No. ____________________

In the
Supreme Court of the United States

MINERVA DAIRY, INC. and ADAM MUELLER,
Petitioners,

v.

SHEILA HARSDORF, in her official capacity as Secretary 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

PETITION FOR WRIT OF CERTIORARI

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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?

LIST OF ALL PARTIES

Petitioners are Minerva Dairy, Inc., and Adam Mueller. All were plaintiffs/appellants in the court below. Defendants are Shelia Harsdorf, in her official capacity as the Secretary 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 Recreation Safety within the Wisconsin Department of Agriculture, Trade and Consumer Protection, all were defendants/appellees in the court below. Joshua Kaul has been substituted in automatically per Fed. R. App. P. 43(c)(2).

CORPORATE DISCLOSURE STATEMENT

Minerva Dairy, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock. Adam Mueller is an individual.

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PETITION FOR WRIT OF CERTIORARI

Minerva Dairy, Inc., and Adam Mueller respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 905 F.3d 1047 (7th Cir. 2018), and reprinted at Appendix A. The district court's opinion is unreported but may be found at 17-cv-299-jdp, ECF No. 51 (W.D. Wis. Feb. 5, 2018), and reprinted at appendix C.

JURISDICTION

The Seventh Circuit issued its opinion on October 3, 2018. On December 21, 2018, Justice Kavanaugh extended the time for filing a petition for a writ of certiorari to and including March 2, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Fourteenth Amendment provides, in the relevant part, that no state "shall deprive any persons of life, liberty, or property, without due process of law."

The Wisconsin butter grading law is codified at Wisconsin Statute section 97.176. The law requires butter offered for retail sale within the state to be labeled with either a Wisconsin grade or a USDA grade. The grade must be determined through an "examination for flavor and aroma, body and texture, color, salt, package and . . . other tests or procedures . . . for ascertaining the quality of butter." Wis. Stat. § 97.176(3).

STATEMENT OF THE CASE

Wisconsin is one of the only states in the nation that currently has a statute that prohibits the sale of ungraded butter, and it is the only state that still enforces its prohibition on ungraded butter. Its butter grading statute dates back to the 1950s, when it was supported by large, in-state butter makers. Wis. Stat. § 97.176. Today, the antiquated law stands as a barrier to the flourishing artisanal butter market. Like craft beer, artisanal butters have become quite popular in recent years as consumers choose superior flavor, quality ingredients, and superior processes over cheap, mass-produced products.

But Wisconsin's butter grading law rewards cheap, mass-produced butter by awarding it the state's highest "butter grade," and it saddles artisanal butters with lesser grades. If butter makers want to achieve Wisconsin's highest mark for butter taste, they must copy the formula and processes of the large commodity butters. Even Kerrygold, an international brand with consumers worldwide, doesn't achieve Wisconsin's highest grade, because its unique taste

was not in the minds of the Wisconsin taste testers when the law and accompanying regulations were crafted.

Minerva Dairy, which produces one of the nation's premier artisanal butters, is therefore faced with a true Hobson's choice: either grade its butter and label it as inferior to mass-produced butters, or don't enter the Wisconsin market. So long as butter grading remains in Wisconsin, Minerva Dairy will not enter that market. The damage to its brand equity, the costs of grading butter, and the disturbance to its distribution channels, all make grading butter commercially infeasible.

Accordingly, Minerva Dairy filed the instant lawsuit in federal court in Wisconsin challenging the constitutionality of the butter grading law. The costs to interstate commerce as a result of Wisconsin's butter grading law are significant. Not only Minerva Dairy, but nearly all out-of-state artisanal butter makers forego the Wisconsin market. Further, the benefits to Wisconsin consumers are nonexistent. Wisconsin has explicitly and repeatedly disavowed any health and safety rationale for its butter grading law (as it must since ungraded butter is perfectly healthful and available for sale and consumption in 49 states). Instead, Wisconsin argues the law "informs consumers" and "prevents deceptive marketing." But both rationales are plainly and provably false. Butter grades provide essentially no information to consumers, and there is nothing "deceptive" about selling ungraded butter.

Although the costs to interstate commerce from Wisconsin's butter grading law are clearly excessive in relation to the nonexistent local benefits, Minerva

Dairy is precluded from pressing its Commerce Clause claim because the Seventh Circuit (along with three other circuits), demands that plaintiffs show the challenged law disparately impacts out-of-state commerce. And because Wisconsin's butter grading law would hypothetically affect in-state artisanal butter makers in a similar way, Minerva Dairy cannot press its Commerce Clause claim in the Seventh Circuit. Accordingly, it asks this Court to clarify the deep circuit split regarding the proper application of the dormant Commerce Clause to laws that do not discriminate against out-of-state commerce, but still have a significant impact on interstate commerce.

Minerva Dairy also asks this Court to review the Seventh Circuit's application of the Due Process Clause to Wisconsin's butter grading law. Butter grading is fundamentally different from health or safety standards or other mandatory labeling laws. While states have an interest in ensuring that products are safe and healthful, preventing deceptive advertising, or requiring disclosure of important factual information—none of those interests apply here. Instead, butter grading amounts to an arbitrary taste test for a product that is otherwise perfectly safe for consumption and truthfully labeled. The government has no interest in requiring producers to bear the costs of informing consumers about whether the government finds the product "pleasing." Government favoritism—devoid of any health or safety rationale—is inherently arbitrary and per se invalid.

FACTUAL BACKGROUND

Minerva Dairy is a family-owned dairy company that has served consumers since 1884. App. C-4.

Originally established in Wisconsin, Minerva moved to Ohio in 1935. App. C-4. Under the leadership of fifth-generation butter maker Adam Mueller, Minerva's 75 employees produce Amish butter and cheeses for consumers nationwide. App. C-4.

Unlike large commodity butter manufacturers, Minerva Dairy produces Amish-style butters in small, slow-churned batches using fresh milk supplied by pasture-raised cows. App. A-6. This brand of artisanal butter is popular with its customers, and Minerva has sold its butter to consumers in all 50 states. App. A-6.

