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

BRIEF OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF THE *AMICUS CURIAE*

The Competitive Enterprise Institute is a nonprofit incorporated and headquartered in Washington, D.C., that is dedicated to advancing the principles of limited government, free enterprise, and individual freedom through policy analysis, commentary, and litigation.

The freedom guaranteed by the Constitution must be preserved for entrepreneurship, innovation, and prosperity to flourish, as the dispute underlying this case shows. Wisconsin's butter tasting law infringes on liberty without advancing any legitimate state interest that is not equally served by a voluntary grading system. As a result of the law and practical realities of the food distribution system, Wisconsin's law substantially inhibits the marketability of artisan butters that can be produced by small businesses and farmers in other states.

The Seventh Circuit's decision below also green-lights the passage of new unconstitutional impediments to the people's enjoyment as consumers and producers of the benefits of free-flowing commerce, especially in an economy shaped by the rise of the Internet and an increasingly globalized and automated economy.

Thus, CEI respectfully submits this brief in support of the petition and urges the Court to take up the case.[*]

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[*] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made any monetary contribution to the preparation and submission of this brief. Counsel of record for the parties received timely notice and consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This brief highlights two reasons for the Court to take this case.

First, the Seventh Circuit's decision on each of the claims squarely rests on its finding that a state has a legitimate interest in requiring goods to be labeled according to subjective taste standards solely to promote the particular goods that the government favors over other goods. However, in the Internet age a state lacks any such interest because governments and consumers can easily disseminate and obtain information without mandatory taste labeling. And laws that lack any legitimate state interest do not pass constitutional muster under any standard of review. But under the Seventh Circuit's approach, laws that infringe liberty and impede interstate commerce would be upheld if they merely involve the disclosure of *any* "relevant product information that may influence . . . purchasing decisions." App. 9.

Second, the Seventh Circuit's failure to recognize that states do not have a legitimate interest to pass mandatory taste labeling laws will have serious consequences. The decision below enables states to use such laws to create barriers to entry that entrench powerful incumbents and favored industries against market forces that would otherwise open up critical opportunities for all Americans to obtain new products and earn their livelihoods in the modern economy.

Accordingly, the petition presents a case worthy of the Court's review.

REASONS FOR GRANTING THE WRIT

I. Wisconsin has no legitimate state interest which could not be satisfied by a voluntary grading system.

The Seventh Circuit upheld Wisconsin's taste law by finding that "ensuring . . . consumers . . . receive" "relevant product information that may influence their purchasing decisions" on the package of the product is a legitimate state interest. App. 9. In every sphere of economic life, the Seventh Circuit's decision would allow states to interpose themselves between producers and consumers to arbitrarily favor some economic interests over others, all in the name of disclosure of "relevant . . . information." *Id*. This is an exceedingly broad holding that allows states to go well beyond protecting health and safety and preventing false or misleading advertising.

As long as including *false* information on packaging is legally prohibited, then positive factual claims that distinguish a product will be provided voluntarily—if the costs are justified—only when the claims are true. Producers who cannot make claims because they are not true are disadvantaged sufficiently by the absence of the claims and the ability of their competitors to take advantage of true product distinctions with marketing campaigns and product labeling.

If a state wishes to highlight a particular quality beyond what the market alone would achieve, it can create special labels and limit their use just as private entities use their trademarks and third-party quality certifications. A state's endorsement via special labels under such a voluntary grading system has neither

more nor less weight than what it earns from the consuming public. It would not infringe any producer's ability to stay out of the voluntary grading system, nor would it unduly impede interstate commerce.

Yet, the Seventh Circuit below rests on the holding that states have legitimate interests in going further and passing laws that *require* labeling products with governmental grades even though they do not concern health or safety. But this power serves only to elevate the influence of a state's messaging beyond what can be readily achieved by voluntary grading systems and private marketing. The question presented is whether this marginal increase in the power of government to influence the market is a legitimate end for states to pursue at the expense of liberty and in favor of some people over others.

Apart from health and safety, there are only two reasons why a government might seek to exercise greater influence over consumer choices than can be obtained using a voluntary grading system.

First, a state might seek to do this in order to advance politically favored private interests. But the Constitution forbids states from denying "any person . . . the equal protection of the laws." A state's use of regulatory power to pick winners and losers merely to advance the private interests of some people over others contravenes this fundamental guarantee.

