No. 18-1520

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

MINERVA DAIRY, INC. ET AL.,
PLAINTIFFS-APPELLANTS,

v.

SHEILA HARSDORF, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION ET AL.,
DEFENDANTS-APPELLEES

On Appeal From The United States District Court
For The Western District Of Wisconsin
Case No. 17-cv-299
The Honorable James D. Peterson, Judge

RESPONSE BRIEF OF DEFENDANTS-APPELLEES, SHEILA HARSDORF ET AL.

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Oral Argument Requested

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JURISDICTIONAL STATEMENT

The Appellants' Amended Jurisdictional Statement is not complete and correct because it does not refer to 42 U.S.C. § 1983. Appellees provide a complete jurisdictional statement as follows:

The district court had jurisdiction over Appellants' federal-law claims under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 2201 (declaratory judgment). The complaint was filed on April 20, 2017, and it raises claims under 42 U.S.C. § 1983, asserting violations of the Commerce Clause, U.S. Const. art. I, § 8, the Fourteenth Amendment's Due Process Clause, and the Equal Protection Clause, U.S. Const. amend. XIV. Dkt.1:2.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 (final decisions of district courts). This appeal is a review of a final order granting summary judgment to Appellees. Dkt.52. The judgment sought to be reviewed was entered by the district court on February 5, 2018. Dkt.52. Appellants filed their notice of appeal on March 5, 2018. Dkt.55. This notice was filed within 30 days of the entry of judgment on February 5. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Does Wisconsin's butter-grading law, which requires butter makers to accurately label their products for retail sale and which mirrors the standards of the United States Department of Agriculture's (USDA) butter-grading program, fail the exceedingly deferential rational-basis test of the Due Process Clause?

2. Does Wisconsin's law fail the same rational-basis standard under the Equal Protection Clause?

3. Does Wisconsin's law, which does not discriminate against interstate businesses either on its face or in effect, fail the same rational-basis test under the dormant Commerce Clause?

INTRODUCTION

In 1954, Wisconsin adopted a law requiring that all retail butter sold in state include on its packaging the product's grade as determined by a licensed tester. This statute's standards mirror those of the USDA's voluntary butter-grading program, which adopted the widespread butter-grading practices that had grown up organically in early-twentieth-century dairy markets. It is one among thousands of product-labeling statutes on the books in jurisdictions across the country. Like those laws, it directly advances the State's important interest in promoting the disclosure of truthful and relevant product information to buyers, even if not all of them care to know it. On this straightforward logic, "disclosure . . . mandate[s] have persisted for decades without anyone questioning their constitutionality." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc). Wisconsin's law clearly passes traditional rational-basis review, with "room to spare." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995).

Minerva Dairy, an out-of-state maker of small-batch butter, disagrees. Although Wisconsin's law does not burden any fundamental right or create any suspect classification, Minerva asks this Court to strike down this ordinary economic

regulation as wholly arbitrary—something that this Court has not done in over 40 years and that the Supreme Court has not done in over 80. Unsurprisingly, therefore, Minerva's arguments do not rely so much on traditional rationality review but instead hearken back to its discredited predecessor, *Lochner v. New York*, 198 U.S. 45 (1905). For instance, Minerva implicitly faults the State for relying on allegedly outmoded economic theory to justify this seemingly paternalistic law, and it repeatedly charges the State with allegedly having failed to produce "evidence" proving that the law advances legitimate ends. Whether these arguments might have prevailed in the *Lochner* era, they fall flat today. The Constitution does not take sides in the continuing debate over whether the benefits of mandatory-disclosure laws outweigh their costs. Nor does it require States to introduce evidence (which, here, the State did anyway) to justify laws not subject to heightened scrutiny. The appropriate audience for Wisconsin's butter-law critics is the Legislature, not the courts.

STATEMENT OF THE CASE

Minerva is challenging Wisconsin's butter-grading law, which requires butter makers wishing to sell their product at retail in Wisconsin to label it with the appropriate grade. *See* Wis. Admin. Code ATCP § 85.06(2); Wis. Stat. § 97.176(1), (2), (4). Butter makers determine the appropriate grade by submitting their products to testing either by a Wisconsin-licensed grader, who may be the butter maker's own employee, or by a USDA grader. Wis. Stat. § 97.176(1)–(2), (6).

A. The History Of Butter Grading In America

Butter grading, the practice of discerning the quality of a batch of butter for sale, has a rich history in America. *See generally* Ralph Selitzer, *The Dairy Industry in America* 41, 88 (1st ed. 1976); Elaine Khosrova, *Butter: A Rich History* 99 (2016). That story begins with the family farm, where, before the late 1800s, America's butter was made. *See* Otto Frederick Hunziker, *The Butter Industry, Prepared for Factory, School and Laboratory* 10–11 (3d ed. 1940). In those days, grocers would buy the product wholesale "from farmers' wagons on market days," *see* Selitzer, *supra*, at 41, 88; U.S. Dep't Labor, Bulletin No. 164, *Butter Prices, from Producer to Consumer* 17 (1915)—but only after the grocer had "classif[ied] and grad[ed]" the merchandise, Edward Wiest, *The Butter Industry in the United States; An Economic Study of Butter and Oleomargarine* 124 (1916). This "was a very simple process." *Id.* The grocer "would decide [the butter's] value based on a sampling," Khosrova, *supra*, at 99, and would ascribe to the sample a basic grade, such as "'fair,' 'good,' and 'prime,'" Edward Sewall Guthrie, *The Book of Butter; A Text on the Nature, Manufacture and Marketing of the Product* 189 (1918). Eventually, the grocer would come to "kn[o]w the habits and personal characteristics" of a given family farmer and "could form a close estimate as to the type of butter that she would be likely to produce." Wiest, *supra*, at 125. Still, some butter makers had a "propensity . . . to cheat the weight or quality of a product." Khosrova, *supra*, at 99. So wary grocers continued to grade. *Id.*

The late 1800s saw production of butter shift from the family farm to the creamery. Selitzer, *supra*, at 84–85; Arthur D. Richardson, Wis. Dep't of Agric.,

Special Bulletin No. 73, *Wisconsin Butter: Production, Marketing, Disposition* 6 (1958). This introduced a new link in the chain of production. Now, farmers would sell their milk or cream to a creamery, which would then use the ingredients to make butter. U.S. Dep't Labor, Bulletin 164, *supra*, at 18. Creamery-centered production, drawing on newer technologies, allowed for increased output, better quality, and a nationwide market. B.H. Hibbard, *The Marketing of Wisconsin Butter* 69 *(*June 1916) (increased output); John Michels, *Creamery Butter-Making,* intro. (1914) (technological advances); *see* Hunziker, *supra*, at 28–29 (nationwide). Ultimately, this market transformation "led to the establishment of organized [butter] markets, known as boards of trade or exchanges," such as the Elgin Board of Trade and the New York Mercantile Exchange. *See* Wiest, *supra*, at 123, 143, 145, 148; Guthrie, *supra*, at 202–03.

To carry out one of their main purposes, which was to establish the "correct market prices for the various qualities" of butter, Wiest, *supra*, at 149–50, the exchanges needed to set up a "[s]ystematic grading" program, Selitzer, *supra*, at 88, through which it would be "possible to establish, for each grade, a market price commensurate with quality," Wiest, *supra*, at 119. Before systematic grading, "it was necessary for each dealer to confer every morning with numerous other dealers before beginning trading in order to ascertain the market price," a method which was "quite unreliable." *Id.* at 121. After grading, exchange prices for each grade were "determined daily," "in harmony with the actual conditions of supply and demand," and made public. *Id.* at 121–22. As this system became more widespread, it came to

be that a butter's grade would alone dictate the price it could command in the national market. *See* E.H. Farrington, *A Guide to Quality in Dairy Products; A Reference Book for the Butter Maker, the Cheese Maker, the Ice Cream Maker and the Dairy Farmer* 3 (1927). So, for creameries, submitting butter for grading proved "absolutely essential" to "creating a strong demand" for its good batches. Michels, *supra*, at 117–18; *see* Farrington, *supra*, at 4 (demonstrating that butter makers could charge more for higher-grade butter).

The reason for this link between butter grade and price was that, despite advances, the quality of the product then was still "far from uniform." Selitzer, *supra*, at 85. Producing good butter "depends upon a succession of little acts, each one of which is liable, when not performed aright, to alter the whole character of the production." Lauren Briggs Arnold, *American Dairying: A Manual for Butter and Cheese Makers* 199 (1876); *see* Wiest, *supra*, at 119. Even "factories in the same neighborhood" created butter with wide variance in quality. Farrington, *supra*, at 26. Thus, grading responded to a real problem, providing the "positive assurance" of quality that consumers needed to justify paying the high prices of butter. Michels, *supra*, at 117–18; Arnold, *supra*, at 198 ("[I]t is the *perfect* article that takes th[e] strong hold of the appetites of men. The *imperfect* article is despised.").

Yet the exchanges' grading systems had shortcomings. For one, "there [wa]s no universal system"; each exchange conducted grading according to its own terms. *See* Guthrie, *supra*, at 188–89; Wiest, *supra*, at 123, 134; Selitzer, *supra*, at 88–89. Worse, exchange graders were not always models of diligence. A worker might simply

"plunge a trier into the butter" and hand it to the grader, "who would pass the trier under his nose" and proclaim a grade. Selitzer, *supra*, at 88–89. A "broker" would confirm, but "[i]f a dispute arose, the men might taste a little of the butter" and "haggl[e]." *Id.* at 89. And if the exchange grader "[wa]s not strictly honest," he "may easily" give a batch of butter an unjustifiably low grade—thus allowing him to purchase the batch wholesale at an artificially low price. Michels, *supra*, at 117–18 (a butter maker could be "at the mercy of the commission man"). And butter makers, for their part, might "attempt to crowd in an inferior shipment" with some higher grade butter. *Id.* at 117.