Minerva Dairy sold its butter in Wisconsin without incident until early 2017, when an individual lodged an anonymous complaint with the Wisconsin Department of Agriculture, Trade and Consumer Protection. App. C-4. The individual complained that Minerva Dairy was being sold at a Wisconsin retail store, Stinebrink's Lake Geneva Foods. App. C-4. A Department sanitarian traveled to the store, confirmed the charges, and asked that the ungraded butter be removed. App. C-4. Shortly thereafter, the Department sent warning letters to both the retail store and Minerva Dairy. App. C-4. The letter notified the recipients of Wisconsin's butter-grading law, and requested the recipients' "future compliance with the State of Wisconsin related to butter grade labeling requirements." App. C-4.

Under Wisconsin law, "[i]t is unlawful to sell . . . any butter at retail unless it has been graded." App. A-2 (quoting Wis. Stat. § 97.176(1)). The implementing regulations forbid persons from selling "butter at retail unless its label bears a statement of the grade." App. A-2 (citing Wis. Admin. Code ATCP § 85.06). To satisfy these requirements, a butter sold

in Wisconsin must carry either a Wisconsin butter grade or a USDA butter grade. App. A-2 (citing Wis. Stat. § 97.176(2)). The USDA butter-grading service is voluntary, and available to dairy product manufacturing plants for a price. App. A-2 n.2 (citing 7 C.F.R. § 58.122(b)).

The Wisconsin butter-grading scheme recognizes four tiers of butter grades connoting various levels of "pleasing-ness." App. A-2. Grade AA denotes butter with a "fine and highly pleasing butter flavor." App. A-2. Grade A butter contains, according to the Department, only a "pleasing and desirable butter flavor." App. A-2. Grade B butter contains a "fairly pleasing flavor." App. A-3. Wisconsin undergrade butter is any butter that fails to meet the requirements for Wisconsin Grade B. App. A-3 (citing Wis. Admin. Code ATCP § 85.03).

The butter grade is based on a multi-factor examination consisting of "tests of procedures" approved of by the Department. App. A-3 (citing Wis. Stat. § 97.176(3)). In particular, each butter is given one of four grades based on 18 flavor characteristics, eight body characteristics, four color characteristics and two salt characteristics. App. A-3 (citing Wis. Admin. Code ATCP § 85.04(1)). Each of these characteristics are further qualified by intensity: either slight, definite, or pronounced. App-A-3 (citing Wis. Admin. Code ATCP § 85.04(2)). To grade a batch of butter, a tester tastes a representative butter sample to identify each applicable flavor characteristic and its relative intensity. App-A-3 (citing Wis. Admin. Code ATCP § 85.02(1)). This results in a preliminary letter grade, which can be reduced if there are defects in the body, color, and salt

characteristics of the butter. App. A-3 (citing Wis. Admin. Code ATCP § 85.02(1)-(3)).

As a result of the Department's warning letter, Minerva Dairy stopped selling its butter at retail stores in Wisconsin. App. A-6. Complying with the butter-grading law hampers Minerva's efforts to brand itself as an artisanal butter, and disassociate with large commodity butters that routinely carry the highest butter grades. Further, because Minerva produces its butter in small, artisanal batches, App. C-1, it is more costly for Minerva to comply with the butter-grading requirement compared to other butter manufacturers that do not make butter in batches.

PROCEEDINGS BELOW

Minerva Dairy filed this civil rights lawsuit in federal court in order to be able to sell its butter in Wisconsin on the same terms it sells it in the 49 other states. 7th Cir. App. 004. Shortly after filing the complaint, Minerva Dairy sought a preliminary injunction to allow it to sell its butter in Wisconsin pending the outcome of the lawsuit. ECF 9. The district court denied that preliminary injunction. ECF 24. After discovery, Minerva Dairy and the Department filed cross-motions for summary judgment. The district court granted the Department's motion and denied Minerva Dairy's motion. ECF 51. It held that Seventh Circuit precedent foreclosed Minerva Dairy's Commerce Clause claim because Minerva Dairy could not show that the law discriminated against out-of-state butters. *Id.* at 6. It further held that the butter-grading law satisfied the Due Process Clause, because "the state could believe that required butter grading

would result in better informed butter consumers." *Id.* at 5.

On appeal, Minerva Dairy continued to press its Commerce Clause claim, while recognizing that it was foreclosed by Seventh Circuit precedent. The Seventh Circuit did not disappoint. It held that Minerva Dairy's Commerce Clause claim was foreclosed because Minerva Dairy could not show that the statute either discriminated against or had a disparate impact upon interstate commerce. App. A-20. With respect to Minerva Dairy's due process claim, the court held that it was reasonable for the state to assume that the butter-grading law will "influence consumer behavior." App. A-13. Accordingly, the Seventh Circuit affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NEEDED TO PROVIDE CLARITY AND UNANIMITY TO THE LOWER COURTS ON THE PROPER APPLICATION OF *PIKE*

The dormant Commerce Clause prevents states from enacting any law if the burden imposed on commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike* balancing, courts are required to closely scrutinize the evidence offered to demonstrate local benefits, and balance the weight of that evidence against the costs the law imposes on interstate commerce. "The inquiry necessarily involves a sensitive consideration of the weight and

nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). This is not a rubber-stamping exercise; the government must prove that local benefits are real (and not speculative), significant (and not trivial), and that they outweigh the burdens on interstate commerce.

Under that straightforward test, this should not be a close case. The justification the Department offers for its butter-grading mandate would be legally insufficient even if it could marshal evidence that the law actually furthers its purported justification. But it cannot provide *any* evidence that the butter-grading law provides the local benefits it claims. In contrast, the costs imposed on interstate commerce are significant. Thus, under this Court's formulation of *Pike*—as reaffirmed in *Raymond Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981), *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994), *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018), and others—Wisconsin's butter-grading requirement plainly violates the dormant Commerce Clause.