The only other reason for seeking greater influence on consumer choices than states can obtain using a voluntary grading system supported by a prohibition on false advertising is a state's parochial interest in supporting local industry that provides employment

and tax revenue. This preference may of course be a proper basis for proprietary state actions, but it should not be a legitimate basis, in our federal system, for a state to employ its regulatory powers to support its local industries. Indeed, in *Pike*, the Court noted this interest was of dubious legitimacy in a similar context to the facts of this case. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144–45 (1970). Specifically, the Court stated that it was "not easy to see why" a state can properly favor its local businesses by requiring a competitor selling a "product that is superior and well packaged" to label its higher quality goods in a particular way so as to enhance their reputations with consumers. *Id.* at 144–45. The Court specifically "assume[d]," without deciding, that this "tenuous interest" was a "legitimate one" as it struck down the state's law in that case. *Id.* at 144. The petition here again presents the question of whether such a law does in fact further a legitimate state interest, and this issue is worthy of consideration by the Court.

Furthermore, as the Court observed in *Pike*, some of the Court's cases suggested long ago the more questionable proposition that states could use their regulatory powers to bolster the reputations of their local industries. *Id.* at 143 (discussing, e.g., *Sligh v. Kirkwood*, 237 U.S. 52, 61–62 (1915)). Indeed, one of these old cases was relied on by the Seventh Circuit here. *See* App. 11 (relying on *Sligh*). Yet the use of regulatory power rather than proprietary state action to bolster the reputation of local industry is hard to justify in the Internet age after decades of experience proves that states can effectively use voluntary grading

and proprietary state actions for this purpose without infringing liberty or impeding interstate commerce.

For its part, the Seventh Circuit's decision contends that Wisconsin's law advances the legitimate interests of "consumer protection" and "promoting commerce." App. 8–9. But today neither of these interests are served any more by a law *mandating* a governmental grade on a label than by state laws that prohibit false advertising and establish a purely voluntary grading system. Relevant information can be easily obtained online and through purely voluntary grading systems with or without state involvement. Neither states nor consumers have a legitimate need to legally mandate information on product packaging when health and safety are not in any way concerned.

The Seventh Circuit found that Wisconsin's law is a legitimate consumer protection measure by reasoning that "some consumers care about the quality of butter they purchase—for example, experienced bakers—and the state has a legitimate interest in ensuring that those consumers receive that information." App. 9. But discerning consumers and experienced bakers can easily obtain information online, and the state can use a voluntary grading system to enable producers to show that they meet any standard of quality that the state adopts. Mandating that every product bear a chosen governmental grade does not provide any additional consumer protection beyond what is already provided by the Internet and the alternative of voluntary grading.

The Seventh Circuit's conclusion that Wisconsin's law is a legitimate measure "promoting commerce,"

App. 9–10, tellingly relies on purported difficulties Wisconsin faced in using voluntary grading *in 1953*. But that was long before the rise of the Internet, and there is no basis to conclude that any such obstacles exist in today's marketplace. Indeed, the federal government and states have strong interests in promoting commerce of all kinds of food products, yet they easily achieve this goal with voluntary grading systems. *See, e.g.*, 7 C.F.R. § 58.122 (USDA's voluntary butter grading). In fact, Wisconsin itself uses voluntary grading for a host of commodities such as cheese, maple syrup, and honey. *See* Wis. Admin. Code ATCP § 81.22(1)(g) (allowing the sale of ungraded cheese); Wis. Admin. Code ATCP § 87.36(1) (allowing the sale of ungraded maple syrup); Wis. Admin. Code ATCP § 87.04 (allowing the sale of ungraded honey); App. 15.

In today's modern economy, states can amply promote commerce by helping quality products to distinguish themselves in the marketplace without label mandates that infringe on liberty and impede interstate commerce. States can easily use the many avenues of inexpensive communication that are now available to encourage consumers to rely on voluntary taste grades that the states design. And the private entities that stand to benefit can likewise promote state grading systems and make the voluntary grades as prominent as they desire on their own labels and through their own marketing.

At a minimum, the decision by the Seventh Circuit applies an antiquated case of this Court from 1915 to reach conclusions that have sweeping implications for the nation. App. 11 (relying on *Sligh v. Kirkwood*, 237 U.S. 52, 61–62 (1915)). Yet that very old case has not

been meaningfully discussed or applied by the Court in decades. In the past forty years, *Sligh* was mentioned only once in a footnote reciting cases collected by a state. By taking up this case, the Court can confirm whether *Sligh's* discussion of a state's legitimate interests has, as this record suggests, lost all force in the wake of decades of experience proving states can amply promote their local industries without infringing on liberty or impeding interstate commerce.

II. The Seventh Circuit's decision green-lights arbitrary and protectionist state laws that reduce opportunities for all Americans.

Americans are happily paying premium prices for goods that offer diversity, individualized consumption, and choices consistent with their personal identity, giving new life to the old adage "we are what we eat." This trend is shifting enormous amounts of commerce away from traditional patterns and away from larger established companies that often cannot match the offerings of upstarts and smaller companies.