But grading improved over time. *See* Wiest, *supra* at 123, 133–34. Practitioners narrowed down the key "elements" of the grade—"[f]lavor, [b]ody, [c]olor, [s]alt, and [p]ackage." *Id.* at 134–35 (calling this "[a]n important step forward"). These "are peculiar characteristics of butter" and "may be regarded as objective." *Id.* at 136. Graders also developed exceedingly detailed "expressions or words" to score a butter's quality with respect to each element. Farrington, *supra*, at 21. Thus a tester might describe "flavor" as "clean," "old cream," "bitter," "musty," or "stale." Guthrie, *supra*, at 191–92. "Body" could be "firm and waxy" or "greasy." *Id.* at 192. "Color" could be "mottled or streaked." *Id.* "Salt" would be "high or low," and "evenly distributed." *Id.* And "package" could be "neat" or "discolored." *Id.* at 193; Leon M. Davis, *Butter Scoring Contest: 1910*, at 3 (Mar. 1911) (providing "[b]utter [s]core [c]ard" for a grading competition, listing the elements and the various descriptors); *see infra* p.11–12 (explaining descriptors in more detail). Although there were early "differences of

opinion as to the importance of the different grade elements"—such as over which element held preeminence and how heavily to weigh each—a consensus on the proper approach to grading emerged by 1905. Wiest, *supra*, at 135.

It was against this backdrop that, in 1919, the USDA entered the butter-grading field, "inaugurating" its own "inspection service." Bureau of Markets, USDA, Service and Regulatory Announcements No. 51, *The Inspection of Butter Under the Food Products Inspection Law* 2 (1919). The USDA's butter-grading regime based its "grade specifications and classifications . . . very largely on existing standards and the best commercial practices" in the exchanges. *Id.*[1] Like those of the exchanges, the USDA grades comprise the elements of "[f]lavor," "[b]ody," "[c]olor," "[s]alt," and "[p]ackage." *Id.* at 4. The agency also adopted a standardized set of descriptors for each element, along with a standard method to calculate the final grade. *Id.* at 4–8; *see* Farrington, *supra*, at 21. As with grading under the exchanges, USDA grading was voluntary. 7 C.F.R. § 58.122(b); Bureau of Markets, USDA, Circular No. 144, *Rules and Regulations of the Secretary of Agriculture Under the Food Products Inspection Law of July 24, 1919*, at 6–7 (1919). In 1939, the USDA amended the 1919 butter-grading standards to "provide a more direct, definite, and accurate basis for grading creamery butter." Bureau of Agricultural Economics, USDA, *Official United States Standards for Quality of Creamery Butter* 11 (1938). The 1939 standards

[1] Before the USDA stepped in, state statutes had referenced grading as early as 1905. *See* 1905 Or. Laws 351 ("[A]ll butter that . . . is sold as a second or third grade shall not be sold in wrappers bearing the Oregon State brand.").

"represent[ed] a refinement and improvement" and were expected to "result in a more unified, accurate, and useful grading service." *Id.*

USDA grading serves two important purposes. First, and primarily, it "provid[es] a common language for wholesale trading and a means of measuring value or a basis for establishing prices," USDA, *USDA Grade Standards for Foods—How They Are Developed and Used* 4 (1973); Selitzer, *supra*, at 299, avoiding the risk of "confusion and difference of opinion" caused by the absence of "clearly defined uniform standards," USDA, Service and Regulatory Announcements No. 51, *supra*, at 11. While the "larger and more important [butter] markets" had "established grades," those grades had been "interpreted in the light of local market requirements and accordingly they have been difficult of application," as noted above, causing "misunderstanding and dissatisfaction" among "shipper[s] and receiver[s]" of butter. *Id.* A universal standard would better "facilitate . . . business with customers in distant places who want to be sure they are getting what they pay for." Production and Marketing Administration, USDA, Leaflet No. 264, *Know Your Butter Grades* (1949). "Many manufacturers or dealers have their butter federally graded to facilitate doing business in distant markets. They consider it good business to assure customers that their product has been certified as to quality by a government grader." Richardson, *supra*, at 12–13.

The USDA butter-grading standards also create "a powerful sales tool" and a "tremendous advertising advantage." Selitzer, *supra*, at 299; *see USDA*, *Know Your Butter Grades*, *supra* ("[T]op grades frequently command a higher price."). The USDA

grades "aid the consumer to obtain the quality she wants and for which she pays"—without it, "the consumer has no assurance" that the butter she purchases is "of good quality." *Id.* Indeed, the strong consumer response to USDA-graded butters motivated "the entire butter industry to adopt government inspection and grade certification." Selitzer, *supra*, at 300. Many butter producers "consider it good business to be able to assure their customers that their butter has been certified as to quality by a Government grader." USDA, *Know Your Butter Grades*, *supra*. In short, "the Government's grading stamp sold butter." Selitzer, *supra*, at 299.

B. Wisconsin's Butter-Grading Law

1. In 1954, Wisconsin adopted a mandatory butter-grading regime, modeled on the USDA's practice. *See* 1953 Wis. Act 638, *codified at* Wis. Stat. § 97.43 (1953–54); Richardson, *supra*, at 12–13. The Wisconsin Farm Bureau, Wisconsin's "largest general farm organization," proposed the law. Dkt.28-1:6 (reprint of Legislative Dep't, Wis. Farm Bureau Federation, *A Butter Grading Law: Yes Or No* (1953)); Wis. Farm Bureau Federation, *About Wisconsin Farm Bureau*, https://wfbf.com/wp-content/uploads/2017/04/2017-About-Wisconsin-Farm-Bureau_BW_web.pdf (last visited June 12, 2018). A 1953 brochure distributed by the Bureau explained that there had been "a great difference between quality on the market" in butter, with "approximately 25% of the butter" classifying as low-grade on the USDA scale. Dkt.28-1:6. "Unlike milk, the quality of which [was] stamped on the cap, butter [wa]s sold without a uniform stamp of quality." Dkt.28-1:6. So buying butter, the Bureau argued, was "like buying a 'pig in a poke' and has driven many consumers to the use

of substitutes." Dkt.28-1:6 (emphasis removed). The consumer needed "to know what grade of butter he [wa]s buying." Dkt.28-1:6.

To remedy this information problem, the Bureau "propose[d] that all butter sold at retail in Wisconsin be identified with a quality grade label." Dkt.28-1:6. The Bureau explained that "[t]he USDA ha[d] successfully graded butter for more than 25 years without serious discrepancies between individual graders." Dkt.28-1:7. And "a survey made in 1952 in the District of Columbia[ ] showed that sales of quality butter increased on a per capita basis in spite of the oleomargarine invasion." Dkt.28-1:7. So mandatory grading could "stimulat[e] consumer demand for butter of a high uniform quality," all to the benefit of "the producer," "the wholesaler," and the "retailer." Dkt.28-1:6; *see also* Dkt.28-1:8–13 (newspaper articles discussing support for the Bureau's proposal and law). Wisconsin did have a voluntary grading program before 1954, but this program had proven ineffective. *See* Dkt.28-1:6. Producers of poor-quality butter would simply skip voluntary grading and go straight to market, which would "prevent[ ] excellent Wisconsin butter from obtaining the national reputation that it should have." Dkt.28-1:6.

2. The butter-grading law in force today is materially identical to the original 1953 law. *Compare* Wis. Stat. § 97.176, *with* Wis. Stat. § 97.43 (1953–54). It provides that "[n]o person shall sell . . . any butter at retail unless its label bears a statement of [its] grade." Wis. Admin. Code ATCP § 85.06(2); *see* Wis. Stat. § 97.176(1). Butter is graded "for flavor and aroma, body and texture, color, salt, [and] package" according to "tests or procedures approved by" the Department of Agriculture, Trade,

and Consumer Protection (hereinafter "the Department"). Wis. Stat. § 97.176(3), (6); Wis. Admin. Code ATCP §§ 85.01–.06; *see generally* App.31–51 (Deposition of Michael Pederson). Specifically, butter is graded on eighteen "[f]lavor characteristics," Wis. Admin. Code ATCP § 85.04(1)(a); eight "[b]ody characteristics," *id.* § 85.04(1)(b); four "[c]olor characteristics," *id.* § 85.04(1)(c); and two "salt characteristics," *id.* § 85.04(1)(d).

Flavor characteristics include, for example, "[a]cid" (the butter "is associated with a lactic acid condition"), "[c]ulture" ("characteristic of a lactic acid producing culture"), "[m]usty" ("suggestive of . . . a damp vegetable cellar"), "[o]ld [c]ream," ("lack of freshness") and "[w]hey" ("characteristic of the acid development of cheese whey"). Wis. Admin. Code ATCP § 85.04(1)(a). Body characteristics include "[c]rumbly" and "[s]ticky." *Id.* § 85.04(1)(b). Color characteristics include "[s]peckled" and "[s]treaked." *Id.* § 85.04(1)(c). And the salt characteristics are "[s]harp" and "[g]ritty." *Id.* § 85.04(1)(d). The Department further qualifies all of these characteristics by "intensity"—"[s]light," "[d]efinite," and "[p]ronounced." *Id.* § 85.04(2); *see generally* Khosrova, *supra*, at 121–25 (narrative description of butter experts testing samples and describing the flavors and their causes).

To grade a batch of butter, a tester tastes "a representative butter sample," Wis. Admin. Code ATCP § 85.02, and identifies "[e]ach applicable flavor characteristic" and its "relative intensity," *id.* § 85.02(1); App.36 (Pederson). This gives a "[p]reliminary" letter grade designation according to a table set out at Wis. Admin. Code ATCP § 85.05(1). Then, the grader determines any defects in the "[b]ody,

[c]olor, and [s]alt [c]haracteristics," which lower the "preliminary letter grade" to the final grade, according to tables at Wis. Admin. Code ATCP § 85.05(2), (3), and (4), *see generally* Khosrova, *supra,* at 122–23 (narrative description of the body, color, and salt characteristics). Wisconsin law provides for an appeal process for producers wishing to dispute the grade a batch of butter receives. *See* Wis. Admin. Code ATCP § 85.08.