This Court's formulation of *Pike*, however, has not survived in the lower appellate courts. For example, in the Seventh Circuit, where this case was heard, the Court imposes a prerequisite for *Pike* claims that is not found in any of this Court's decisions. That Circuit requires any *Pike* claimant to first demonstrate that the challenged law disproportionately burdens out-of-state commerce before it will weigh the putative local benefits against the costs to interstate commerce. *See Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45

F.3d 1124, 1132 (7th Cir. 1995). Although the Circuit's test has met with criticism within the Circuit, it remains as a bar to otherwise valid dormant Commerce Clause claims. *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.").

Nevertheless, the Seventh Circuit is not alone. Put bluntly, *Pike* balancing is a mess in the lower courts. Review is sorely needed to clarify this important constitutional doctrine and to provide unanimity within the lower courts.

A. Discrimination and Disparate Impact: The Approaches of the Second, Third, Fifth, and Seventh Circuits

Like the Seventh Circuit, the Second, Third, and Fifth Circuits require a seminal showing of "discrimination" or "disparate impact" before they will hear a claim that a law violates the dormant Commerce Clause under *Pike*. Yet, even among the "disparate impact" quartile, the formulations of *Pike* differ.

Second Circuit. The Second Circuit imposes a threshold requirement on all *Pike* claims that "the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001). Even where the burdens on interstate commerce are demonstrably significant, the Second Circuit will not entertain a

dormant Commerce Clause claim where those burdens do not disparately impact out-of-state interests. *See Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock*, 93 F.3d 68, 75 (2d Cir. 1996). Further, the Second Circuit has indicated, quite uniquely, that only certain types of burdens will be considered as disparately affecting out-of-state commerce. *Sorrell*, 272 F.3d at 109-12.

Third Circuit. Under the Third Circuit's formulation of *Pike*, an out-of-state plaintiff must show discrimination against out-of-state commerce. *See Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). It reads the "incidental burdens" of *Pike* to mean "the degree to which the state action incidentally *discriminates* against interstate commerce relative to intrastate commerce." *Id.* at 406 (emphasis added). Thus, the Third Circuit has refused to rule on *Pike* claims even where the district court made findings that the burdens on interstate commerce were real and significant. *See Ford Motor Co. v. Ins. Comm'r of Pa.*, 874 F.2d 926, 943-44 (3d Cir. 1989); *see also Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 826-27 (3d Cir. 1994) ("devastating" interstate consequences not sufficient to raise a claim under *Pike*).

Fifth Circuit. Like the Second Circuit, the Fifth Circuit requires a threshold showing of disparate impact on interstate commerce before it will undertake *Pike* balancing. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004) (citing *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)). Unlike the Second Circuit, however, the Fifth Circuit focuses its

disparate impact analysis to instances where the statute or regulation "inhibits the flow of goods interstate." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007).

Seventh Circuit. The Seventh Circuit takes an extremely narrow view of *Pike* balancing. It specifically rejects the view that courts should balance the costs to interstate commerce against the local benefits, and instead requires plaintiffs to show that challenged law discriminates against interstate commerce.[1] *See Nat'l Paint & Coatings Ass'n*, 45 F.3d at 1130-32. Under this restrictive formulation, the Seventh Circuit has even rejected claims where the effect of a local ordinance would only be felt by out-of-state interests, because the law was facially neutral and non-discriminatory. *See Park Pet Shop, Inc.*, 872 F.3d at 495. Unsurprisingly, this hyper-restrictive formulation of *Pike* has been criticized within the Circuit. *See id.* at 504 (Hamilton, J., dissenting).

B. Benefits and Burdens—The Approaches of the Fourth, Sixth, Tenth, and Eleventh Circuits

Fourth Circuit. While the Fourth Circuit has expressed skepticism towards *Pike* balancing, it also refuses to adopt the discrimination/disparate impact framework adopted in other circuits. *See Colon Health Ctrs. of America, LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013). Instead, the Fourth Circuit applies the *Pike* test as this Court has explained it, closely

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[1] Thus, in certain formulations, the Seventh Circuit has entirely eviscerated *Pike*. A law that discriminates against interstate commerce would already be *per se* illegitimate and subject to strict scrutiny. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

scrutinizing the putative local benefits and weighing them against the costs imposed upon interstate commerce. Indeed, the Fourth Circuit has twice struck down regulations under *Pike*. In *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 563 (4th Cir. 2005), the court struck down a statute that allowed any existing franchised dealer in Virginia to protest the establishment of a new dealership for the same brand anywhere in the state. Although the law applied equally to intrastate and interstate firms, the court held that the "the statute's burdens clearly exceed its benefits." *Id.* at 573. Similarly, in *Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va.*, 985 F.2d 164, 165-67 (4th Cir. 1993), the court held that the government's purported benefits were too speculative to survive a challenge under *Pike*.

Sixth Circuit. The Sixth Circuit's approach to *Pike* claims is to faithfully apply the language of this Court. In *E. Ky. Res. v. Fiscal Court of Magoffin Cty., Ky.*, 127 F.3d 532 (6th Cir. 1997), the court upheld a regulation of solid waste management because "the Commonwealth's clearly legitimate goals outweigh the burdens, if any, that are placed upon interstate commerce." *Id.* The Sixth Circuit has followed this straightforward approach to a claim that a regulation unconstitutionally burdened the interstate scrap metal market, as well as to a statute preventing milk sellers from disclosing the absence of hormones in their milk products. *See Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010). In no Sixth Circuit case has the Court imposed a prerequisite that a *Pike* plaintiff demonstrate

discrimination between interstate and intrastate commercial interests.