In the past two decades alone, American spending per capita in real dollars on food and beverages has increased 25 percent, adding nearly $600 billion to the national economy per year. U.S. DEPT. OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, FOOD EXPENDITURE SERIES (Sept. 20, 2018). This immense increase is due in no small part to the growing demand for specialty foods, craft beers, and small batch distilleries which is creating vast new opportunities for small enterprises and a more inclusive and decentralized economy. *See* Emma Liem, *Specialty Foods Sales Surge to Record $140.3B in 2017*, FOOD DIVE, June 13, 2018 ("Specialty food sales rose 11% between 2015 and 2017, according to a report from the Specialty Food Association. The segment raked in a record $140.3 billion last year. This category is growing faster than all food sold at retail, jumping 12.9% compared to 1.4%.");

Minerva Dairy, while a venerable company that has been around for more than a century, is emblematic of the small, independent companies that are benefitting from the modern food and beverage economy.

Minerva Diary's butter offers a taste, texture, and higher butterfat content that is especially well-suited for baking, cooking eggs, or making grilled cheese. Standing behind that product is a family-owned business, a small group of hard working employees, and Amish farmers who supply milk from cows living on wide-open pastures in Ohio. Their butter is packaged in colorful boxes and in enjoyable throwback paper-wrapped rolls:

Notably, the packages are adorned with phrases such as "America's Oldest Family Owned Creamery," "Supporting Family Farms," "Pasture-Raised Cows,"

"Amish Butter," and "85% Butterfat." Right above the name of the business, there is a color silhouette of a cow emblazoned with the year of its founding, 1894. The color of the cow and certain squares and quarter circles on the packaging depends on which particular butter you select, *e.g.*, blue for unsalted, turquoise for sea salt, light green for garlic herb, and tan for the most adventurous option—pumpkin spice.

Apart from the carefully selected design features, the packaging provides the required disclosures of objective nutritional facts and product weight.

Unsurprisingly in light of the specialty food boom, sales of Minerva Dairy's butter have surged in recent years, especially to millennials. Nor is it a surprise that the "big butter" interests in Wisconsin which manufacture ordinary, commodity butter have taken notice and felt threatened enough to seek protection of their market position from their state's government.

The "anonymous complaint" that led to Wisconsin enforcing its mandatory butter tasting law succeeded in imposing a significant impediment to Minerva Dairy and other potential rival butter companies. App. C-4. Food producers face inter-food competition for limited shelf space and interstate distribution, as large and regional groceries and bulk distributors seek to maximize their thin profit margins. Most are understandably unwilling to even discuss taking on products that cannot be marketed in every state or that can be marketed only in a specific state. Thus, Minerva Dairy and other specialty butter makers must either comply with Wisconsin's law for all of their butter

or lose access to a huge number of store shelves both in and outside of Wisconsin.

For small or new potential butter makers, the law poses a potentially existential barrier to successfully entering the market for specialty and artisan butter. Even if they can obtain a top grade, being forced to add "Wis. Grade A" or the USDA Grade AA shield to their packages reduces the product's uniqueness, sending the exact opposite message to consumers than what is necessary for upstarts to succeed. Including either of these on butter labels perpetuates the myth that all butter is created equal, when in fact commodity butter that earns the highest marks from Wisconsin and USDA is arguably inferior to what can be achieved with alternative methods. So, an upstart seeking to offer superior small batch or cultured butter must either *confuse* potential consumers or accept the much more limited market of consumers that they can reach without complying with Wisconsin's law, given the practical realities of interstate food distribution.

It is little wonder, then, that food historians and connoisseurs of butter agree most Americans are only getting "bland sticks of fat in the supermarket" when they could otherwise enjoy superior butters including those produced by Minerva Dairy and others which are only available in niche outlets and states that are far away from Wisconsin. *See* Melissa Clark, *Spreading Culture*, N.Y. TIMES, Oct. 8, 2013, at D1.

This is, unfortunately, not just a case about butter. The Seventh Circuit's decision provides a road map for entrenched incumbent companies to resist these new forces in the food and beverage industry. With states'

help, they can rely on tasting laws to defend their own interests at the expense of the public.

The success stories of the new American food and beverage economy are natural foes of large established concerns, and the big guys have not hesitated to use their size and political influence to seek protection from state legislatures. The Seventh Circuit's decision offers up a broad avenue for protectionist lawmaking in the name of supposedly informing consumers about taste or whatever else a state deems relevant and convenient to mandate on product labels. And, as this case shows, this is a matter of national concern. Even if other federal circuits do not follow suit, Wisconsin, Illinois, and Indiana can easily use labeling mandates to interfere with the market for goods sold beyond their borders as a result of the practical realities of interstate distribution.

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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