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; JOSHUA KAUL, in his official capacity as the Attorney General for the state of Wisconsin; and PETER J. HAASE, in his official capacity as Bureau Director of the Division of Food and Recreational Safety within the Wisconsin Department of Agriculture, Trade and Consumer Protection,
Respondents.

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

REPLY BRIEF

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QUESTIONS PRESENTED

1. Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Dormant Commerce Clause is violated whenever the burden imposed on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* at 142. To state a claim under *Pike*, must a plaintiff allege that the challenged law discriminates (or has a disparate impact on) out-of-state commerce, as the Second, Third, Fifth, and Seventh Circuits have held, or instead is it sufficient for a plaintiff to allege that the law's burdens on interstate commerce plainly outweigh the putative local benefits, as the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have held?

2. Under the rational basis test, may the state impose "quality" standards on a commodity when the only measure of quality is the extent to which government inspectors consider particular examples of the commodity to be subjectively pleasing?

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INTRODUCTION

Minerva Dairy respectfully requests that the Court grant its Petition for Certiorari. There is a plain circuit split on the proper application of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and this case is the proper vehicle to resolve it. Wisconsin's butter grading law imposes significant costs on interstate commerce, and Minerva Dairy has supplied the lower courts with ample evidence demonstrating those costs. Further, the local benefits of the law are minimal, nonexistent, or illusory. However, because the law significantly burdens intrastate commerce similarly to how it burdens interstate commerce, district courts in the Seventh Circuit will not apply *Pike*. This approach to *Pike* balancing is not found in precedents of this Court, but the Seventh Circuit—along with the Second, Third, and Fifth Circuits—has made disparate impact to out-of-state commerce a prerequisite to scrutinizing a commerce-burdening law under *Pike*. The other circuit courts do not apply this prerequisite. Clarity is needed.

In addition, this Court should grant review to determine which interests the government may constitutionally pursue under the rational basis test. The Wisconsin butter grading law is neither a health or safety law, nor is there any evidence that it provides consumers with objective information. It only gives consumers information about whether the government considers butter "pleasing." But a butter's pleasingness-to-the-government is not a legitimate state interest. Pleasingness is a matter for consumers and the market, and should not be a justification for keeping healthful and delicious butter from Wisconsin consumers.

ARGUMENT

I.

THE PETITION PRESENTS A DEEP CIRCUIT SPLIT ON THE DORMANT COMMERCE CLAUSE THAT NEEDS TO BE RESOLVED BY THIS COURT

A. The Distinction Between Allegations and Evidence Under Seventh Circuit Precedent Is a Red Herring

The Department disputes that the circuit courts of appeals have different standards of review with respect to *Pike* balancing under the dormant Commerce Clause. Its lead argument chides Minerva Dairy for the "fundamental flaw" of conflating different standards of proof at different stages of litigation. Opposition at 19. Under the Department's view of lower court precedent, the different standards of review can be explained by some cases being decided on the merits, others being dismissed at the pleading stage, and still others being decided on preliminary injunction motions. *Id.* at 19-21.

Of course, it's true that courts treat *allegations* and *evidence* differently depending on the motion the court is reviewing. But if certain allegations are irrelevant to stating a claim at the pleading stage, evidence supporting those allegations is necessarily irrelevant for summary judgment. For example, in the Seventh Circuit, *allegations* of harm to interstate commerce are irrelevant when ruling on dormant Commerce Clause claims, unless the plaintiff also alleges a disparate impact to out-of-state interests.

See Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1130-32 (7th Cir. 1995). Accordingly, *evidence* of harm to interstate commerce is irrelevant to the Seventh Circuit unless and until a disparate impact to interstate commerce is *proven*. If the Seventh Circuit considers the allegations of harm to interstate commerce irrelevant, it *a fortiori* will not consider evidence proving those (irrelevant) allegations.