Tenth Circuit. The Tenth Circuit has faithfully applied the language of this Court and reviewed dormant Commerce Clause claims by balancing the costs to interstate commerce against the putative local benefits. Further, the Tenth Circuit has expressly rejected and criticized the "discrimination" and "disparate impact" approach to *Pike* balancing. In *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), the defendants contended "that when a statute regulates evenhandedly, the extent of the burden the statute imposes on interstate commerce is irrelevant; the only inquiry is whether the statute imposes a different burden on interstate commerce than it does on intrastate commerce." *Id.* In holding that defendant's argument was "not only circular," but that it "completely missate[d] the *Pike* analysis," the Tenth Circuit expressly rejected the "differential impact" or "discrimination" threshold of the Second, Third, Fifth, and Seventh Circuits. *Id.* The court concluded that "[b]y definition, a statute that regulates evenhandedly does not impose a different burden on interstate commerce than it does on intrastate commerce." *Id.*

Eleventh Circuit. Like the Tenth Circuit, the Eleventh Circuit has declined to incorporate the discrimination/disparate impact prerequisite into its analysis of *Pike* claims. In *Diamond Waste, Inc. v. Monroe Cty., Ga.*, 939 F.2d 941, 944-45 (11th Cir. 1991), the court struck down a county ordinance because it "could have achieved its objectives as well with a lesser impact on interstate activities." The Eleventh Circuit has also expressed concern over deferring to local judgments in a proper *Pike* analysis.

In a challenge to stevedore permits, the court held that "deference is not absolute," and struck down the scheme because although the benefits claimed were legitimate, "the record . . . shows no local benefit rationally furthered" by the permitting scheme. *Florida Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1261 (11th Cir. 2012). However, the court has also demonstrated that it will uphold a statute or regulation where the burdens on interstate commerce are minimal. *See Locke v. Shore*, 634 F.3d 1185, 1195 (11th Cir. 2011).

C. Benefits, Burdens, and Deference: The Approaches of the First and Eighth Circuits

First Circuit. The First Circuit has created a three-part test for evaluating *Pike* claims that closely tracks this Court's formulation: "(1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is 'clearly excessive' as compared to the putative local benefits." *Pharm. Research & Mfrs. of America v. Concannon*, 249 F.3d 66, 83-84 (1st Cir. 2001). It is the only circuit that has created such a formulaic approach. However, unlike the Fourth, Sixth, Tenth, and Eleventh Circuits, the First Circuit appears to impose a heightened burden on plaintiffs attempting to show that a law's burdens on interstate commerce outweigh its local benefits. For example, it has cited approvingly the Third Circuit's explanation that "the fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." *Id.* at 84 (citing *Instructional Sys., Inc.*, 35 F.3d at 827).

Eighth Circuit. Like the First Circuit, the Eighth Circuit's approach to *Pike* claims is to apply this Court's precedents in their most straightforward way without incorporating a threshold discrimination/ disparate impact requirement, but while also giving deference to legislative judgments. *See U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1070-71 (8th Cir. 2000); *see also United Waste Sys. of Iowa, Inc. v. Wilson*, 189 F.3d 762, 768 (8th Cir. 1999) (holding *Pike* balancing is "far more deferential to the states"). Yet, the court has also recognized that *Pike* is not toothless and has struck down a regulation where the effects on interstate commerce were "far from trivial." *U & I Sanitation*, 205 F.3d at 1072.

D. Unclear: The Ninth and District of Columbia Circuits

Ninth Circuit. The Ninth Circuit has explicitly recognized that there is a significant circuit split on whether *Pike* claims require a threshold showing of discrimination or disparate impact. *See Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014-15 (9th Cir. 1994) (explaining the circuit split). However, the court has also repeatedly declined to pick a side in the debate. Instead, the court's analysis of dormant Commerce Clause claims focuses on discrimination while giving *Pike* only cursory and conclusory analysis. *See, e.g.*, *Hass v. Or. State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 399 (9th Cir. 1995); *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 916 (9th Cir. 2018).

D.C. Circuit. The D.C. Circuit has not ruled on a *Pike* claim in over 30 years. The lone *Pike* case in the D.C. Circuit involved a challenge to the

constitutionality of a District of Columbia ordinance which banned the sale, use, or possession of "any device designed to detect or counteract" a police radar. *Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984). The court upheld the ordinance simply "because the local government's safety rationale [wa]s not 'illusory' or 'nonexistent.'" *Id.* at 113.

As this survey of the circuit courts demonstrates, the lower courts are hopelessly confused and in stark disagreement about how to apply *Pike* in dormant Commerce Clause challenges. Whereas the Second, Third, Fifth, and Seventh Circuits require a threshold showing of discrimination against out-of-state commercial interests, the other circuits have rejected that approach. Further confusing the lower courts is how they are to evaluate the "putative local benefits" and "burden to interstate commerce." What level of deference should the courts afford state and local governments? These concerns have gone unanswered for decades. Review is needed to provide clarity and uniformity among the lower courts.

E. Minerva Dairy's Dormant Commerce Clause Claim Is the Proper Vehicle to Resolve the Circuit Split

Wisconsin has adopted a butter-grading scheme that effectively prohibits out-of-state artisanal butter makers from entering the Wisconsin market. But, because hypothetical in-state butter makers would face a similar—but not identical—burden to enter the Wisconsin butter market, Seventh Circuit precedent forecloses Minerva Dairy's dormant Commerce Clause claim. *See Nat'l Paint*, 45 F.3d at 1130-32. Although Minerva Dairy has produced significant evidence showing that the butter-grading law imposes

significant costs and burdens on interstate commerce, and that the state's purported justifications for the law are speculative and illusory, that evidence will not be considered in the Seventh Circuit.

If the butter-grading law were adopted in Western-neighboring Minnesota, the Eighth Circuit would scrutinize the state's justifications and give proper consideration to Minerva Dairy's evidence. *See U & I Sanitation*, 205 F.3d 1063. Similarly, in Northern-neighboring Michigan, the Sixth Circuit would determine whether Minerva Dairy's evidence demonstrates that the butter-grading law imposes costs on interstate commerce that outweigh the state's purported interests. *Int'l Dairy Foods Ass'n*, 622 F.3d 628. Unfortunately for Minerva Dairy, however, Wisconsin's butter-grading law is insulated from scrutiny because the Seventh Circuit will not hear that evidence unless and until Minerva Dairy demonstrates that the butter-grading law discriminates against out-of-state commerce.

