

LISA KIVIRSIT, et al.,

DECISION

Plaintiff/Petitioner,

Case No. 16-CV-06

vs.

WISCONSIN DEPARTMENT OF AGRICULTURE,

Defendant/Respondent.

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Transcript of proceedings at the hearing of  
the above-entitled matter before the HON. DUANE M.  
JORGENSEN, Judicial Administrative District 5, Lafayette  
County Courthouse, 626 Main Street, Darlington, Wisconsin,  
commencing on May 31, 2017.

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Official Court Reporter  
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May 31, 2017

P R O C E E D I N G S

THE COURT: Lafayette County  
Circuit Court will be in session.

The matter before this Court is  
16-CV-06, **Lisa Kivirist, et al., v.**  
**Wisconsin Department of Agriculture.**

Can I have appearances, please.

MS. SMITH: Erica Smith for the  
Plaintiffs.

MR. BINDAS: Michael Bindas for  
the Plaintiffs, your Honor.

MR. JOHNSON-KARP: Assistant  
Attorneys' General Gabe Johnson-Karp and  
Karla Keckhaver for the Defendants, you  
Honor.

THE COURT: And, counsels, do we  
have any matters to take up before the  
Court --

MS. SMITH: No, your Honor.

THE COURT: Okay.

MR. JOHNSON-KARP: Nothing from  
Defense.

THE COURT: All right. Let me  
begin by complimenting counsel on the

1 handling of this case. It's certainly  
2 been well documented and well briefed, and  
3 I can't imagine that there's any more  
4 documentation that the Court could have  
5 been provided than the parties have  
6 provided. And, frankly, part of me is  
7 glad that there isn't more. But, I'm sure  
8 that appellate courts are used to that  
9 sort of thing, but the -- I'm reminded of  
10 the -- we were at a -- I was at a judicial  
11 conference and the -- a peer of mine  
12 commented that trial judges get to  
13 decide -- get six months to decide what  
14 the courts of appeals gets to decide in  
15 six months, so . . . Get a taste of what  
16 it's like to -- gives you a flavor of what  
17 it's like to be in this position.

18 So the facts before this Court  
19 are uncontested. The Plaintiffs, Lisa  
20 Kivirist -- and I hope I'm saying that  
21 right after all this time, and my  
22 apologies if I'm not -- Kriss Marion and  
23 Dela Ends are self-described home bakers  
24 who acknowledge having sold baked goods up  
25 until they became aware that their

1 practice of selling such baked goods is  
2 prohibited under Wisconsin Statute unless  
3 they were to obtain food establishment or  
4 food processing plant licenses. In order  
5 to qualify for such license, the  
6 Plaintiffs would be required to install a  
7 commercial grade kitchen, separate from  
8 their home kitchen.

9 Plaintiffs seek a declaratory  
10 judgment asserting that the Wisconsin  
11 Statute and regulatory scheme is  
12 unconstitutional as applied to them. They  
13 assert that a rational basis for the  
14 stated purpose of the statute does not  
15 exist; and, secondly, as applied to them,  
16 is a violation of equal protection.

17 As stated, this is an action for  
18 declaratory judgment filed by Plaintiffs.  
19 Both parties having filed competing  
20 motions for summary judgment, I'll just  
21 briefly state the legal standards  
22 governing declaratory judgment and summary  
23 judgment.

24 Declaratory judgment is an  
25 action brought under Wisconsin Statute

1           806.04. The purpose of which is to settle  
2           and to afford a party relief from  
3           uncertainty and insecurity with respect to  
4           rights, status and other legal relations.

5                   A trial court can exercise  
6           discretion to entertain and decide an  
7           election for declaratory judgment when  
8           there is a justifiable controversy, and  
9           the court can determine parties' legal  
10          rights with respect to a particular  
11          statute or ordinance, instrument, contract  
12          or franchise.

13                   Here both parties have moved for  
14          summary judgment under 802.08(2) of the  
15          Wisconsin Statute. The purpose of that  
16          statute is to determine whether a dispute  
17          can be resolved short of trial.

18                   If the complaint states a claim  
19          and the pleadings show the existence of  
20          factual issues, the court examines the  
21          moving party's affidavits or other  
22          evidence -- and in this case there was a  
23          substantial amount of that -- to determine  
24          whether that party has made a prima facie  
25          case for summary judgment.