Wisconsin recognizes four grades of butter. First is "Wisconsin Grade AA butter," which has "a fine and highly pleasing butter flavor"; "may possess a feed or culture flavor to a slight degree or cooked flavor to a definite degree"; is "made from sweet cream of low natural acid to which a starter culture may or may not have been added"; and has a low level of demerits for "body, color and salt characteristics." Wis. Admin. Code ATCP § 85.03(1). Next is "Wisconsin Grade A butter," which has "a pleasing and desirable butter flavor"; may have a "slight degree" of "acid, aged, bitter, coarse, flat, smothered and storage" flavors; could have a "definite degree" of "culture flavor and feed flavor"; and has a medium level of disratings for "body, color and salt characteristics." *Id.* § 85.03(2). Third is "Wisconsin Grade B butter," which has "a fairly pleasing butter flavor"; may have "malty, musty, neutralizer, scorched, utensil, weed and whey" flavors to "a slight degree"; may have a "definite degree" of "acid, aged, bitter, coarse, flat, smothered, storage and old cream" flavors; may have "a pronounced degree" of "culture and feed flavors"; and has the highest level of demerits. *Id.* § 85.03(3). Fourth is "Wisconsin Undergrade Butter," which is any

butter that "fails to meet the requirements for Wisconsin Grade B." *Id.* § 85.03(4).[2] "Most butters are usually graded as Wisconsin Grade A or Grade AA." App.43 (Pederson).

The USDA's butter-grading standards match Wisconsin's, as noted above. App.36 (Pederson). Like Wisconsin, the USDA grades butter according to its "flavor," "body, color, and salt" characteristics, and according to whether these characteristics are "slight," "definite," or "pronounced." AMS, USDA, *United States Standards for Grades of Butter* 1–2 (1989), https://www.ams.usda.gov/sites/default/files/media/Butter_Standard%5B1%5D.pdf. The USDA standards have seventeen flavor characteristics, all of which are reflected in Wisconsin's standards (the Wisconsin standard missing from the USDA's list is "cultured"), *id.* at 3; eight body characteristics, all identical to Wisconsin's; four color characteristics; and two salt characteristics, *id.* at 4. The USDA's grades are also materially identical. *Id.* at 2 (narrative description of U.S. Grades AA, A, and B). Unlike Wisconsin's system, only a USDA-employed grader may give USDA grades. *See* App.71 (Deposition of Steve Ingham). And while grading under the USDA standards is voluntary, 7 C.F.R. § 58.122(b), it is the position of the Federal Government that such grading "will significantly aid the [dairy] operators to manufacture more consistently, uniform high-quality stable dairy products," *id.* § 58.122(a).

[2] Butter grading in Wisconsin is usually done at the production site, *see* App.39 (Pederson), consistent with the USDA's practice since 1924, Selitzer, *supra*, at 299.

Any person may grade butter under Wisconsin law if licensed. Wis. Stat. § 97.175(2). To obtain a license, an applicant must take an examination given by one of the licensed butter graders employed by the Department and pay a $75 fee. App.38–42 (Pederson); Wis. Stat. § 97.175(1); Wis. Admin. Code ATCP § 85.07. The exam comprises two parts: (1) a practicum, where the applicant grades butter in front of the Department's licensed grader (graded as pass or fail), and (2) and a written test covering applicable Wisconsin law and the butter-making process (with a minimum passing grade of 70 percent). App.38, 40–42, 45 (Pederson); *see generally* Dkt.20-1 (application and testing materials). An average of 90 percent of applicants pass the butter-grading exam. App.41 (Pederson). Formal education or experience is not required to take the exam, App.44 (Pederson), although in practice most applicants have had some experience working at a butter plant, App.38–39 (Pederson). Some applicants enroll in a dedicated short course offered by the Center for Dairy Research at the University of Wisconsin in preparation for the butter-grading exam. App.38, 40–41 (Pederson). The Department will also "provide information and materials necessary to prepare for the examination upon request." Dkt.46:20. A butter-grading license remains valid for two years and is renewable upon payment of a $75 fee. Wis. Admin. ATCP § 85.07(2); App.42 (Pederson).

Wisconsin law allows individuals outside the State to become licensed graders. *See* Wis. Stat. § 97.175(2) ("[any] person desiring a license shall apply"); App.39–40 (Pederson); *see infra* pp. 51–52 (discussing recently resolved dispute over this point). Indeed, currently "a couple larger plants that have facilities in other states," as well

as a company in Ireland, "have the butter-grader credential." App.39 (Pederson); *see also* Steve Chamraz, *Banned Irish Butter Back in Wisconsin Stores*, WTMJ-TV Milwaukee (Dec. 21, 2017), https://www.tmj4.com/news/i-team/banned-irish-butter-back-in-wisconsin-stores (provides statement from Kerrygold Butter upon starting sale of graded butter in Wisconsin). If an out-of-state individual wishes to become a licensed grader, he or she would simply apply and travel to Wisconsin to take the exam at a prearranged butter-making facility in the State, at the University of Wisconsin, or at the Department itself. App.40–41 (Pederson).

Once a batch of butter is graded, the butter maker must accurately label the product with the Wisconsin grade. Wis. Stat. § 97.176(4), (5), (7). To comply, the producer need only "prominently" display the grade on the butter package in "12-point type" or larger, Wis. Admin. Code § ATCP 85.06(2), or use the appropriate USDA label, *id.* § 85.06(5); *see* AMS, USDA, *Understanding Food Quality Labels*, https://www.ams.usda.gov/publications/content/understanding-food-quality-labels (last visited June 12, 2018) (link to USDA "Understanding Food Quality Labels Factsheet").

The Department enforces the butter-grading law and ensures the accuracy of licensed butter graders by doing "unannounced inspections" of Wisconsin creameries, by purchasing and inspecting graded butter at retail, and by monitoring retailers for the sale of ungraded butter. App.35–36, 42 (Pederson); App.110 (deposition of Peter Haase). Department employees do not conduct inspections of butter plants outside Wisconsin. App.49 (Pederson). Sometimes, consumers will inform the Department of

possible noncompliance. Dkt.19:2. If the Department finds mislabeled butter, an employee might visit the manufacturer of the butter, discuss the problem with its butter-grading staff, and identify solutions. App.42–43 (Pederson). Alternatively, the Department's compliance division might send a warning letter identifying the noncompliance. App.42 (Pederson). The Department also sends warning letters to retailers selling ungraded butter. App.110 (Haase). Wisconsin law authorizes the Department to seek fines or imprisonment for noncompliance, Wis. Stat. § 97.72, but, so far as the Department is aware, such corrective measures have never been used, *see* App.42 (Pederson); Dkt.32:2.

3. Wisconsin's butter-grading statute is certainly not the first state law to regulate the quality of butter. As early as 1905, States codified features of the exchanges' butter-grading regimes. *See* 1905 Or. Laws 351. Oregon formalized four butter grades in 1931 using the industry-developed scorecard. 1931 Or. Laws 163; *see also State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan*, 84 P.2d 471, 472 (Or. 1938) (discussing the 1937 promulgation of butter-grading standards). California followed suit with a 1935 codification of a "Butter Grading" chapter to its Agricultural Code. 1933 Cal. Stat. 60.

Today, at least six States, including Wisconsin, have mandatory butter-grading statutes. California requires that butter "sold or distributed in package form" be designated, labeled, and advertised as one of two grades to "indicate [the butter's] quality," Cal. Food & Agric. Code § 37131: (1) first quality, with a score "not less than 92," *id.* § 37132; or (2) second quality, with "scores below 92, but not less than 90," *id.*

§ 37133. Idaho requires the "grades of butter" to comply with "the United States department of agriculture's [ ] 'Standards for Grades of Butter'" and denominates butter scoring below USDA Grade B as "undergrade butter." Idaho Code § 37-313; *see* Idaho Admin. Code r. 02.04.05.500. It also requires butter packages to feature the grade. Idaho Code § 37-313. Michigan, too, requires butter grading according to USDA standards, allowing only persons "approved by the department" to be graders. Mich. Comp. Laws § 288.717(1)–(2). And it requires all butter to be "churned from wholesome cream and properly labeled." *Id.* § 288.716. Utah considers butter to be unlawfully "[m]isbranded" if it "is not at least B grade," or if it "does not meet the grade claimed on the package, measured by U.S.D.A. butter grade standards." Utah Code § 4-3-102(11)(c); Utah Admin. Code r. 70-370-2; *see* Utah Code § 4-3-401(4). And New York incorporates USDA butter grades into its "basic formula price" for dairy products. N.Y. Comp. Codes R. & Regs. tit. 1, § 20.51.[3]

Like other States, Wisconsin requires grading for a variety of other foods as well. Since 1897, it has required canned foods to be "distinctly labeled with the grade or quality." James K. Matson, Wis. Dep't of Agric., *Food Regulation in Wisconsin: Past, Present and Future* 7 (2008). Wisconsin also requires the grading of maple

[3] South Dakota used to have a mandatory butter-grading law that made it a Class 2 misdemeanor "to sell, offer or expose for sale, or have in possession with intent to sell, any butter at retail" without a grade and grading date "indicated on the container." *See* S.D. Codified Laws § 39-9-4, *repealed by* 2013 S.D. Sess. Laws ch. 191 § 16. Minnesota too, until very recently, had a butter grading law. Minn. Stat. § 32.475, *repealed by* 2017 Minn. Laws 62.

syrup. *See* Wis. Admin. Code ATCP § 87.36; App.69 (Ingham). Milk, too, has grades based on its "microbiological limits and farm characteristics." App.69 (Ingham).

C. Factual And Procedural History

Minerva Dairy is an Ohio company that makes butter, flavored butter, and a variety of cheeses. Dkt.36:2 (Declaration of Adam Mueller, President and Co-owner of Minerva). Minerva produces its butter in "small, slow-churned batches using fresh milk supplied by pasture-raised cows." Dkt.36:2. Minerva sold its butter in Wisconsin for decades without labels identifying a Wisconsin or USDA butter grade, in violation of Wisconsin's butter-grading law. *See* Dkt.36:3. In February 2017, after it received an anonymous complaint, the Department sent a warning letter to Minerva, informing it of its noncompliance. App.25.