That is precisely what happened to Minerva Dairy. Minerva Dairy alleged and ultimately provided significant evidence that the costs imposed by Wisconsin's butter grading law to interstate commerce were significant. It provided evidence that the butter grading requirement eviscerates the brand equity of artisanal butter makers, that becoming a licensed butter grader is expensive and time consuming, that employing a licensed butter grader can be cost prohibitive to artisanal butter makers, and that compliance with Wisconsin's one-of-a-kind grading mandate would upset best business practices of artisanal butter makers. 7th Cir. App. 039-041, 076. Moreover, it provided evidence that the putative local benefits of Wisconsin's butter grading law were illusory and nonexistent. *Id.* at 091-093. Indeed, the Department explicitly disavowed that the butter grading law advances health and safety interests. Under Seventh Circuit precedent, it did not need to do otherwise. Minerva Dairy's *evidence* was not considered and properly weighed by the court because Minerva Dairy did not *allege* (or prove) any disparate impact of the law to out-of-state interests. App. C-8. According to the district court (following unambiguous Seventh Circuit precedent), Minerva

Dairy's failure to make such *allegations* foreclosed any review of the *evidence* it provided about the costs to interstate commerce. *Id.*

This approach is not unique to the Seventh Circuit, but it is also not universal among the circuits. As explained in detail in Minerva's petition, the Sixth, Tenth, and Eleventh Circuits will consider allegations (and evidence) of harm to interstate commerce without first requiring plaintiffs to show that those harms cause a disparate impact to out-of-state economic interests. *See* Petition at 12-15. Accordingly, were Minerva Dairy's claims heard in a district court in Kentucky, Colorado, or Florida, the outcome would likely have been different.

B. There Is No Food Labeling Exception to the Dormant Commerce Clause

The Department's next attempt to avoid the circuit split argues that there is no split in the circuits on the constitutionality of labeling laws under *Pike*. Opposition at 22-23. By carving out this small subset of dormant Commerce Clause cases, the Department attempts to show that there is no circuit split on *Pike* challenges to these types of laws. This argument fails factually, logically, and as a matter of precedent.

As a factual matter, Minerva Dairy is not challenging a labeling law; it is challenging Wisconsin's ban on ungraded butter being sold in Wisconsin. App. A-1. Labeling is *also* required under

the statute, but that is not Minerva Dairy's complaint.[1] Minerva Dairy's product has always been truthfully labeled, and the Department has never argued otherwise. Its butter is sold with the same packaging in 49 other states. And if the Department simply required Minerva Dairy to label its butter as "ungraded," the burden to interstate commerce would be appreciably less. But Wisconsin bans Minerva Dairy butter altogether. It is unique among the states in banning healthful, delicious, and truthfully labeled ungraded butters. The Department analogizing its artisanal butter ban to mere labeling laws is disingenuous and untrue.[2]

As a logical matter, the Department offers no reason why labeling laws—assuming *arguendo* that the butter grading law is a labeling law—should be afforded special treatment under the dormant Commerce Clause.[3] If a labeling law imposes significant burdens on interstate commerce, but provides no local benefits, it should be analyzed identically to other laws that courts scrutinize under the dormant Commerce Clause. Imagine a state law that required all computers manufactured in the state to be labeled in large print "may explode." Surely, the

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[1] The labeling component of Wisconsin's butter grading law is only relevant in that it increases the costs to interstate commerce. But a labeling law untethered to a butter grading mandate would be significantly less costly.

[2] The Department never explains why a labeling law should be viewed the same as its butter grading mandate and prohibition on ungraded butters. Instead it only states in conclusory fashion that the laws are "comparable." Opposition at 23.

[3] And as explained below, Wisconsin's butter grading law is fundamentally different than other labeling laws.

costs to interstate commerce of such a law would be significant, and the benefits would be minimal. The fact that the law was a "mere labeling law" would not (and should not) insulate it from constitutional scrutiny under the dormant Commerce Clause.

