

STATE OF WISCONSIN

CIRCUIT COURT

LAFAYETTE COUNTY

For Official Use

SUPPLEMENTAL DECISION

Lisa Kivirist, Kriss Marion, and Dela Ends,

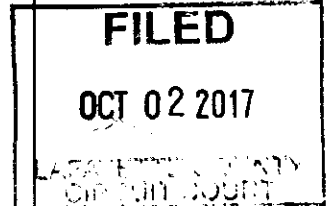
Plaintiffs,

Case No. 16-CV-06

v.

Wisconsin Department of Agriculture, Trade and  
Consumer Protection, and Ben Brancel, in his official  
Capacity as Secretary of the Wisconsin  
Department of Agriculture, Trade and Consumer Protection,

Defendants.



This matter is back before this Court on Plaintiff's request to extend its ruling from May to have larger and greater effect.

This Court's ruling in May addresses the claim, that as applied to these three Plaintiffs, this Court found the Wisconsin Statutory scheme to be unconstitutional as applied to them. This Court found that the application of the statutory scheme lacks a rationale basis to the stated objectives, and that the scheme violated the equal protection clause of both the U.S. Constitution and the Wisconsin State Constitution. I am not revisiting that Court decision today.

Plaintiffs, however, argue that the Court decision should have wider application and bring forward much case law to support their claim.

Accompanying the Supplemental Decision is the Final Order and Judgment in this matter.

Because the Plaintiffs have requested a clarification and seek to have this Court extend its oral decision of May 31, 2017 to similarly situated individuals.

In their request, Plaintiffs point to a recent Wisconsin Supreme Court case Gabler v. Crime Victims Rights Bd., 2017 WI 67, 897 N.W. 2d 384, for supporting the extension of this Court's determination that the statutory scheme that is the subject of this litigation is unconstitutional as applied to the Plaintiffs and to those individuals who are similarly situated. The

Wisconsin Supreme Court characterized its determination as a hybrid as an applied/facial claim. While the Plaintiff in the Gabler case sought to invalidate a statute as it was applied to him, but also as to all other judges, but otherwise not invalidating the statute as to others not so similarly situated other than circuit court judges. The burden on Plaintiff in Gabler was to show that the statutory scheme must be unconstitutional as applied “under any circumstances” to judges. (See Gabler)

This Court is satisfied that its ruling of May 31, 2017 should and can be extended to those other individuals that are similarly situated to the Plaintiffs. This Court finds that there is no set of circumstances where the State could rationally require a home baker(as they call themselves), who seeks to sell commercially non-hazardous baked goods, as that term was defined in the Court’s decision of May 31, 2017, that are self stable, and where (in Respondent counsels’ words) the bakers are of “good character”, or the “hygiene” of their kitchens are not in question, and it is undisputed that the bakers’ kitchens are clean. (See transcript from April 27, 2017, page 23.)

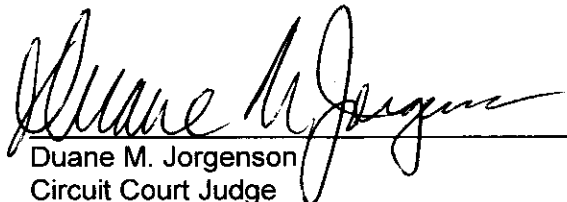
Simply put, bakers are food processors. [97.29(1)(g)]. Further, because the legislature has seen fit to exempt other similarly situated low volume food processors, they cannot subject low volume bakers of non-hazardous foods to a statutory scheme that on its face seeks to treat bakers of non-hazardous baked goods differently from other food processors, for all the same reasons this Court outlined in its decision of May 31, 2017.

For all reasons herein stated, the Court grants Plaintiffs’ request to extend this Court’s prohibition to those similarly situated as the Plaintiffs in this case.

This is a final order and judgment for purposes of appeal.

Dated: October 2, 2017

**BY THE COURT:**

  
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Duane M. Jorgenson  
Circuit Court Judge