Minerva responded to the Department's letter with this lawsuit, claiming that Wisconsin's butter-grading law violates the federal Due Process and Equal Protection Clauses and the dormant Commerce Clause. App.1–2. Both Minerva and the Department moved for summary judgment. Dkt.25, 33. Analyzing the butter-grading law under the rational-basis test, the district court granted summary judgment to the Department on all claims. SA.5–6, 10. Addressing the due-process and equal-protection claims, the court explained that "[c]onsumer protection is a legitimate governmental interest," and that the State "could believe that required butter grading would result in better informed butter consumers." SA.5. That Wisconsin does not impose similar grading standards on other products, the court explained, is irrelevant. *See* SA.5–6. The court also rejected Minerva's dormant Commerce Clause

claim, since the law "does not discriminate against interstate commerce" and otherwise "survives rational-basis review." SA.8, 10. Minerva appealed. App.128.

SUMMARY OF ARGUMENT

I. Minerva's economic substantive-due-process claim fails because Wisconsin's butter-grading law satisfies the rational-basis test, the most lenient form of judicial review. The law promotes consumer welfare, an unquestionably legitimate interest, by enabling consumers to make more informed purchasing decisions. It also promotes commerce (another undisputed legitimate interest) by providing a common measure of the quality of butter. While scholars debate the efficacy of labeling laws such as this one, the Fourteenth Amendment does not take sides in that dispute.

Minerva's contrary arguments misunderstand the rational-basis test, the nature and history of butter grading, or both. For instance, it argues that the State did not support the law's rationality with record evidence. Even if that were true (it is not), it would not matter. Both this Court and the Supreme Court have consistently held that the State need not marshal evidence to support laws challenged as irrational. Minerva also asserts that the law embodies nothing more than the State's taste preferences, but Minerva overlooks that the law reflects industry best practices and consumer demands.

II. Minerva's next move is to rehash the same arguments under a new label: the Equal Protection Clause. Yet the same, markedly deferential rational-basis test applies, and the lines that the butter-grading law draws are sensible. Minerva argues that, if the State were consistent, it would impose the same kind of mandatory

grading regime on other foods. Even if true, this critique ignores the bedrock rational-basis principle that States may "regulate one step at a time," without running "the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *Clements v. Fashing*, 457 U.S. 957, 969–70 (1982) (citations omitted).

III. Minerva's challenge under the so-called dormant Commerce Clause fares no better. The butter-grading law does not facially discriminate against interstate commerce. Nor does it have disparate effects: Any butter maker in any State (indeed, in any country) may sell butter in Wisconsin, so long as it is graded by the USDA or a Wisconsin-licensed grader. And any person may obtain a butter-grading license upon passing an exam. Accordingly, under this Court's dormant Commerce Clause jurisprudence, the law needs only a rational basis to survive, which it has.

ARGUMENT

I. The Butter-Grading Law Complies With The Due Process Clause Because It Is Rationally Related To The State's Legitimate Interests In Improving Consumer Welfare And Promoting Commerce

Minerva's lead theory is that Wisconsin's butter law "deprive[s]" it of "property[ ] without due process of law," U.S. Const. amend XIV, § 1. Opening Br. 12. This is not because the law denies Minerva fundamental *procedural* protections, such as "notice and an opportunity to be heard," *Gosnell v. City of Troy,* 59 F.3d 654, 658 (7th Cir. 1995) (describing a traditional procedural-due-process claim), but rather because it allegedly violates Minerva's right to economic "*substantive* due process," *id.* at 657 (emphasis added). More particularly, the idea is that the statute allegedly

trespasses on Minerva's general right to be free of "arbitrary and irrational" enactments that limit its returns on investment. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014).

This claim faces "unusually inhospitable legal terrain." *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1121 (7th Cir. 1996) (citation omitted). Economic substantive due process—a relic of the infamous decision in *Lochner v. New York*—has had a bad 80-year run, to put it mildly. *See, e.g.*, *Gosnell*, 59 F.3d at 657 ("'Substantive due process' has the distinct disadvantage, from plaintiffs' perspective, of having been abolished in the late 1930s . . . . Economic substantive due process is not just embattled; it has been vanquished."); *Nat'l Paint*, 45 F.3d at 1130; *see also* Steven Calabresi, *Text vs. Precedent in Constitutional Law*, 31 Harv. J. L. & Pub. Pol'y 947, 952 (2008) ("The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique[.]"). Since 1937, courts no longer accord fundamental-right status to interests in "work[ing] [certain] hours" or "earn[ing] money," much less to interests "in obtaining the maximum return on investment." *Nat'l Paint*, 45 F.3d at 1130. Judges instead have returned to the "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963); *see also* Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment. 61, 68 (2017) (book review) (defending traditional rational-basis review and noting the absence of

"founding-era cases in which litigants came to the courts to enforce their rights to liberty and property against self-seeking democratic majorities").

Thus in litigation over laws alleged to burden ordinary commercial interests, courts today apply only that "most lenient form of judicial review": the rational-basis test. *Monarch*, 861 F.3d at 681.[4] Under this familiar standard, a challenger must prove that the law is not rationally related to a legitimate government interest. This is "a notoriously heavy legal lift," *id.* (citation omitted), especially for litigants targeting economic regulations, which enjoy a "strong presumption of validity," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993). So long as a court can articulate a "reasonably conceivable state of facts that could provide a rational basis for the [enactment]," the law must stand. *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015) (citation omitted); *see also Saukstelis v. City of Chicago*, 932 F.2d 1171, 1174 (7th Cir. 1991) ("Courts [properly] bend over backward to explain why even the strangest rules are not *that* far gone.").

[4] In this Circuit, the viability of economic substantive due process is in doubt. Some of this Court's decisions suggest that, when the Supreme Court overruled the doctrine of *Lochner*, it foreclosed altogether substantive-due-process review of economic regulations not implicating fundamental rights, meaning that such laws are not even subject to testing for rationality. *See, e.g.*, *Nat'l Paint*, 45 F.3d at 1127–30; *Gosnell*, 59 F.3d at 657–58; *Cent. States, Se. & Sw. Areas Pension Fund*, 181 F.3d at 806; *Mid-Am. Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 291–92 (7th Cir. 1995); *Cent. States, Se. & Sw. Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir. 1992); *see also Pontarelli Limousine, Inc. v. City of Chicago*, 929 F.2d 339, 341–42 (7th Cir. 1991). Other decisions indicate that economic substantive due process remains a viable Fourteenth Amendment theory, albeit one that triggers only deferential rational-basis review. *E.g.*, *Gibson*, 760 F.3d at 621; *Matter of Gifford*, 688 F.2d 447, 453 (7th Cir. 1982). Although the State reads the line of cases ending with *National Paint* as more accurately reflecting settled circuit law, it will proceed here on the assumption that Minerva has raised an available due-process claim triggering rational-basis review.

Thus it falls to the challenger to "negative every conceivable basis which might support [the law]." *Ind. Petroleum*, 808 F.3d at 322 (citation omitted).

Rational-basis review has deep roots in our constitutional structure. For the same reasons that applying this standard to acts of Congress "respect[s] . . . the separation of powers," *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985), applying the test to the laws of the States secures federalism, *see generally SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1273–74 (5th Cir. 1988). This is because "[r]ational basis review expresses the appropriate level of deference that unelected judges should display to the democratically informed judgments of a legislature"—whether those judgments turn out to be good or bad. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1, 8 (2003); *see Nat'l Paint*, 45 F.3d at 1127. Nothing in the Fourteenth Amendment grants courts a roving commission to "judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. Rather, the people's representatives are given plenty of room to enact laws that are "improvident," "unwise," or "out of harmony with a particular school of thought." *Valenti v. Lawson*, 889 F.3d 427, 430 (7th Cir. 2018) (citation omitted); *see, e.g.*, *Saukstelis*, 932 F.2d at 1174 (upholding a law under rational basis because it was neither "wacky" nor "loony"). More to it, by "accept[ing] hypothetical purposes," rational basis "accounts for" and respects "the normal functioning of the legislative process." Barrett, *supra*, at 73. As Justice Thomas has explained for the Supreme Court, "because we never require a legislature to articulate its reasons for enacting a

statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. Finally, as Judge Barrett has noted, traditional rational-basis review is properly calibrated to courts' institutional capacities. Not only does it spare judges the near-impossible task of reconstructing true legislative "intent" (if there is such a thing), Barrett, *supra*, at 69–73, it also "reflects the judgment that a more searching inquiry would pull judges into terrain they are not good at navigating," such as "assess[ing] competing claims about the nutritional value of filled milk or a complex environmental policy," *id.* at 74.

Hence members of this Court (and the Supreme Court) have consistently voted to uphold statutes that, as members of a legislature, they well might have opposed. To illustrate, in light of the interest in reducing underage drinking, this Court rejected a rational-basis challenge to an Indiana law that prohibited grocery stores, but not liquor stores, from selling cold beer. *Ind. Petroleum*, 808 F.3d at 324–25. And given the government interest in promoting temperance (as well as the seemingly contradictory interest in "maintaining tax revenue"), this Court upheld a state statute that separated beer and liquor wholesalers. *Monarch*, 861 F.3d at 683. The Supreme Court, meanwhile, has not struck down an economic regulation under rational-basis review in over 80 years. *See Cent. States, Se. & Sw. Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir. 1999).[5]

[5] When that Court has invalidated laws purportedly under the rational-basis test, it has applied a form of heightened scrutiny—"rational basis with bite"—rather than the

A. The range of ends that constitute legitimate state interests is extremely broad. So long as an interest relates to the public good, capaciously defined, it counts as legitimate. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 147 (1938); *Kelo v. City of New London,* 545 U.S. 469, 480 (2005); *see generally Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). Put differently, a legitimate state interest is any purpose for which a State might exercise its traditional "police powers," which reach all matters of "public health, safety, welfare and morals." *Franz v. United States*, 707 F.2d 582, 605 (D.C. Cir. 1983), *supplemented by* 712 F.2d 1428 (D.C. Cir. 1983).