Lastly, as a precedential matter, there is no labeling law exception recognized among the circuits. Even if circuit courts have uniformly *upheld* labeling laws, it does follow that the *review* of those laws is uniform. The Department's reliance on the Sixth Circuit's decision in *Int'l Dairy Foods Ass'n v. Boggs* is telling. That Court—unlike the Seventh Circuit—analyzed the burdens that a Michigan labeling law imposed on interstate commerce. 622 F.3d 628, 650 (6th Cir. 2010). It did not require a predicate showing of discrimination or disparate impact to out-of-state commerce. The court concluded that the law's burdens on interstate commerce were minimal. But by reviewing and considering the costs to interstate commerce imposed by the labeling law, the court undertook the precise analysis that is lacking in the Seventh Circuit. To the latter court, those burdens would be irrelevant. To the Sixth Circuit, the burdens were relevant, albeit minimal. Just because the Sixth Circuit upheld a labeling law under *Pike* balancing does not mean that its review of that law mirrors the Seventh Circuit's analysis, which would have not even performed *Pike* review.

That many laws will survive under a proper *Pike* analysis is a feature of the test, not a bug. The sky will not fall if courts are required to weigh the burdens imposed on interstate commerce against the local benefits provided. A majority of the circuit courts

already perform this balancing and weighing of the evidence. Most laws will survive easily, as the Sixth Circuit's decision in *Dairy Foods* demonstrates. Wisconsin's butter grading law, however, as the evidence amply demonstrates, is not one of them.

C. Review Under the Dormant Commerce Clause Varies Greatly Among the Circuits

The Department's final attempt to deny the circuit split on *Pike* balancing argues that the different tests enunciated by the different circuits are illusory. Opposition at 24-30. But the Department paints with too broad a brush when it argues that "[o]ther circuits . . . are in accord with this approach of upholding laws under which there is no demonstrable burden on out-of-state commerce." *Id.* at 25 (citing cases).

Minerva Dairy agrees that all courts uniformly reject dormant Commerce Clause claims where there is no burden on out-of-state commerce. But that does not address the point in contention. Do those courts *require a discriminatory burden* on out-of-state commerce? The answer is unquestionably no. And for good reason, to do so would eliminate *Pike* completely as *discriminatory* laws are already prohibited under the dormant Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). A law that places significant burdens on interstate commerce should not be saved simply because it also places significant burdens on intrastate commerce. It should only be saved if the putative local benefits of the law outweigh those significant burdens. That is the lesson of *Pike*. 397 U.S. at 142.

In Minerva Dairy's petition, it boxes the *Pike* balancing jurisprudence of the circuits into four categories: (1) those circuits that require plaintiffs to show discrimination or disparate impact on out-of-state commerce as a prerequisite to weighing the costs to interstate commerce against the local benefits; (2) those circuits without any prerequisite; (3) those circuits that have no prerequisite but give some degree of deference to the government; and (4) those circuits that are unclear. Petition at 8-17. The Department does not engage Minerva Dairy on these categorizations. It cannot. The circuits treat *Pike* claims quite differently. Indeed, the Tenth Circuit has rejected the approach of the Seventh Circuit explicitly. *See Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). And Judge Hamilton of the Seventh Circuit has recognized that his court is not following this Court's precedents. *See Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 504 (7th Cir. 2017) (Hamilton, J., dissenting) ("[T]he Supreme Court itself has not yet confined the balancing test under *Pike*[, 397 U.S. 137 (1970)], as narrowly as my colleagues suggest.").

D. The Seventh Circuit's Approach Encourages Protectionist Legislation

Even if the circuit split is real, the Department argues that the Court should deny certiorari because the Seventh Circuit's approach is most consistent with the purpose of the dormant Commerce Clause to root out "protectionist" schemes while leaving "legitimate local concerns" to the local jurisdictions. Opposition at 30-32. While the Department properly understands

the purpose of the dormant Commerce Clause, it misses the mark on its application.

Wisconsin's butter grading law *is* protectionist. The Department's own recitation of the facts explains that the butter grading law was designed in 1953 to favor Wisconsin butter over out-of-state margarine. Opposition at 5 (citing Dkt. 28-1:6-7). That the law is now used to favor Wisconsin's large in-state conglomerate butter makers over small artisanal butter makers is a natural evolution of the original protectionist law. The purpose has always been protectionist.