1                   Summary judgment is appropriate  
2                   when there are no genuine issues of  
3                   material fact, and the moving party is  
4                   entitled to judgment as a matter of law.

5                   In the context of a summary  
6                   judgment motion, all inferences to be  
7                   drawn from the underlying facts contained  
8                   in the moving party's materials are viewed  
9                   in the light most favorable to the party  
10                  opposing the motion. Doubts as to the  
11                  existence of a genuine issue of material  
12                  fact are resolved against the moving  
13                  party, and the court takes evidentiary  
14                  facts in the record as true if not  
15                  contradicted by opposing proof.

16                  Here, both parties have moved  
17                  for summary judgment, and it is the  
18                  equivalent of a stipulation of facts  
19                  permitting the trial court to decide the  
20                  case on the legal issues. And that is, in  
21                  fact, the issue before the Court. There  
22                  are no disputed facts. The parties have  
23                  supplied affidavits, deposition  
24                  transcripts from witnesses, an abundance  
25                  of statutory material, legislative record

1 surrounding the statutory and regulatory  
2 scheme. Both parties maintain that no  
3 material issues of fact exist.

4 Then back to the matter before  
5 the Court.

6 The stated purpose for, in  
7 particular, first the overall statutory  
8 scheme of the Wisconsin Food Code, for  
9 lack of a better way of phrasing it, and  
10 specifically 97.29 and 97.30, to be  
11 applied to the Plaintiffs is the need to  
12 assure public safety. The rationale is  
13 that these regulations, specifically the  
14 licensing requirement and the requirement  
15 for a commercial kitchen, assumes --  
16 assures the consumers may purchase baked  
17 goods safely.

18 The Plaintiffs, self-described  
19 home bakers, argue that the application of  
20 the Wisconsin statutory scheme as applied  
21 to them bears no reasonable or substantial  
22 relation or connection to the  
23 Defendants -- in this case the  
24 government -- stated, or proffered,  
25 objective of the statute. Plaintiffs



1           contend that their home baked goods are  
2           safe. And the statutory scheme, as  
3           applied, does nothing to assure safety --  
4           to assure a safe consumer product, but  
5           serves only to act as a form of economic  
6           protectionism, protecting those larger,  
7           more established commercial food  
8           processors. Consequently, they argue the  
9           statute does not serve a legitimate  
10          government purpose. It is not rationally  
11          related to the stated government purpose.

12                         Further, Plaintiffs point to  
13          other food processors that, by statute,  
14          are exempted from the same restrictions  
15          from those Plaintiffs here complain.  
16          Plaintiffs assert that these other food  
17          processes are similarly situated as  
18          themselves, and Plaintiffs are treated in  
19          a disparate manner, without a rational  
20          basis for significant or differing  
21          treatment.

22                         In examining the merits of the  
23          parties' arguments in resolving the issues  
24          before the Court, this Court is very  
25          cognizant of the limited scope of judicial

1 review here. It is well settled, indeed,  
2 in reference to **State ex rel Grand Bazaar**  
3 **v. Milwaukee**, at 105 Wis. 2d 203, which  
4 characterizes it is a maxim of statutory  
5 construction that statutes enjoy a  
6 presumption of validity. See also **State**  
7 **ex rel Hammerill Paper Company v.**  
8 **LaPlante**, at 58 Wis. 2d 32.

9 Consequently, the party  
10 challenging an ordinance or statute bears  
11 the frequently insurmountable task of  
12 demonstrating, beyond a reasonable doubt,  
13 that the statute possesses no rational  
14 basis to any legitimate governmental  
15 objective. Again, see **Grand Bazaar v.**  
16 **Milwaukee**, cites **Vance v. Bradley**, 440  
17 U.S. 93, as well as **Clark Oil v. Tomah**, 30  
18 Wis. 2d 547. That rational basis standard  
19 forbids this Court from substituting its  
20 notion of public policy for that of the  
21 legislature who adopted the statutory  
22 scheme. I am reminded and recalled often  
23 in considering my decision in this case,  
24 the words of the late Justice Thurgood  
25 Marshall, when he stated that the

1 legislature has a right to adopt stupid  
2 laws. This Court cannot and does not  
3 evaluate the public policy issues that  
4 play here.