Thus, it is plain that Minerva Dairy's claim turns on the proper application of *Pike*. The evidence is gathered and the state's purported interests are known. All parties agree that Minerva Dairy is significantly injured by the butter-grading requirement. This case is therefore a proper vehicle for this Court to provide guidance on how lower courts should apply *Pike*.

II. THIS CASE ALSO PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION REGARDING WHAT ENDS THE GOVERNMENT MAY PURSUE UNDER THE RATIONAL BASIS TEST

This case also concerns the legitimate ends of government under the rational basis test. Though the standard is notoriously lax and requires deference to legislatures, it does not allow the state to arbitrarily pick favorites. Even under the rational basis test, there must be some limit to what ends the government can pursue—and arbitrariness is not a legitimate end.

Here, the state seeks to impose "quality" standards on a commodity based on subjective ideas about what makes a product "pleasing." The state does not contend that "pleasingness" relates to a product's safety or healthfulness, or even objectively verifiable standards. Instead, it contends that consumers must be protected from the harm that would occur if they purchased a product—butter—that the state believes tastes bad. Ranking a product according to the state's subjective taste preferences is outright arbitrary and violates even the relatively forgiving rational basis standard.

Notably, Wisconsin's butter-grading law is fundamentally different from other laws that impose "quality" standards. The state has explicitly disavowed any health or safety rationale. Nor does butter grading provide consumers with any objective information about butter, like color, fat content, or place of origin. Butter grading is not a "truth in advertising law," because it's not misleading to sell ungraded butter. Instead, grading merely purports to

tell consumers whether a butter pleases the state's palate.

The government has no interest in informing consumers of whether a product is pleasing. Indeed, even if that were a valid interest, such a law could never accomplish its goal—because the only person who knows whether a product is "pleasing" is the person who uses it. Under the state's reasoning, it could require designers to grade clothing according to the government's "fashion" standards, or require blanket companies to grade blankets according to a "cuddly" scale.[2] Yet according to the Seventh Circuit's opinion below, the state is permitted to pursue this arbitrary end.

Lax formulations of the rational basis test, like the one below, have a disproportionate effect on politically powerless groups. Because the vast majority of constitutional rights are relegated to rational basis scrutiny, this case has significant implications for the scope of government power.

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[2] In some cases, the results will not just be arbitrary, they will reflect corporate actors' ability to curry favor with the legislature.

A. The Butter Grading Law Is Fundamentally Different from Health or Safety Standards, or Consumer Information Laws

i. Butter Grading Does Not Relate to Health or Safety, or Provide Consumers with Objective Information

The state admits that butter grading does not further any health or safety interest; even the lowest graded butters are perfectly safe for consumption and may be sold in the state. Instead, grading conveys whether, overall, a butter conforms to the state's subjective preferences for taste, consistency, saltiness, and color—such that the state considers it "pleasing." Wis. Admin. Code ATCP § 85.03.

This should not be confused with a state's legitimate interest in providing consumers with objective information. Importantly, butter grading does not communicate that a butter has any one of the state's preferred qualities.[3] Because it is based on a composite score that considers several different characteristics, butter grading merely communicates the state's overall impression—not any one trait. In fact, two butters with wildly different qualities may share the same grade, while two butters with the same qualities may obtain different grades.

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[3] Moreover, people do not taste things the same way, so even if butter grading supposedly indicated that a butter tasted "mildly salty," that would not mean that the butter actually tastes mildly salty to the consumer. *See, e.g.*, Scientific American, *Super-Tasting Science: Find Out If You're a "Supertaster"!,* https://www.scientificamerican.com/article/super-tasting-science-find-out-if-youre-a-supertaster/.

Purchasers therefore have no way to anticipate what an AA butter tastes like, because it might be comprised of any number of combinations of flavors, consistencies, colors, or saltiness that can earn a butter that grade.[4] The only thing that butter grading communicates is whether a butter has the right mix of attributes to qualify it as either "highly pleasing," "mildly pleasing," or even less pleasing according to the state's palate. As the state admits, this serves no health or safety purpose. It serves only to ensure that butters sold in Wisconsin conform to the state's arbitrary idea of pleasingness.

Moreover, unlike other labeling laws, grading does not communicate any objectively verifiable information like shape, size, color, nutritional content, structural integrity, or country of origin. It does not tell consumers whether the butter has been inspected, or whether it includes carcinogenic material. Instead, the law purports to tell consumers whether a given butter tastes good based on whether it has characteristics like "utensil," "mottled," "cooked," or "ragged boring." The problem is not just that consumers have no way of anticipating what the state considers good or bad qualities in butter, but also that they may ultimately disagree.[5]

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[4] Moreover, companies are permitted to downgrade, 7th Cir. App. 044, meaning that purchasers cannot rely on a grade to inform them about the butter's actual characteristics.

[5] In fact, the evidence shows that even the most informed consumers don't understand the meaning of the terms used to evaluate butter. At deposition, the Department's own experts could not explain the meaning of several characteristics butter grading supposedly evaluates. *See* 7th Cir. App. 066-067; 073-074; 107. If the experts don't know what those terms mean, grading terms must be indecipherable to the average consumer.

As the Department admits, consumers have their own preferences when it comes to what type of butter tastes good. That's evidenced by the popularity of artisanal brands like Kerrygold and Minerva Dairy, which don't taste like "commodity" butter and therefore tend to rank below butters like Land O'Lakes under Wisconsin's grading standards—yet rank very highly in the court of public opinion.[6] When the state first enforced the butter-grading law against Kerrygold, Wisconsinites were travelling out of state to stockpile contraband butter.[7] Yet that brand would not receive an AA grade according to Wisconsin's standards.