Throughout this litigation, the Department has consistently disavowed any health and safety rationale for the butter grading law. It has further admitted that ungraded butter is perfectly safe. That no other state prohibits ungraded butter, and that the ungraded butter market is flourishing nationwide, speaks for itself. Wisconsin's law has one true purpose: keep out competition. And it is succeeding.

The Seventh Circuit's approach to *Pike* will lead to more protectionist schemes. Even if a law imposes significant burdens on interstate commerce, it will not be scrutinized under the Seventh Circuit's test if those burdens are also felt in-state. That is not *Pike*. And the result of such a test is that powerful in-state interests can keep out competition from both interstate and intrastate firms. That is what is happening to butter makers in Wisconsin. Not only are out-of-state butter makers kept out of the Wisconsin market, but small in-state butter makers are disadvantaged as well. The dormant Commerce

Clause demands more. *Pike* is supposed to be that test, but the lower courts are hopelessly at odds with how to apply it. Review by this Court is needed to resolve the split of opinions among the lower courts.

II.

THE PETITION SEEKS TO RESTORE WELL-ACCEPTED DUE PROCESS PROTECTIONS

There is no question that courts afford legislatures wide latitude to regulate economic activity. But not every law is constitutional under the rational basis test merely because the government believes it so. There are well-accepted limits on the government's ability to legislate, even when it comes to rational basis review. Minerva Dairy merely asks this court to affirm those limits, and to hold that the government may not act arbitrarily based on its subjective whim. Requiring businesses to grade their products according to government's arbitrary predilections is exactly what substantive due process protects against. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 584 (1972) ("The protection of the individual against arbitrary action is the very essence of due process." (quotation marks and citation omitted)); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("[L]iberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.").

The Department correctly states that under modern rational basis precedent, courts will uphold an economic regulation so long as there is some conceivable, legitimate basis for it. However, Wisconsin's butter grading law is based on subjective preference, and subjective preference is not a legitimate basis for legislation. Just because a bureaucrat thinks butter is better when it is yellow and salty does not actually mean that yellow, salty butter is better. By the same token, just because a bureaucrat deems a tree prettier when green and in the spring rather than orange and in the fall does not make it so. It's simply a matter of preference—devoid of any objective truth. When the government requires businesses to grade their products according to its own subjective preferences, and to inform consumers of how that product fares according to its standards, it acts arbitrarily.

The Department argues that butter grading is not arbitrary because the statute incorporates objective, clear standards. First, Minerva argued at length in its Petition that those standards are not at all clear, or objective. Petition at 21-23. But even if they are, the quality that those standards measure—i.e., "pleasingness"—is meaningless and arbitrary. Grading does not relate to health or safety, or convey objective, verifiable, factual information—it relates to preference. And even then, it does not inform consumers that a butter is "pleasing" in any meaningful way, because it only informs consumers that a butter is, overall, pleasing in the eyes of the government. Skewing the market in favor of products that the government happens to like at any given moment is outright arbitrary.

The Department also argues that butter grading is not arbitrary because it wasn't enacted out of animus. But what else do you call it when the government burdens one group merely because it doesn't like it? True, discriminating against butter isn't as offensive as burdening homes for the mentally disabled, as in *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), but it's the same action in kind. The Department has no reason to say that Minerva Dairy butter is not "pleasing" other than because it doesn't like it. That's arbitrary and not supported by any valid health, safety, or public welfare justification.

Despite the Department's attempts to justify butter grading as a consumer protection measure, the law simply does not protect the public in any way. The Department admits that ungraded butter is perfectly safe for consumption. The only risk that the Department contends comes from purchasing ungraded butter is the risk that a consumer won't think the butter tastes good. The government has no interest in making sure people enjoy the products they buy. But even if it did, butter grading does not eliminate that risk, since consumers don't understand butter grading and there's no evidence they agree with its standards. Indeed, the popularity of butters like Minerva Dairy suggest that consumers disagree.

Finally, the Department suggests that butter grading is legitimate because it "promotes Wisconsin's national reputation" for butter, but that only underscores the protectionist and unconstitutional intent of the statute. Certiorari is needed to affirm

that the state has no interest in establishing standards based on subjective taste preferences.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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