5 That said, that does not mean  
6 that this Court's evaluation is limited to  
7 form over substance. I return to the  
8 language in the *Grand Bazaar* case, where  
9 the case restated, *Schweiker*, which is  
10 S-C-H-W-E-I-K-E-R, *v. Wilson*, at 450 U.S.  
11 221, and *United States Railroad Retirement*  
12 *Board v. Fritz*, at 449 U.S. 166, stating  
13 the rational basis standard of review is  
14 not a toothless one.

15 The objective standard, under  
16 the rational basis test, is whether the  
17 statute is rationally related to the  
18 public health, safety, morals or general  
19 welfare. There must be a reasonable and  
20 substantial connection between the assumed  
21 purpose or stated purpose of the statute,  
22 and the end to be accomplished. Again,  
23 see *Grand Bazaar*.

24 The stated purpose of the Food  
25 Code is to assure public health and safety

1 when consumers purchase foods produced, in  
2 this case, by a food processor.

3 Before the Court engages in its  
4 analysis, this Court briefly reviews, as  
5 did the Court in **Grand Bazaar**, the issue  
6 raised by Plaintiffs regarding the  
7 assertions regarding the anticompetitive  
8 claims made here. The record is, in fact,  
9 replete with special interests at play.  
10 The level of special interest influence  
11 here, which is undeniable, gives the  
12 Court -- and the Court, as the Court did  
13 in **Grand Bazaar**, some pause to step back  
14 and view the stated purpose of the  
15 legislation and its application towards  
16 these Defendants and others like  
17 Plaintiffs with some skepticism. That  
18 skepticism is enhanced when the record  
19 shows that within the statutory scheme  
20 itself, there is an exemption carved out  
21 that allows one of those very special  
22 interests groups to produce for sale,  
23 directly to the consumer, some 400,000  
24 cream puffs at the State Fair where the  
25 duration of that exemption corresponds

1 with the duration of the State Fair.  
2 Those same proponents of that current  
3 statutory scheme are allowed to produce  
4 those 400,000 cream puffs, which, by  
5 evidence of this Court's file, those cream  
6 puffs would be potentially hazardous food  
7 as that term has been used in this case;  
8 and specifically where Dr. Ingraham, in  
9 his deposition, talked about the adding of  
10 cream fillings after the baking process,  
11 making the processing of those foods as  
12 being potentially hazardous. That  
13 nonprofit arm of that special interest  
14 that supports the Wisconsin Food Code in  
15 its current form, opposes -- and opposes  
16 any changes to that Code, can then use a  
17 carved out exemption to profit, and then  
18 use those profits to support efforts not  
19 to change the Code and keeping in mind as  
20 well, that kitchen itself that is used is,  
21 by the statutory definition, unlicensed.  
22 And they can then use those profits to  
23 support efforts not to change the Code  
24 speaks loudly to the level of special  
25 interests at play here. It gives great

1           credence to the claims by the Plaintiffs  
2           of the force of economic protectionism at  
3           play here.

4                        To reiterate, this is not,  
5           however, not determinative. But it does,  
6           under the case law, cause this Court to  
7           view the stated purpose of the statutory  
8           scheme with some skepticism.

9                        With that skepticism in mind,  
10          this Court then looks to the statutory  
11          scheme as it applies to these Plaintiffs,  
12          though the Court cannot simply look at  
13          whether this Court views the statutory  
14          scheme unwise or even in some subjective  
15          sense unfair. With a healthy skepticism  
16          mentioned above, this Court looks at  
17          whether the statutory scheme is rationally  
18          related to public health, safety, morals  
19          or general welfare. Simply stating it is  
20          not sufficient. Stated another way, if  
21          the stated purpose is manifested, that  
22          there is no substantial connection between  
23          the assumed or stated purpose of the  
24          statute and the end to be accomplished, it  
25          is unenforceable.

1                   Is there -- is there a record of  
2                   any public health, safety, morals or  
3                   general welfare problem or concern that  
4                   the application of this statute addresses  
5                   as to the Plaintiffs? And where the  
6                   application to these Plaintiffs, and  
7                   others like them, the statutory scheme, in  
8                   this Court's view, unravels.

9                   On the issue of safety, the  
10                  Court is presented with two  
11                  highly-qualified, distinguished experts,  
12                  both of remarkable qualifications;  
13                  Dr. Steve Ingraham and Dr. Thomas  
14                  Montville. And the Court has reviewed  
15                  both of their depositions and their  
16                  reports in detail. Both agree that baked  
17                  goods, subject to the conventional baking  
18                  process, renders baked goods safe and  
19                  nonhazardous.