As for whether there is a rational relationship between the interests and the means chosen, only some tendency to promote the State's ends is required. The law can be substantially under-inclusive: the Legislature need not address all sources of an alleged evil and may ignore ones that "may be even greater." *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949). Likewise, the law can be substantially over-inclusive. That is, just as it can exclude some individuals whose inclusion arguably would advance the government's interest, it can include in its ambit more individuals than necessary to further its goal. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979); *see also Vance v. Bradley*, 440 U.S. 93, 108 (1979). Critically, whether the proffered ends actually motivated the State to adopt the law is irrelevant. So long as "any reasonably conceivable state of facts [ ] could provide a rational basis for the classification"—regardless of whether the Legislature harbored or expressed that

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traditional standard. *E.g.*, *Cleburne*, 473 U.S. at 446–47; *see* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. Rev. 2070, 2071–72 (2015).

basis as its purpose—it must be upheld. *Beach Commc'ns*, 508 U.S. at 313; *Ind. Petroleum*, 808 F.3d at 322.

B. Wisconsin's butter-grading law satisfies both prongs of the rational-basis test. The State has a legitimate interest in sellers' conveying truthful and relevant product information to buyers. By requiring the disclosure of that information, the butter-grading law not only rationally relates to, but directly advances, that interest. This explains why "[disclosure] mandates have persisted for decades without anyone questioning their constitutionality." *Am. Meat Inst.*, 760 F.3d at 26.

The butter-grading statute—like virtually all product-labeling laws—promotes the State's important interest in consumer welfare, *see Hipolite Egg Co. v. United States*, 220 U.S. 45, 57–58 (1911); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007), by enabling consumers to make more informed purchasing decisions, *see Am. Meat Inst.*, 760 F.3d at 24–25 (upholding law mandating disclosure of country-of-origin information). Labeling laws promote this purpose in different ways. Some, for example, require products to denote facts that a reasonable consumer would almost surely want to know but that a self-interested seller might otherwise omit, such as the amount of saturated fat per serving or whether a product causes cancer. *See, e.g.*, 21 U.S.C. § 343 (mandatory nutrition-information labeling); Cal. Code Regs. tit. 27, § 25607.2(a)(2) (cancer disclosure). Other laws require disclosure of facts that, while irrelevant to health and safety, might bear on product *quality*—yet another metric presumably relevant to all buyers. *See, e.g.*, AMS, USDA, *Grades and Standards*, https://www.ams.usda.gov/grades-standards (last visited June 12, 2018)

(voluntary quality-grading standards for, among other products, meat, dairy, fish, fruits, and vegetables); 27 C.F.R. § 5.22(b) (describing the features of whiskey that can properly be labeled "bourbon whisky," "straight bourbon whisky," and the like). Still other laws require disclosure of facts that will be important to only *some* buyers—perhaps even only a tiny percentage of the entire consumer base—such as whether a food was genetically modified or produced in the United States. Act of July 29, 2016, Pub. L. No. 114-216, 130 Stat. 834 (2016) (requiring USDA to develop GMO-disclosure standards); National Bioengineered Food Disclosure Standard, 83 Fed. Reg. 19,860 (May 4, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-05-04/pdf/2018-09389.pdf (those standards); *see also Am. Meat Inst.*, 760 F.3d at 23 (country-of-origin labels). Although the kinds of product-labeling requirements differ, their straightforward effect is the same: each directs sellers, at their own expense, to disclose truthful information that a legislature conceivably expects or hopes will be important to at least some buyers.

This is precisely the goal of the butter-grading law. Even if not all consumers consult the grade or find it meaningful, the Legislature enacted the butter-grading law "against a historical backdrop that has made the value of this particular product information to consumers" readily apparent. *Id.* at 24 (country-of-origin labels). The creation of the exchanges' and of the USDA's grading systems in the early twentieth century met a real consumer need. Butter quality had been "far from uniform." Selitzer, *supra*, at 89. While the exchanges' grading systems helped provide the "positive assurance" of quality that consumers desired, Michels, *supra*, at 117–18;

accord App.67 (Ingham), their lack of uniformity still caused market "confusion," USDA, Service and Regulatory Announcements No. 51, *supra*, at 11. The USDA's universal standard reduced that problem, further "aid[ing] the consumer to obtain the quality she wants and for which she pays." *USDA*, *Know Your Butter Grades*, *supra; accord* App.68 (Ingham). Wisconsin's mandatory standard went a step further by stopping producers of poor, ungraded butter from going straight to market, thereby protecting Wisconsin's "national reputation" for excellence in dairy. Dkt.28-1:6. So all butter in Wisconsin must contain a grade, which "vouches for . . . the characteristics of the product inside the packaging . . . ensuring honest presentation of . . . the butter." App.67 (Ingham). Thus, today, "knowledgeable" consumers "look for the grade when [they] buy butter." App.66 (Ingham). Even with the history set aside, "[t]he self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades" without constitutional controversy. *Am. Meat Inst.*, 760 F.3d at 26. As the D.C. Circuit has explained, even under a more demanding standard of review a court need not bother with "evidentiary parsing" when "the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest." *Id.* (commercial-speech claim).

Labeling laws also conceivably promote commerce, another unquestionably legitimate government interest. *See United States v. 40 Cases, More or Less of Pinocchio Brand 75% Corn, Peanut Oil & Soya Bean Oil Blended with 25% Pure Olive*

Oil, 289 F.2d 343, 345–46 (2d Cir. 1961). They do this first by providing a common measure of the quality of goods, allowing for more efficient comparison shopping. And like laws outlawing the sale of "adulterated" goods, product-labeling laws also "protect the integrity of [ ] products so as not to depress the demand for goods." *40 Cases*, 289 F.2d at 345. That is, if a product does not possess a properly disclosed "standard[ ] of purity," *id.*, then purchasers of that product are more likely to be dissatisfied and take their business elsewhere. Consumers "want to be sure they are getting what they pay for." USDA, *Know Your Butter Grades*, *supra*; Dkt.28-1:7 (poor quality drives consumers to substitute goods).

Of course, not everyone agrees that the benefits of mandated-labeling laws outweigh their costs. Policy experts are divided. Some argue, for example, that disclosure "regularly—though not inevitably—fails to achieve its purpose of improving [purchasing] decisions." Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 679 (2011). These authors explain that "disclosees often do not read" or "understand" the disclosed information, and sometimes it "does not improve disclosees' decisions." *Id.* at 665. According to this view, the effectiveness of food-labeling laws is "mixed" at best. *Id.* at 675. Yet Ben-Shahar and Schneider concede that "brief, simple, easy disclosures" may be effective under the right conditions. *Id.* at 743. They note that "symbols instead of sentences"—like Los Angeles County's practice of grading restaurants for cleanliness with an "A," "B," or "C'—could benefit more than a narrow slice of the market and even affect consumer behavior. *Id.*

Other scholars see matters differently. *See, e.g.*, Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 Wash. L. Rev. 333 (2013); Jeremy N. Sheff, *Disclosure As Distribution*, 88 Wash. L. Rev. 475 (2013). Both Craswell and Scheff argue that many mandatory disclosures easily benefit at least *some* consumers, even if nowhere near a majority. *See* Craswell, *supra*, at 338, 352–53; Sheff, *supra*, at 484–85. Craswell further argues that mandatory disclosures can encourage producers to increase the quality of their products, because disclosure of certain attributes has positive reputational effects that could boost sales. *See* Craswell, *supra*, at 342–43 (classifying these as "dynamic disclosures"). So even if disclosure does not sway consumer behavior in the short term, it may create a social benefit in the long run. *See id.* Sheff also contends that mandatory disclosures could be seen as fulfilling "a moral obligation" of producers to "respect disclosees' autonomy" in knowing what products or services are composed of. Sheff, *supra*, at 476–77. When viewed in this light, *all* truthful and relevant mandatory disclosures are beneficial. *See id.*

The Fourteenth Amendment does not take sides in this debate. It does not enact any "particular economic theory," whether "paternalism" or "*laissez faire*." *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). Rather, it leaves such matters to political resolution, where "people of fundamentally differing views" may persuade their fellow citizens, form "a dominant opinion," and enact that opinion into law. *See Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). The courts, therefore, have "no power to impose upon the States their views of what constitutes wise economic [ ] policy."

Dandridge v. Williams, 397 U.S. 471, 486 (1970). To hold otherwise, allowing the substitution of one "preferred" policy view (here, that of Ben-Shahar and Schneider) over the view favored "by the people's representatives" (here, Craswell and Scheff's), would recommit "*Lochner*'s sin." *Epic Systems v. Lewis*, No. 16-285, 584 U.S. __, 2918WL2292444, at *16 (May 21, 2018).

C. Although Minerva agrees that promoting consumer welfare and enhancing commerce are legitimate state interests, it repeatedly asserts that the State has failed to introduce "evidence" showing that the butter-grading law is rationally related to those interests. Opening Br. 13–14, 18, 23–25. Strikingly, Minerva even rebukes the district court for "fail[ing] to engage" this contention—namely, that "no facts in the record" support the Department's rational-basis argument. Opening Br. 13. This is not so. The State introduced extensive testimony regarding the law's goals. *See supra* p. 29. In any event, Minerva's argument, bereft of any citations of Seventh Circuit cases, see Opening Br. 12–27, reflects a profound misunderstanding of how rational-basis review works. As this Court has repeatedly held, the State "does not need to present actual evidence" to pass rational basis. *Monarch*, 861 F.3d at 683. In fact, "[o]utside the realm of 'heightened scrutiny' there is . . . *never* a role for evidentiary proceedings." *Nat'l Paint*, 45 F.3d at 1127 (emphasis added). A legislative decision "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. So the district court was quite correct to hypothesize (without troubling over record cites) that "required butter grading would result in better informed consumers." SA.5.

