law did not regulate "evenhandedly" as to out-of-state commerce, as is the standard to trigger *Pike* balancing. *See Yamaha Motor Corp., U.S.A.*, 401 F.3d at 567, 569–74. Indeed, the court recognized that the law imposed "heavy burdens predominantly on out-of-state interests." *Id.* at 573. Thus, the court's invalidation of that law was not the result of a simple balancing of burdens and benefits, as Minerva suggests. Instead, the court's holding rested squarely on the law's discriminatory effect on out-of-state firms. *See id.*

Other courts, while nominally citing *Pike*, have similarly disposed of laws as not regulating "evenhandedly" as to out-of-state-commerce. *See, e.g.*, *U & I Sanitation*, 205 F.3d at 1065, 1072 (conducting *Pike* inquiry, but invalidating law based on its discriminatory preference for in-state firms); *Fla. Transp. Servs., Inc.*, 703 F.3d at 1257 (noting "[a]t the outset . . . that the Port Director's permitting practices were not even-handed and were designed to prevent competition").

Elsewhere, Minerva relies on a case that largely turned on summary judgment principles, not *Pike*. (*See* Pet. 14 (discussing *Dorrance*, 957 F.2d at 761–62).) In *Dorrance*, the court reversed a summary judgment decision that had upheld Wyoming laws prohibiting private ownership and importation of big-game animals into the state. Although the court cited *Pike*, its holding was actually grounded in its conclusion that summary judgment was inappropriate because the plaintiff had "presented evidence that created genuine issues of material fact" about the burden the private-ownership ban imposed on interstate commerce. *See Dorrance*, 957 F.2d at 765. Beyond that, the court recognized that portions of the law did not "regulate[ ] evenhandedly," so the *Pike* analysis was inapplicable. *See id.* The Tenth Circuit's approach to *Pike* is not materially different from any other circuit confronting similar challenges. (*Contra* Pet. 14.)

As the foregoing illustrates, the cases on which Minerva relies do not demonstrate a meaningful split in how circuits are deciding cases under *Pike*. Rather, the cases show that when courts address the issue of *Pike* balancing, they consistently reach the same result as the Seventh Circuit: if there is no unique burden *at all* on out-of-state commerce, there is no need to balance those non-existent burdens against local benefits. Instead, the laws will be upheld on a straightforward rational basis review, as the Seventh Circuit did here. (*See* Pet. App. A:23.) While some courts devote more discussion to the *Pike* analysis, none of Minerva's cited cases demonstrates a meaningful split in the outcomes the courts are reaching under *Pike*.

C. The Seventh Circuit's decision was correct and consistent with this Court's precedents.

There is no circuit split on the dormant Commerce Clause issue. Further, there is no need to review the Seventh Circuit's decision for the more basic reason that it was correct and was consistent with this Court's dormant Commerce Clause case law.

The "crucial inquiry" under the dormant Commerce Clause "must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only

incidental." *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). In light of this focus, this Court's cases (particularly, recent ones) acknowledge a hesitation to interfere with states' "cardinal civic" responsibilities, unless there is a clear and disparate burden imposed on out-of-state commerce. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39, 342–43 (2008). Of particular note, the Court in both *Davis* and *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007), expressed strong "apprehension about 'unprecedented . . . interference' with a traditional government function," such as trash removal in *United Haulers*, and the "century-old taxing practice" at issue in *Davis*. *Davis*, 553 U.S. at 342. And in *Davis*, the Court noted the institutional concerns with invalidating an otherwise nondiscriminatory law on the ground that it failed *Pike's* judicial balancing of complex economic considerations.[3] *See id.* at 353–55. This Court's approach applies with equal force to Wisconsin's food regulation at issue here.

---

[3] Moreover, contrary to Minerva's urging to *expand* courts' role under the banner of the dormant Commerce Clause, multiple members of this Court have expressed skepticism about the continuing validity of the doctrine. *See McBurney v. Young*, 569 U.S. 221, 234–35 (2013); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (questioning role of courts in "rigorously scrutiniz[ing] economic legislation"); *see also Skywest, Inc. v. Hirst*, No. 18-1097, Br. in Opp'n 32–33, Apr. 24, 2019.

Thus, all else aside, the petition should be denied because the Seventh Circuit reached the correct result. The court correctly recognized that Minerva's complaints are not about burdens on interstate commerce but on the small subset of artisanal butter makers, wherever they are. (*See* Pet. App. A:21–22.) This simply is not the focus of the Commerce Clause, dormant or otherwise. And the Seventh Circuit also correctly rejected Minerva's complaints about having to travel to Madison for licensure since this, too, has no connection to the state of origin. (*See id*.) Because Minerva failed to point to any unique burden on out-of-state commerce, the Seventh Circuit's decision upholding Wisconsin's butter-grading law was correct and in accord with this Court's precedents.

II. Minerva's attempt to expand substantive due process protections for butter makers does not warrant this Court's review.

Minerva also argues that certiorari is warranted to expand substantive due process to cover economic regulations like Wisconsin's butter-grading law. (*See* Pet. 4, 19–32.) This does not warrant review. First, nothing in this Court's modern, post-*Lochner*-era jurisprudence supports Minerva's proposal. Second, under existing precedent, the Seventh Circuit correctly held that Wisconsin's butter-grading law satisfies rational-basis review.

A. Nothing in this Court's modern precedents supports expansion of substantive due process to reach economic regulations like Wisconsin's butter-grading law.