In other words, grading does not relate to health or safety, or conveying factual information, it relates to preference. And even then, it does not inform consumers that a butter is "pleasing" in any meaningful way—it informs consumers that a butter is, overall, pleasing in the eyes of the government. Skewing the market in favor of businesses that the government happens to like at any given moment is outright arbitrary.

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[6] *See, e.g.*, Renee Kelly, The Kansas City Star, *Taste Test of Eight Butters Shows There is a Difference*, Apr. 25, 2014, https://www.kansascity.com/living/liv-columns-blogs/chow-town/article346850/Taste-test-of-eight-butters-shows-there-is-a-difference.html.

[7] Chicago Tribune, *Ban on Irish Butter in Wisconsin Sends Shoppers Across State Lines*, http://www.chicagotribune.com/news/local/breaking/ct-wisconsin-butter-law-met-20170301-story.html.

ii. Butter Grading Does Not Prevent Deceptive Advertising

Nor does the butter grading advance any interest the state has in ensuring "honest presentation" of butter.[8] There is nothing inherently deceptive about selling ungraded butter. It's only deceptive to sell ungraded butter if the company markets the butter contrary to its qualities. That type of mislabeling is not addressed by the butter-grading statute, and is already prohibited by other Wisconsin consumer protection statutes.

The state apparently believes that a butter may taste so poorly that it would be considered "deceptive" to market that butter as "butter." But such an argument is circular. Wisconsin already has a standard of identity law that allows butter makers to market their products as "butter" so long as they meet certain requirements. Wis. Stat. § 97.01. Butter doesn't then become "deceptive" just because someone doesn't like it. S*ee Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017) ("[W]hat consumers believe to be" the attributes of a given commodity "does not make [a seller's truthful representation] misleading.").

At its core, Wisconsin's "consumer expectations" argument rests on the assumption that products must conform to dominant tastes; otherwise a person will

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[8] While the Department argued that grading promotes "honest presentation" of butter, it provided no evidence that the law actually furthers that purpose; it stated that it "believe[s]" the benefits are there, but was "unaware" of any actual evidence. In the decades that ungraded butters have been sold in the state, the Department cannot show that a single consumer has *ever been misled* by purchasing ungraded butter.

be harmed if they try something new. But grading does not necessarily ensure that a butter conforms to a consumer's expectations. And even if it did, consumers are not harmed by the entry of new tastes and flavors into the marketplace—they are benefitted. Consumer expectations are dynamic. Though Folgers may be one of the most well-known brands of coffee, it would be absurd to suggest we should grade all coffees against Folgers. That would have prevented new entrants to the marketplace, like Starbucks, or Caribou Coffee, who were not always as pervasive and who were once thought to taste "different." When the government establishes its arbitrary preferences as the standard, it edges artisanal products out of the market. That's not only arbitrary, it's protectionist and unconstitutional. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (economic protectionism is not a legitimate state interest); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (same).

That is not to say that the government cannot prohibit businesses from *falsely* advertising their product as something it is not. States can prohibit a butter from calling itself USDA AA grade, for example, if it is not graded USDA AA. They can also ban a margarine from calling itself a "butter."[9] But butter grading does not prohibit false advertising; it

[9] To this end, Wisconsin already has a truth in advertising statute that applies to food advertisements, Wis. Stat. § 100.18, and a standard of identity statute for butter, Wis. Stat. § 97.01.

mandates disclosure of the state's subjective butter preferences.[10]

iii. The Seventh Circuit Permitted Arbitrariness as a Legitimate State Interest

Butter grading is favoritism for the sake of favoritism—which is outright arbitrary. The perception of taste is subjective, let alone one's preference when it comes to that taste. Science has shown that individuals vary in the amount of taste buds on their tongues and their ability to perceive certain flavors.[11] Some people who walk amongst us are so-called "supertasters." They have a heightened ability to taste salt, and therefore tend to think dishes are under-seasoned where most of us might think the chef was heavy handed with the salt. This may explain why even licensed graders sometimes disagree about the appropriate grade: they literally perceive the butter as tasting differently.

But even if everyone tasted things the same way, describing flavor is a notoriously tricky endeavor.[12] Though wine connoisseurs routinely describe wine as having "minerality," for example, it turns out that

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[10] Indeed, butter grading permits (if not fosters) *mis*labeling: it allows butters to mislabel their grade so long as they use a lower grade, and it requires artisanal butters like Minerva Dairy to associate themselves with commodity butter grades when it does not taste like or market itself as commodity butter.

[11] *See, e.g.*, Scientific American, *Super-Tasting Science: Find Out If You're a "Supertaster"!,* https://www.scientificamerican.com/article/super-tasting-science-find-out-if-youre-a-supertaster/.

[12] In the documentary *Somm*, one wine-taster famously describes a wine as tasting like "crushed hillside," a "freshly opened can of tennis balls," and "fresh new rubber hose." https://www.hollywoodreporter.com/video/somm-clip-fresh-tennis-balls-652178

neither winemakers nor drinkers agree on what that term means.[13] And even when there's agreement about what a term means, it doesn't mean that consumers can perceive that quality when they go to taste a product. A 2007 study found that even when wine drinkers were given extensive tasting notes, they had only about a 50% shot of pairing the correct wine with its description.[14] Wisconsin's butter-grading law is therefore inherently arbitrary at the very least because people differ in the way they taste and describe the taste of things.