Minerva next claims that the butter-grading law mandates the disclosure of only "the State's subjective" and "aesthetic [butter] preferences," not information actually relevant to buyers. Opening Br. 14, 16. In fact, the law reflects the detailed "standards and the best commercial practices" of the butter-making industry. USDA, Service and Regulatory Announcements No. 51, *supra*, at 2; *supra* pp. 8, 10 (Wisconsin grades modeled after USDA grades). Traditionally, butter that has scored well according to those industry grading standards has sold better, *supra* pp. 9–10, a fact that directly supports the conclusion that these standards actually track consumer preferences, *see* App.37 (Pederson); App.68–69 (Ingham); *compare Clark v. Dwyer*, 353 P.2d 941, 947–48 (Wash. 1960) (upholding grading system for apples based solely on color). For butter especially, this makes sense, given that, in contrast to other products, its "range of widely accepted characteristics" is "considerably narrower." App.69 (Ingham). Typically, consumers expect "a butter that has primarily sweet cream flavor as opposed to a whey base." App.69–70 (Ingham). Were a consumer to purchase butter expecting those characteristics only to discover an "extremely different product," the consumer might "feel deceived." App.68 (Ingham). By "vouch[ing] for or stat[ing] the characteristics of the product inside the packaging," butter grading improves the market. App.67 (Ingham).

Despite this, Minerva claims that "consumers don't understand what butter grading communicates," or at least that the Department presented "no evidence" about consumer knowledge. Opening Br. 17–18. Here again, Minerva mistakenly believes the Department needed to "present actual evidence" to satisfy rationality,

rather than simply set forth a reasonably conceivable set of supporting facts. *Monarch*, 861 F.3d at 683. It is perfectly reasonable to conclude that consumers will alter their purchasing behavior in light of a butter's grade, whether or not they understand the technical specifics of the grading process, since the grade comports with dominant consumer preferences. *Accord* Ben-Shahar & Schneider, *supra*, at 743 (simple letter-grade labels can be effective).

Minerva further attempts to obscure the legitimacy of Wisconsin's interest in butter quality with a parade of horribles: if the Court upheld the law here, it must then uphold "fashion standards," blanket "cuddly scale[s]," or pen "writeability preferences." Opening Br. 15. But this simply evades the basis for the State's interests in butter grading: disclosing relevant product information to consumers that is not discoverable before purchase, as well as furthering commerce through a standard language of trade, in an industry where such standards first had arisen solely through market forces. *See supra* p. 8. It is difficult to conceive of a similar plausible set of facts that would support the outlandish examples Minerva gives.[6]

Minerva does admit that mandated disclosures about "a product's healthfulness or safety for consumption" are valid, Opening Br. 14, 16, but it does not accept the State's broader interest in food quality more generally. The Supreme Court rejected precisely this cramped conception of the public good long ago. *See Hebe Co.*

[6] To say nothing of the potential First Amendment limitations on such government standards. *Accord Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017) (clothing is a "medi[um] of expression").

v. Shaw, 248 U.S. 297, 302–03 (1919). In *Hebe*, the Court upheld a prohibition on the sale of condensed milk made from skimmed milk, although it banned the sale of certain condensed-milk products that were both "wholesome" and accurately labeled. *Id.* The Court made clear that the "power of the legislature is not to be denied simply because some innocent articles or transactions may be found within the proscribed class" of a statute. *Id.* at 303. Rather, the Legislature may legitimately adopt a high-quality standard that renders unlawful the sale of "wholesome" products that fall below it. *See id.*; *accord Clark*, 353 P.2d at 945 (upholding apple-grading law and noting that "the police power" "extends . . . to the preservation and promotion of the public welfare").

Indeed, if Minerva's limited conception of truthful disclosures were correct, Opening Br. 14, a whole host of laws would fall. Many components of nutrition-labeling laws are only tangentially related to a product's healthfulness or safety. Consider, for example, a food item's percent daily values, the accuracy of which experts are constantly debating. *See, e.g.*, Tamara Duker Freuman, *When Nutrition Labels Lie*, U.S. News & World Report (Aug. 21, 2012, 12:50 PM), https://health.usnews.com/health-news/blogs/eat-run/2012/08/21/when-nutrition-labels-lie. What is more, many regard GMO-labeling laws, organic-labeling laws, and the like as lacking *any* known connection to health or safety whatsoever. *See*, *e.g.*, John J. Cohrssen & Henry I. Miller, *The USDA's Meaningless Organic Label*, 39 Reg. 24 (Spring 2016); Jane E. Brody, *Are G.M.O. Foods Safe?*, N.Y. Times (Apr. 23, 2018), https://www.nytimes.com/2018/04/23/well/eat/are-gmo-foods-safe.html (generally

"endors[ing] . . . honest labeling of all products," but explaining the "important way" that GMO-labeling "is very misleading"). A labeling law (such as a country-of-origin requirement) could very well pursue a patchwork of interests. *See Am. Meat Inst.,* 760 F.3d at 23. Though perhaps costly to comply with, such a law might provide product-safety notices, convey information about a product's quality, or perhaps simply respect some other consumer interest in knowing where purchases originate, Sheff, *supra*, at 476–77.

Minerva next argues that the butter-grading law is "capricious" because it does not lead to consistent grading results. Opening Br. 15, 19. The deposition of Pederson, the Department's butter grader, squarely refutes this. "[M]ost of the time," the Department's butter graders—who periodically audit the grades of non–Department licensed graders, *supra* p. 16—agree on how to score each element of a butter's grade, and only "sometimes" come to differing opinions about particular samples, and those disagreements (such as whether an attribute is "slight" or "very slight") are usually minor. App.45 (Pederson). This consistency in testing is unsurprising. The elements of a butter's grade—"[f]lavor, [b]ody, [c]olor, [s]alt, and [p]ackage"—"are peculiar characteristics of butter" and "may be regarded as objective." Wiest, *supra* at 134–36. And although there will inevitably be variance (depending on the grader and his expertise), limited subjective evaluation is tolerated without controversy in diverse areas of the law. *See, e.g.*, 5 U.S.C. § 2301(b) (merit-based hiring and pay for federal empoyees); *Miller v. California*, 413 U.S. 15, 33–34 (1973) (holding that States may prohibit obscenity, defined in part by "contemporary" community "standards").

Minerva also argues that, for it and other small butter makers, complying with the butter-grading law will prove prohibitively expensive, but this "mode of argument" does not "suffice under rational-basis review." *Ind. Petroleum*, 808 F.3d at 325. As explained above, Minerva produces its artisanal butter in small batches, each of which, under the butter-grading law, must be graded and appropriately labeled. *See supra* p. 19. This means Minerva must "predetermine" which batches are destined for Wisconsin, segregate those batches, grade them, and separately label them, a logistical problem compounded because Minerva sells its butter both "online" and "through regional distributors that cover multiple states." Dkt. 36:1–2 (Minerva President declaration). But even if these allegations were correct, Minerva's complaints about this individualized burden misunderstand rational-basis review. "[A]ll disclosure mandates impose some costs," Sheff, *supra*, at 484, which are by definition prohibitive to the producers at the economic margins. Regardless of whether Minerva happens to be one of those producers, this does not cause the butter-grading law somehow to cease to be rational. *Accord Hebe*, 248 U.S. at 301 (upholding ban on certain condensed-milk products although it would allegedly cause "the destruction of the plaintiffs' business"); *Clark*, 353 P.2d at 435 (change in apple-grading law which "operates to reduce the market value of [only some producers'] produce" survives rational-basis test). Indeed, many going-concern butter producers *do* comply with the law, *e.g.*, App.43 (Pederson), including "small plant" butter makers, *see* App.37, 39 (Pederson), "facilit[ies]" that make "artisan butter," *see* App.47–48 (Pederson), and plants that create butter with more unusual "strong feed"

or "cultured flavor[s]," App.43 (Pederson).[7] So even if *some* producers are prohibitively burdened, Wisconsin consumers may still readily purchase graded butter from a wide variety of quality butter makers—precisely the goal of the law. At bottom, Minerva is "ask[ing] whether the benefits" of its compliance with the law "justify the costs," which is "inevitably" an unreviewable question of whether the Legislature has "drawn th[is] line in the right place" with this provision. Sheff, *supra*, at 485.

Even if Minerva's individualized-burden tack could suffice under rational-basis review, it has not put forward enough evidence to prove the burden exists. A variety of facially reasonable methods exist for Minerva to comply with the law. *See Valenti*, 889 F.3d at 431–32 (presence of alternatives defeats rational-basis claim). The law allows one of Minerva's own employees to become a licensed grader, *supra* pp. 15–16, which would substantially reduce the cost of grading each "small batch." It may use the same Wisconsin-grade label for all of its products, since nothing appears to prohibit such labels in other States, Dkt.29:2, thereby removing those logistical hurdles. And Minerva could contract with another producer for grading, packaging, and labeling its butter for sale in Wisconsin. App.48 (Pederson).

Minerva next contends that the law forces "artisanal butters [ ] to associate themselves with commodity butter grades when [they] do[ ] not taste like or market [them]sel[ves] as commodity butter[s]," harming Minerva's brand equity. Opening Br. 16; Dkt.36:3 (declaration of Minerva's President). This type of "interference" cost from

[7] Khosrova lists seven "small-batch and artisanal butters" produced in Wisconsin, as of 2016. Khosrova, *supra*, at 317–21.

mandatory disclosure laws is nothing new, Craswell, *supra*, at 348, and so should not give the Court pause here. Besides, plenty of "artisan[al]" and "small batch" butters are lawfully sold in Wisconsin—and do well. App.47–48 (Pederson); Khosrova, *supra*, at 317–21; Jane Burns, *Amid a Rise in Artisanal Butter, State to Make It Easier to Get a Buttermaker License*, Wis. State J. (Sept. 4, 2010), https://host.madison.com/wsj/business/amid-a-rise-in-artisanal-butter-state-to-make-it/article_669feaa2-b837-11df-a91f-001cc4c002e0.html ("[S]ome of the state's larger butter producers are responding to a demand for [artisanal butter]."). Minerva has not shown how Wisconsin's law concretely harms these producers, and no harm is apparent.[8]

Finally, Minerva claims that the law encourages deception, not truthful disclosure, because suppliers may elect to label their butter with a lower grade than what it earns. Opening Br. 22–23. In truth, seller discretion to downgrade is a safety-valve feature of the law, protecting some smaller plants that produce butter with "a strong feed flavor or a cultured flavor." App.43 (Pederson). "The Grade A has a little more flexibility as far as attributes or flavors [including those two] that may not be desirable" for many consumers. App.44 (Pederson). It also protects sellers who expect the grades of future batches to vary and who might want to avoid the expense of constantly changing their packaging. The freedom to downgrade at the seller's discretion, in other words, "gives . . . a little more flexibility." App.44 (Pederson); *see*

[8] Whether the First Amendment protects these alleged "association" rights is not at issue, because Minerva has raised no such claim. *See Am. Meat Inst.*, 760 F.3d at 20 (upholding country-of-origin labeling law against First Amendment challenge).