When confronted with due process challenges to economic regulations, courts consistently defer to legislative determinations about the proper scope of regulation. *See Beach Commc'ns, Inc.*, 508 U.S. at 314–15. As long as there is some conceivable, legitimate basis for an economic regulation, courts will not invalidate it. *See id.* at 315. Indeed, challengers bear the burden to "negative every conceivable basis which might support" the law. *Id.* (citation omitted). Put simply, there is no question in modern cases that states exercise wide latitude in crafting economic legislation like the retail food regulations at issue here. *See, e.g. United Haulers*, 550 U.S. at 347 (declining to reinvigorate the *Lochner*-era practice of "rigorously scrutiniz[ing] economic legislation passed under the auspices of the police power").

It is therefore not surprising that Minerva cites no cases from this Court to support its argument that rational basis review is limited to health and safety as the only interests a state may pursue through economic regulations. (*See* Pet. 21–26.)

Equally unsurprising is the absence of cited cases suggesting that qualitative standards like those in Wisconsin's butter-grading framework are inherently and unconstitutionally arbitrary. (*See id.* at 26–29.)

On the contrary, Wisconsin's law provides clear standards for qualified technicians to apply when grading butter. *See* Wis. Admin. Code §§ ATCP 85.02–.05. The fact that those standards are imposed by individuals does not make the law arbitrary. Indeed, if Wisconsin's standards were arbitrary, so too would be USDA's virtually identical butter-grading framework.

And to the extent that Minerva (or anyone) has complaints about a particular grading decision, those complaints can be addressed in Wisconsin's established procedure for challenging butter-grading decisions. *See, e.g.*, Wis. Admin. Code § ATCP 85.08. Likewise, if Minerva wants to change any of the regulations governing butter-grading (for example, proposing a different balancing of flavor characteristics for specific grades), Wisconsin provides procedures for that, too. *See* Wis. Stat. § 227.12 (procedure to petition for change to agency regulations).

Further, Minerva's case is nowhere close to *City of Cleburne*, 473 U.S. at 447–50, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), or any other "animus" case. (*Contra* Pet. 30–32.) There is no reason to believe that butter-makers are the target of the type of social animus that motivated this Court in *Cleburne* or *Moreno*. Petitioners certainly do not provide any.

Finally, despite Minerva's references to decisions discussing whether "protectionism" is a viable

state interest,[4] this is not a protectionism case. While Minerva has tried to make this case about "big-butter" versus "artisanal butter" (*see* Pet. 25, 29–30, 35), they did not frame this as a protectionism case below, and did not present evidence about the Wisconsin Legislature having any "protectionist" motive for adopting the law.[5] Accordingly, neither the district court nor the Seventh Circuit treated the case as asking whether the butter-grading is a "protectionist" measure. (*See generally* Pet. App. A, C.) This Court should decline Minerva's attempt to reframe this case now.

Nothing in Minerva's petition suggests any basis in this Court's modern precedents to take up this case.

B. The Seventh Circuit correctly rejected Minerva's substantive due process challenge to the butter-grading law.

Contrary to Minerva's argument, the Seventh Circuit did not "[p]ermit[ ] [a]rbitrariness as a

---

[4] *See* Pet. 25 (discussing *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); and *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008)). For decisions contrary to those on which Minerva relies, see, for example, *Sensational Smiles, Inc. v. Mullen*, 793 F.3d 281 (2d Cir. 2015); and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

[5] Minerva's single reference below to protectionism was to a pamphlet from the Wisconsin Farm Bureau, urging support for the passage of Wisconsin's butter-grading law in 1953. (*See* Minerva's 7th Cir. Br. 8 (citing Dkt. 28-1).)

[l]egitimate [s]tate [i]nterest" (Pet. 26), and instead correctly held that Wisconsin's law unquestionably satisfies this Court's firmly established rational-basis framework. (*See* Pet. App. A:8–13.) That decision is consistent with 80 years of this Court's precedents upholding economic regulations.

The Seventh Circuit correctly recognized that the butter-grading law served at least two valid interests: consumer protection and promoting commerce.[6] The court likewise was correct in holding

---

[6] In support of Minerva's petition, Amicus Competitive Enterprise Institute takes issue with the Seventh Circuit's citation to *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915). (Competitive Enter. Inst. Br. 7–8.) The Seventh Circuit cited *Sligh* for the uncontroversial proposition that a state may validly adopt economic regulations to promote commerce that is particularly important to the state, such as citrus in Florida or butter in Wisconsin. (*See* Pet. App. A:11.) Amicus questions the continuing validity of this "very old case" (Competitive Enter. Inst. Br. 7–8), but fails to acknowledge that the proposition has been confirmed in this Court's subsequent decisions. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 305–06 (1976) (per curiam) (recognizing legitimacy of law restricting certain commercial vendors in New Orleans's French Quarter to preserve the historic character of the area and "ensure [its] economic vitality"); *see also Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108–09 (2003) (sustaining law taxing slot machine revenues differently from racetracks and riverboats, noting that legislators may have reasonably sought to "encourage the economic development of river communities or to promote riverboat history"). Review is not necessary here to confirm this well-established proposition.

that Wisconsin's grading regime—including its labeling requirements—reasonably served the law's purpose. (*Id.* at 8–9.) The court also correctly rejected Minerva's argument that the law must benefit everyone to survive rational basis review, and Minerva's attempt to shift the burden to Wisconsin to *prove* that its butter-grading law was constitutional. (*See id.* at 9–10, 12–13.)

In sum, the Seventh Circuit's rational-basis analysis strictly adhered to this Court's precedents. In response, Minerva asks this Court to undertake a sweeping reworking of its approach to rational basis review of substantive due process claims. Minerva provides no basis for resurrecting that long-rejected approach.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

GABE JOHNSON-KARP
Assistant Attorney General
Counsel of Record

Attorneys for Respondents

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 267-8904
johnsonkarpg@doj.state.wi.us

May 20, 2019