Whatever may said about the science of tasting, it is wholly uncontroversial that one's personal judgment about what tastes "good" is subjective. Thus, the fact that Wisconsin incorrectly assumes that it can tell us what we taste is bad enough. What's worse is that it purports to tell us which butter tastes *good*. After all, what is dismissed as "bad" in highbrow circles is often actually considered good in the view of the general public. Folgers, for example, may be dismissed by coffee snobs—but it's one of the best selling coffee brands in the nation. And anyway, no preference—or even perception—is pure. As French sociologist Pierre Bourdieu posited, people formulate opinions about things, including flavor, because of the social and cultural capital they derive from it.[15]

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[13] Wendy V. Parr, et al., *Minerality in Wine: Towards the Reality behind the Myths*, 41 Food Quality & Preference 121-132 (2015).
[14] Bianca Bosker, New Yorker, *Is there a better way to talk about wine?*, https://www.newyorker.com/culture/culture-desk/is-there-a-better-way-to-talk-about-wine.
[15] Pierre Bourdieu, *Distinction: A social critique on the judgment of taste* (1983); *see also* Bianca Bosker, *Cork Dork: A Wine-Fueled Adventure Among the Obsessive Sommeliers, Big Bottle Hunters, and Rogue Scientists Who Taught Me to Live for Taste* at 184

Permitting the state to play a role in influencing consumer preferences about perfectly healthful products serves no legitimate purpose, and is arbitrary. It creates a situation straight out of Orwell's *1984*. In Oceania, the state told you that 2+2=5; in Wisconsin, the state tells you that Land O'Lakes tastes better than Kerrygold.

While it's true that the rational basis test is "lenient," the Seventh Circuit has essentially eliminated any limit on the ends that the government may pursue under that standard. The court held that "[t]he state could believe that required butter grading would result in better informed consumers" and allow consumers to "purchase butter with confidence in its quality." App. A-8. Under the state's conception of "quality," which the Seventh Circuit approved, the government could require clothing manufacturers to hire licensed graders to grade clothing according to the government's "fashion" standards. It could require blanket companies to grade blankets according to a "cuddly" scale. It could require pen companies to grade their pens according to the government's "writeability" preferences. Such tests could even be based on objective criteria: cuddliness could be based on the fabric's material, thickness, warmth, etc. All of these tests would ostensibly "inform" consumers of *something*. But the substance of that information, *i.e.*, whether the government considers a shirt to look pleasing, or a blanket to feel cuddly, or a pen to glide nicely, is valueless and capricious. It is valueless because it is subjective, and it is capricious because it is determined by mere government whim. The state

(2017) (describing the difficulty of determining taste standards, and communicating how something tastes).

simply doesn't have an interest in prescribing how healthful and safe products should taste, look, or feel—which amounts to economic protectionism for its own sake.

Courts are actually split on this question. *Compare St. Joseph Abbey*, 712 F.3d 215 (economic protectionism is not a legitimate state interest); *Craigmiles*, 312 F.3d at 224 (same); *Merrifield*, 547 F.3d at 991 n.15 (same), *with Sensational Smiles v. Mullen*, 793 F.3d 281 (2d Cir. 2015) (economic protectionism is a legitimate state interest); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (same). The Seventh Circuit's decision below exacerbates the split.

B. The Seventh Circuit's Opinion Is Fundamentally at Odds with the Concept of Substantive Due Process

At its core, substantive due process protects against arbitrariness by ensuring that deprivations of liberty are a product of "law" rather than "a lawless assertion of power." Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y 283, 287 (2012). Law is different from brute force because it is defined by guiding principles, predictability, and order. *Id.* at 295. Substantive due process ensures that deprivations of liberty occur for reasons of principle rather than whim. Thus, while states have broad authority under their police power to legislate in furtherance of public health or safety, substantive due process imposes limits on the ends that they can pursue.

States cannot, for example, legislate solely in order to protect a discrete interest group from economic

protectionism. *See, e.g., St. Joseph Abbey*, 712 F.3d at 215. Nor can they pursue wholly arbitrary ends. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 588 (1972) ("The protection of the individual against arbitrary action is the very essence of due process."). Due process requires that states pursue an end that is actually in the public interest. *Meyer v. Nebraska*, 262 U.S. 390, 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."); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (Due process of law protects every person's right to "the benefit of the general law . . . which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial.").

Even the rational basis test includes these limits on government power. In *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 447-50 (1983), for example, the Court struck down a requirement that group homes for the mentally disabled obtain a special use permit when the city did not require the same permit for other group homes. Though the city put forward several health and safety rationales, the Court found that in reality the law was based on "prejudice against the mentally retarded," which was arbitrary and irrational.

Similarly, in *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529, 532-33 (1973), the Court held it was irrational for Congress to exclude households of unrelated people from a federal food stamp program. The government asserted that the law prevented food stamp fraud. But after considering the evidence, the

Court concluded that the purpose of the regulation was to discriminate against "hippies." Such animus was inherently arbitrary.

In *Schware v. Bd. of Bar Exam'rs of State of N.M.*, 353 U.S. 232, 234, 238 (1957), a law school graduate challenged the government's refusal to allow him to sit for the bar exam. After reviewing the evidence, the Court determined that the government's reasoning had nothing to do with ensuring that the plaintiff was fit to be a member of the bar. *Id*. at 249 ("[r]efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause"). The threat in each of these cases is that the state is engaged in favoritism or animus with no connection to public health or safety—which is inherently arbitrary.

In order to withstand due process, not only must the government's ends be rational, the means must be rationally related to those ends. In *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970), for example, the Court held that a law requiring property ownership to be eligible to serve on the school board violated due process. While the state argued that ownership of real property related to the school board members' capacity to make wise decisions—this Court held that there was no relationship between the two. *Id*.

While the rational basis test has been watered down in recent years, it is not "a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (rational basis review is not "toothless"). It may require courts to defer to

legislative judgment, but it also empowers courts to determine whether laws are actually related to their purported ends, and to ensure that the ends are legitimate.

C. Lax Rational Basis Formulations, Like the One Below, Wreak Havoc on Vulnerable Groups

Most constitutional rights are relegated to rational basis scrutiny. The Seventh Circuit's opinion therefore has significant implications for the vast majority of unenumerated rights.

Lax rational basis formulations, like the ones below, have had particularly harsh consequences for politically powerless groups—including religious, racial, and economic minorities. These groups, like the racial minorities in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), the out-of-state business owners in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985), and the politically unpopular dissenters in *Schware*, 353 U.S. 232, seek protection from the courts when the political process fails them. When legislatures deprive these groups of liberty to benefit the politically powerful, the lax rational basis test leaves them with no meaningful recourse in the courts.