Dandridge, 397 U.S. at 486–87 (rational-basis review does not require a law to pursue its ends at all costs).

II. The Butter Law Complies With The Equal Protection Clause For The Same Reasons That It Complies With The Due Process Clause

A. Minerva's next move is a familiar one: it raises an argument under the Equal Protection Clause that is virtually identical to its Due Process Clause theory. But as this Court has warned, "[i]t does no good to relabel [such an] attack as a claim under the equal protection clause," because "[t]hat provision, too, allows states great latitude in regulating the economy, provided the decision is not wacky." *Saukstelis*, 932 F.2d at 1173–74. In particular, unless the challenger can show that the statute "treats it[ ] . . . differently than others similarly situated and [that] the difference in treatment is not rationally related to a legitimate state interest," the law must stand. *Ind. Petroleum*, 808 F.3d at 322 (citation omitted). The rational-basis test applies identically under both clauses. As under the Due Process Clause, for example, the State "does not need to present actual evidence to support its proffered rationale for the law, which can be based on rational speculation unsupported by evidence or empirical data." *Monarch*, 861 F.3d at 683 (quotation marks omitted). Case law also recognizes that legislative line-drawing is inevitable. *Beach Commc'ns*, 508 U.S. at 315–16; *accord Pontarelli*, 929 F.2d at 341.

B. The lines drawn by the butter-grading law are rational. To conclude that the consumer-welfare and market-based reasons described above support a requirement that butter in Wisconsin be graded and labeled, *see supra* pp. 27–30, is to determine that those interests justify prohibiting butter that has *not* been graded

and is *not* labeled. And whether those interests might also justify mandatory grading laws for cheese, honey, or maple syrup, *see* Opening Br. 29, it is well settled that the "Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge*, 397 U.S. at 486–87. It does not even require it to address evils that "may be even greater." *Ry. Express Agency*, 336 U.S. at 110. Rather it "allows the State to regulate one step at a time," without running "the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked." *Clements v. Fashing*, 457 U.S. 957, 969–70 (1982) (citation omitted); *see also Beach Commc'ns*, 508 U.S. at 316. In any event, the Legislature could well have rationally speculated that, while personal palates for cheese, for example, are more diverse and idiosyncratic, popular perceptions of good and bad butter are more uniform and objective. *See* App.69 (Ingham). For these reasons, and the reasons discussed above, *supra* pp. 27–40, the butter-grading law does not deny equal protection.

C. Minerva responds by inappositely invoking *Cleburne*, 473 U.S. 432, a rare case in which the Supreme Court struck down a statute under the Equal Protection Clause because it drew unsupportable distinctions between the mentally disabled and others. As this Court made clear less than a year ago, "*City of Cleburne* [is] better understood as [an] extraordinary rather than exemplary rational-basis case[ ]." *Monarch*, 861 F.3d at 685. It holds only that "[i]f a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law

is that the people who are hurt by it happen to be irrationally hated or irrationally feared by a majority of voters, it is difficult to argue that the law is rational if 'rational' in this setting is to mean anything more than democratic preference." *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998); *see also Pontarelli*, 929 F.2d at 341 (rejecting equal-protection challenge to economic regulation and reading *Cleburne* as applying only to discrimination against "the mentally retarded").

Minerva's reliance on the Ninth Circuit's decision in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), which struck down a pest-control licensing law, is also misplaced. Minerva cites *Merrifield* in support of its argument that Wisconsin's grading law is irrational because it does not apply to "cheese, honey, and maple syrup," Opening Br. 29, but, as explained, Supreme Court precedent uniformly forecloses any kind of rational-basis tailoring analysis and plainly allows under-inclusivity. *Supra* p 41. In truth, as this Court explained in *Monarch*, *Merrifield* has more to do with whether economic protectionism for its own sake (or "incumbent protectionism") is a legitimate state interest. 861 F.3d at 684 n.4. This question divides several circuits. *Id.* (citing cases); *see also Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286–87 (2d Cir. 2015). As in *Monarch*, the Court here need not "weigh in" on that question "today," 861 F.3d at 684 n.4, because this case does not implicate it. The butter-grading law neither bans nor selectively burdens out-of-state butter producers from fully competing with butter makers in Wisconsin. *See infra* pp. 46–48. *All* butter makers who wish to sell in Wisconsin must submit to grading, either by the USDA or by a Wisconsin-licensed grader. *Supra* pp. 3, 11.

While Wisconsin's butter-grading law does reflect particular concern for dairy-product quality, as dairy is "one of the great industries" for which the State is known, *Sligh v. Kirkwood*, 237 U.S. 52, 61 (1915), that sort of "favoritism" (if it can be called that) is not at all forbidden under the Equal Protection Clause. When a State becomes known for a product, the State's name itself becomes part of the product's brand, making "[t]he protection of the state's reputation in foreign markets" appropriate. *See id.* at 61–62 ("[T]he raising of citrus fruits is one of the great industries of the state of Florida."); *Clark*, 353 P.2d at 946 ("[T]he protection of the reputation of Washington apples . . . is [a legitimate interest] which could properly be served in the exercise of the police power."); *Marshall v. Dep't of Agric. of Idaho*, 258 P. 171, 172 (Idaho 1927) (mandatory grading of Idaho potatoes); *accord Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) ("public concern" for a particular local industry is legitimate); *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 305–06 (1976) (per curiam) (law preserving "historic" character of New Orleans to "ensure [its] economic vitality" was "legitimate"). Wisconsin—"America's Dairyland"—has just such an interest here. *E.g.*, Wisconsin Historical Soc'y, *Icon Wisconsin: Exploring the State's Cultural Symbols*, https://www.wisconsinhistory.org/museum/exhibits/iconwisconsin/dairyland/index.asp (last visited June 12, 2018). It has been a national leader in the dairy industry since at least the mid-1920s. *See* Selitzer, *supra*, at 17, 57–58; *see generally id.* at 149 ("the first dairy school was established at the University of Wisconsin, at Madison"). The dairy industry contributes "$43.3 billion annually to Wisconsin's economy" and is "the [l]argest [s]egment of Wisconsin [a]griculture." Wis. Milk

Marketing Bd., *2017 Dairy Data: A Review of the Wisconsin Dairy Industry* 3, http://www.wisconsindairy.org/assets/images/pdf/WisconsinDairyData.pdf (last visited June 12, 2018). And Wisconsin ranks second in the nation in butter production, Burns, *supra*, second in milk production, and first in cheese production, Wis. Milk Marketing Bd., *supra*, at 6–7. It has every reason to preserve its reputation for excellence.

III. The Butter Law Complies With The Dormant Commerce Clause Because It Does Not Discriminate Against Out-Of-State Businesses Either On Its Face Or In Effect And Because It Has A Rational Basis

A. The Supreme Court has held that Congress' power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, contains a "dormant" or "negative" component, implicitly prohibiting a State from passing laws that bar "the free flow of interstate commerce," even if such laws do not conflict with a law of Congress. *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017) (citations omitted). This implied limitation "applies only to laws that *discriminate* against interstate commerce, either expressly or in practical effect." *Id.* If the law does not so discriminate, "there is no reason to require special justification" for it. *Id.* at 502; *see also Nat'l Paint*, 45 F.3d at 1132 ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause.").

This Court recognizes three categories of state law "for purposes of dormant Commerce Clause analysis." *Park Pet Shop*, 872 F.3d at 501. The first category covers "laws that explicitly discriminate against interstate commerce." *Id.*; *e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 619, 628 (1978) (New Jersey law banning

importation of waste generated or collected outside of New Jersey). These laws are "presumptively unconstitutional," *Park Pet Shop*, 872 F.3d at 501; *e.g.*, *City of Philadelphia,* 437 U.S. at 628 (invalidating the New Jersey law), and trigger strict scrutiny, *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 834 n.1 (7th Cir. 2017).

The second category comprises "[f]acially nondiscriminatory laws" that "have a discriminatory effect on interstate commerce," which in turn are subcategorized according to the strength of their effects. *Park Pet Shop*, 872 F.3d at 501. If the discriminatory effect is powerful—"acting as an embargo on interstate commerce without hindering intrastate sales"—the Court treats the law as if it were a first-category, facially discriminatory statute. *Id.* (citation omitted); *Nat'l Paint*, 45 F.3d at 1130. If the facially nondiscriminatory law imposes only "'mild disparate effects'" and has "'potential [] justifications'" that are "neutral" between interstate and intrastate commerce, then the Court balances the "burden on interstate commerce against the nature and strength of the state or local interest at stake," *Park Pet Shop*, 872 F.3d at 501 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)), all the while keeping keenly aware of the dangers of such an all-things-considered analysis, *see Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009) ("The judiciary lacks the time and the knowledge to be able to strike a fine balance" between a law's burdens and benefits under *Pike*). Importantly, the Court engages in this so-called "*Pike* balancing" only when the law imposes a *discriminatory* effect on interstate commerce, not when the law simply *affects* interstate commerce. *Park Pet Shop*, 872 F.3d at 502; *see also Nat'l Paint*, 45 F.3d at 1130–31.