Excessive deference under the rational basis test has had had tragic results, for example, in cases involving property rights. The consequence of judicial deference in eminent domain cases has been primarily to harm minority groups, who most frequently reside in the areas targeted for condemnations. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting); *see also* Jim Bailey, *Ethnic*

and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform, 19 Wash. & Lee J. Civil Rts. & Soc. Just. 73, 90 (2012) (empirical analysis shows that majority property taken belongs to ethnic minorities). The eminent domain program sanctioned in *Berman v. Parker*, 348 U.S. 26, 32 (1954), uprooted over 20,000 black residents and replaced their homes with retail buildings and middle-income housing. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 41 (2003).

Because members of minority groups typically have less political power to stave off attempts to condemn their property, these groups rely on courts to protect them against majoritarian abuse. Lax formulations of the rational basis test deprive them of that protection. *See Hettinga v. United States*, 677 F.3d 471, 482-83 (D.C. Cir. 2012) (Brown, J., concurring) (rational basis review "allow[s] the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions").

It is no coincidence that Wisconsin's butter-grading law predominantly harms small, out-of-state businesses; it was explicitly aimed at protecting Wisconsin butter makers from competition with outsiders. When passed, trade groups noted that it was expected that Wisconsin butter makers in particular would score well. ECF 28-1. The result in this case has been to put a small, artisanal butter maker out of the market, while larger butter makers who conform to the state's taste standards and who

easily absorb the cost of grading, reap the benefit. The upshot is to benefit entrenched industry insiders at the expense of small businesses and consumers. Petitioners respectfully request that the Court grant the petition for certiorari to affirm that a state's arbitrary "pleasingness" mandate does not further any legitimate state interest.

III. THIS CASE RAISES ISSUES OF NATIONWIDE IMPORTANCE

This petition presents issues of nationwide importance. In recent years, constitutional challenges to laws like Wisconsin's have proliferated in federal courts. The Eleventh Circuit, for instance, invalidated a Florida law that prohibited a creamery from selling its milk in the state unless it added a product label that read: "Non-Grade 'A' Milk Product, Natural Milk Vitamins Removed." *Ocheesee Creamery LLC*, 851 F.3d at 1232-33. Meanwhile, the Ninth Circuit has examined two laws—enacted by two municipal governments in the San Francisco Bay Area—that require persons to broadcast government opinions on their products. *See American Bev. Ass'n v. City & Cty. of San Francisco*, Nos. 16-16072 & 16-16073, 2019 WL 387114 (9th Cir. Jan. 31, 2019) (en banc) (preliminarily enjoining an ordinance that required soda advertiser to broadcast government-mandate message on 20% of all advertisements); *CTIA-The Wireless Ass'n v. City of Berkeley, Cal.*, 854 F.3d 1105, 1111 (9th Cir. 2017), *cert. granted, vacated, remanded* (S. Ct. 17-976) (examining requirement that cell phone retailers print message on radio-frequencies on a prominently displayed poster with no smaller than 28-point font). Still more, the Sixth Circuit invalidated, on dormant Commerce Clause grounds, a

law that required returnable bottle and cans to feature state-specific marks.

The laws challenged in these cases affect commerce nationwide, and they show no signs of abating. A case filed last year challenges a regulation that forbids creameries from selling pure skim milk unless it is labeled "imitation milk" or a similar description. *See* Complaint ¶ 58, *South Mountain Creamery, LLC v. U.S. Food & Drug Admin.*, No. 1:18-cv-00738, 2018 WL 1704191 (M.D. Pa. Apr. 5, 2018). The North Dakota Legislature proposed a similar law earlier this year, and its sponsor argued that preventing almond, oat, and other non-dairy milks from being marketed as milk, is "a product safety and consumer education" legislation. *See* Emma Epperly, The Northern Light, *Proposed Legislation Addresses Definition of "Milk",* Feb. 7, 2019.[16]

Although not every law that is similar to Wisconsin's butter-grading requirement involves Commerce Clause and due process issues, those laws often implicate core Commerce Clause and due process concerns. As several circuit courts have held, the Due Process Clause forbids government from justifying a law with an interest in economic protectionism alone. *St. Joseph Abbey*, 712 F.3d at 222-23. Yet the Wisconsin butter-grading requirement, and laws like it, exist for the purpose of propping up groups favored by the government. During discovery, the Department produced news articles suggesting that the law is a protectionist measure dating back to the 1950, when it was

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[16] https://www.thenorthernlight.com/proposed-legislation-addresses-definition-of-milk/

supported by large in-state butter makers. *See* ECF 28-1. *See also Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 32 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (noting that country-of-origin labeling requirements were imposed to support American manufacturers, farmers, and ranchers as they compete with their foreign counterparts).

In the context of the Commerce Clause, state-specific labeling laws threaten to create a state-by-state patchwork of labeling requirements. *See* American Coating Ass'n, *ACA and the Paint and Coatings Industry Encourage Federal Labeling Standards for Consumer Products* (laws like the Berkeley cell phone frequency disclosure requirement create "a nightmarish patchwork of labeling requirements for industry").[17] Thus, laws like the butter-grading law undermine the notion that "the peoples of the several states must sink or swim together." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The decision below, if allowed to stand, would invite other states to adopt their own state-specific labeling requirements, and undermine a robust national marketplace for goods and services.

The issues are cleanly presented in this case. Throughout litigation, Wisconsin has repeatedly disavowed any interest in health and safety. The only remaining question is whether Wisconsin can rely on amorphous consumer information interests to support a law that prevents a fifth-generation butter maker from Ohio selling his butter in Wisconsin. The Internet has changed the dynamics of the national

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[17] https://www.paint.org/publications-resources/issue-backgrounder/federal-labeling/

economy. *Wayfair, Inc.*, 138 S. Ct. at 2097. The questions presented are more relevant now than ever.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March 2019.

Respectfully submitted,

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