The third and final category applies to laws not contained within the first two: nondiscriminatory economic regulations that simply *affect* interstate commerce "without any reallocation [of commerce] among jurisdictions" or, in other words, without "giv[ing] local firms any competitive advantage over those located elsewhere." *Park Pet Shop*, 872 F.3d at 502 (citations omitted). These laws comply with the dormant Commerce Clause if they satisfy "the normal rational-basis standard." *Id.* (citation omitted); *see Monarch*, 861 F.3d at 681.

B. Wisconsin's butter-grading law falls within the third category, since it "does not expressly discriminate against interstate commerce" or "have a disparate impact on out-of-state [butter makers]." *Park Pet Shop*, 872 F.3d at 502. And because this law passes the rational-basis test, *see supra* Parts I & II, it satisfies the Commerce Clause. *Park Pet Shop*, 872 F.3d at 502.

1. Nothing on the face of Wisconsin's butter-grading law targets out-of-state butter makers for disfavored treatment. To the contrary, the labeling requirement is entirely neutral: "*No person* shall sell . . . any butter at retail unless its label bears a statement of [its] grade," drawing no distinction between in-state and out-of-state persons. Wis. Admin. Code ATCP § 85.06(2) (emphasis added); Wis. Stat. § 97.176(1) ("It is unlawful to sell . . . any butter at retail unless it has been graded."). Removing all doubt, Section 97.176(5) explicitly imposes the same labeling requirements on both in-state and out-of-state butters: "Butter from outside of the state sold within the state shall be provided with a label . . . which indicates the grade in a manner equivalent to the requirements for butter manufactured and sold within the state."

The butter-grading specifications themselves likewise do not take into account the product's geographic source. *See* Wis. Admin. Code ATCP § 85.02; Wis. Stat. § 97.176(1).

The licensing requirements are also neutral. Any person, located either in state or out of state, may obtain a butter-grading license. *See* Wis. Stat. § 97.175(2) ("No person may act as a butter grader or a cheese grader without a license granted by the department"); Wis. Admin. Code ATCP § 85.07. All that an applicant must do is submit a written application, pass the licensing test, and pay a fee. Wis. Stat. § 97.175(2); Wis. Admin. Code ATCP § 85.07; *supra* pp. 14–15. Indeed, the Department has licensed out-of-state butter graders who grade butter in out-of-state creameries. App.39–40 (Pederson).

2. Likewise, the butter-grading law causes no disparate effects on interstate commerce ("powerful," "mild," or otherwise) and so does not fall within the second dormant Commerce Clause category. *Park Pet Shop*, 872 F.3d at 501 (citation omitted). Butter makers in Wisconsin "enjoy no competitive advantage over their counterparts outside the state": all must label their butter with the appropriate grade before selling at retail in Wisconsin. *Id.* at 502. This makes the statute indistinguishable from myriad other "state laws imposing product labeling requirements for in-state sales, even when the product is produced out-of-state." *Legato Vapors*, 847 F.3d at 832 (favorably citing *Nat'l Elec. Mfrs. Assoc. v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding light-bulb labeling law), and *Int'l Dairy Foods Assoc. v. Boggs*, 622 F.3d 628 (6th Cir. 2010) (upholding milk-labeling law)). Indeed,

in one important respect, the butter-grading law *favors* out-of-state sellers, because Department officials are not authorized to audit out-of-state plants selling Wisconsin-graded butter—even though they can, and do, audit plants in Wisconsin. App.35–36, 49 (Pederson). Hence the law plainly does not trigger *Pike* balancing. *Park Pet Shop*, 872 F.3d at 502.

It is true that, to obtain a license, an applicant must travel to an exam location within Wisconsin, but this requirement does not impose a *disparate* burden on interstate applicants. A straightforward application of *Park Pet Shop* shows why that is so. There, this Court upheld Chicago's ban on "puppy mill[s]," which would have the "plausible" effect of sending customers to breeders out of Chicago for pets. 872 F.3d at 502–03. While these customers would likely "prefer to patronize breeders located closer to the city," those breeders "are as likely to be located in nearby Wisconsin or Indiana as they are in suburban Chicago or downstate Illinois." *Id.* In other words, any burden was a function of relative differences in proximity, not jurisdiction. *See id.* The same effect is present here. A would-be grader who lives in Superior faces a greater burden than an applicant living just north of Chicago. Hence, as the district court held, the law at most "discriminates against long-distance commerce, which does not trigger *Pike* balancing." SA.7–8 (also holding that Minerva "waived this argument by failing to develop it").

3. That leaves the dormant Commerce Clause's third category, where the law plainly fits. The statute does not discriminate against out-of-state producers, either on its face or in effect. It merely "*affect[s]* [interstate] commerce without any

reallocation among jurisdictions," providing no "competitive advantage" to Wisconsinites. *Park Pet Shop*, 872 F.3d at 502 (emphasis added) (quoting *Nat'l Paint*, 45 F.3d at 1131). And since it satisfies the rational-basis test "with room to spare," it raises no dormant Commerce Clause problem. *Nat'l Paint*, 45 F.3d at 1130; *Park Pet Shop*, 872 F.3d at 503–04.

C. Minerva's counterarguments misread the butter-grading law and misunderstand the dormant Commerce Clause.

Minerva is incorrect that the butter-grading law disparately affects interstate commerce. Opening Br. 37–40. Observing that "many Wisconsin butter makers [ ] are not USDA-approved for selling their butter interstate," but that all "interstate butter makers like Minerva Dairy" allegedly must be, Minerva argues that the further costs of complying with Wisconsin's grading law disparately burden interstate commerce. Opening Br. 32–33. This argument fails at every step, starting with the premise. USDA plant inspections are in fact *not* a prerequisite to selling butter interstate; they are a prerequisite to selling *USDA-graded* butter interstate, but USDA grading is voluntary. *See* 7 C.F.R. § 58.122(a). If Minerva thinks the United States Code should not require interstate butter producers seeking a USDA grade to undergo costly plant inspections because it allegedly puts them at a competitive disadvantage with local sellers, it should take that objection up with Congress. Regardless, the disparate effect that Minerva alleges is not between in-state and out-of-state firms; it is between exclusively intrastate sellers and interstate sellers, a category that includes some Wisconsin butter firms, as Minerva notes. Opening Br. 32.

Minerva's argument that Wisconsin's law would fail this Circuit's *Pike*-balancing standard (if triggered) also fails. Even if the Court were to agree with Minerva that the butter-grading law does impose a "mild" disparate effect on interstate commerce, "the nature and strength" of the State's interest would justify that effect. *Park Pet Shop*, 872 F.3d at 501 (citation omitted). To begin, the burden on interstate sellers is exceedingly small. The costs of an out-of-state applicant's obtaining a grading license are far from prohibitive. The law does not prevent the shipment of butter into Wisconsin, as even ungraded butter can be shipped into and sold in the State, so long as it is not sold at retail. *Compare Granholm v. Heald*, 544 U.S. 460 (2005) (finding laws preventing the shipment of out-of-state wine from entering the State violated the dormant Commerce Clause). The law does not require Minerva Dairy to sell Wisconsin-graded and labeled batches outside Wisconsin, so retail sales of butter in the other 49 states remain undisturbed. *Compare Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 661–62, 669 (7th Cir. 2010) (holding that an Indiana law regulating transactions occurring outside the State violated the dormant Commerce Clause). Nor does the law apply to flavored butter, App.46–47 (Pederson), one of Minerva's main products, Dkt.36:1 (flavored butters comprise five of seven butters Minerva makes). Finally, the State's important interests in improving consumer welfare and enhancing commerce—interests furthered by disclosure laws of all stripes—outweigh any minor interstate burden. *See supra* Part I.

Finally, Minerva wrongly contends that the district court at least should have declared unconstitutional the Department's alleged pre–April 2017 "understanding"

of the butter-grading law, which supposedly did not allow out-of-state applicants to obtain grading licenses. SA.8. This argument has several problems. First, and most fundamentally, there is no record evidence that this pre–April 2017 "understanding" even existed. Minerva cites the testimony of the Department's prior director, but his statements do not move the needle. Asked if there had been a "written policy" excluding out-of-state butter graders before April 2017, he answered "no." App.111 (Haase). Asked if there had been an "unwritten policy," he responded that he could not "speak definitively" to that because the question addressed a matter before his tenure—that is, he did not know. He allowed only that there "*may* have been" such a "nonwritten understanding." App.111 (Haase) (emphasis added). Pressed on why the Department (hypothetically) might have had such a (possibly nonexistent) "understanding," the former director speculated that perhaps it would have been thought consistent with statute or administrative rule. App.111 (Haase). But of course the licensing laws are unambiguously neutral, forbidding the kind of facial discrimination that Minerva suspects used to be commonplace. The former director later made all of this clear: "Following the filing of this lawsuit . . . we confirmed the butter grading law allowed both in-state and out-of-state butter makers to become licensed Wisconsin butter graders and could grade butter in any location, so long as that location was identified on the application and license." Dkt.29:2 (Haase Declaration). Compounding these shortcomings, Minerva has been unable to point to even a single instance of the Department ever turning away an out-of-state applicant. Finally, even if Minerva had definitively shown that the alleged pre–April 2017

understanding existed, there is no reason to expect that the Department would ever return to that unlawful understanding. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC) Inc.*, 528 U.S. 167, 189 (2000); *accord Frank v. Walker*, 819 F.3d 384, 388 (7th Cir. 2016) (holding that the district court should evaluate constitutional challenges to Wisconsin's voter-ID regime in light of "how the state's system works *today*" (emphasis added)).[9]

CONCLUSION

This Court should affirm the district court's judgment.

[9] As of this writing, there are ten currently licensed out-of-state graders. Wis. Dep't of Agric., Trade, and Consumer Protection, *Butter Grader License Holders*, https://mydatcp.wi.gov/Home/ServiceDetails/8474e17b-fba1-e711-8100-0050568c4f26?Key=Services_Group (last visited June 13, 2018).

Dated, June 18, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 13,967 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: June 18, 2018

/s/ Ryan J. Walsh
RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2018, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: June 18, 2018

/s/ Ryan J. Walsh
RYAN J. WALSH