20                  The Defendants argue that the  
21                  potential safety hazards that exist in a  
22                  home-bakers' kitchen are so substantial,  
23                  that it justifies licensing and commercial  
24                  kitchens to be used by all bakers who seek  
25                  to sell to consumers directly. Through

1 the depositions of Dr. Ingraham, these  
2 health and safety concerns boil down to  
3 the following, according to Dr. Ingraham:

4 The sprinkling or potentially  
5 cross-contamination of contaminated flour,  
6 post baking or sprinkling of contaminated  
7 spices;

8 Contamination of icing or  
9 fillings or other potentially hazardous  
10 toppings or fillings that a baker may add  
11 after the baking process such as the cream  
12 in the cream puff post baking. And these  
13 items also may include eggs or dairy  
14 product ingredients;

15 Next, allergen risks. That the  
16 products, once baked, could be  
17 cross-contaminated by other potential  
18 allergens;

19 Finally, the contamination of  
20 the norovirus.

21 Then, general sanitation and  
22 cleanliness, although the Defendants  
23 concede in oral argument that they have no  
24 issue and have no concern over the  
25 cleanliness or sanitation of the



1 Plaintiffs' kitchen.

2 As the record clearly shows,  
3 Wisconsin and New Jersey, apparently are  
4 the only two states that impose a complete  
5 ban on the sale of home-baked goods not  
6 processed under a license and in a  
7 commercial kitchen. That means, by logic,  
8 there are 48 states that permit such  
9 activity to varying degrees. For this  
10 statute to rationally relate to its stated  
11 objection, there must then be logically  
12 significant evidence that shows that the  
13 safety concerns, as stated above, are of a  
14 concern and a real problem that requires  
15 the intervention of the State.

16 Dr. Ingraham, in his deposition,  
17 testified as to the potential. Here's the  
18 rub: There's virtually no evidence of or  
19 incidences of cross-contamination by  
20 contaminated flour or contaminated spices.  
21 There is no evidence of any incidences of  
22 food-borne illnesses or outbreaks caused  
23 by potentially hazardous toppings,  
24 fillings or other processing after the  
25 baking of goods.

1 Allergen risks, the Court  
2 agrees, present a risk. But licensing and  
3 the requirement of a commercial kitchen in  
4 no way serves, in this Court's view, to  
5 protect a would-be consumer of a baked  
6 good from such hazard. That is evidenced  
7 by the fact that commercial bakers are not  
8 required to list the ingredients before  
9 they sell them. That logically tells the  
10 Court that the safety concern is not  
11 served in any rational way by the  
12 statutory scheme when it comes to  
13 allergens.

14 Finally, we come to the stated  
15 concern over -- over norovirus. Again,  
16 Dr. Ingraham speaks of the potential or  
17 theoretical safety concern. There is no  
18 evidence of any norovirus outbreaks caused  
19 by home-baked goods. But the deposition  
20 that this Court's -- but the deposition  
21 testimony that made this Court wince was  
22 Dr. Montville's testimony when he, during  
23 deposition, testified that the real  
24 probability of norovirus contamination was  
25 somewhere between one and eight billion

1 and one -- or one in 13 billion. While  
2 there seems to be some dispute as to the  
3 facts of that, the Court considers that  
4 not to be a meaningful issue.

5 These factual assertions by the  
6 Plaintiffs are not countered by Defendants  
7 indeed accepted, as the parties stipulated  
8 that there is no material issue of fact in  
9 dispute.

10 With that being the evidence  
11 that is uncontested here, I considered the  
12 language of our Wisconsin Supreme Court  
13 case in **Ferdon, F-E-R-D-O-N, v. Wisconsin**  
14 **Patients Comp. Fund**, at 284 Wis. 2d 573.  
15 To pass the rational basis test  
16 legislation needs, "more than a  
17 speculative tendency as the means for  
18 furthering the valid legislative purpose."  
19 This Court must ask itself, as the Supreme  
20 Court did in **Grand Bazaar**, at what point  
21 does the proffered concern become  
22 fanciful, and at what point does it become  
23 real. So the State's statutory scheme, as  
24 adopted and as applied to the Plaintiffs,  
25 seeks to eliminate a problem that has been

1           neither noticed, nor shown.  Simply put,  
2           there is a clear evidentiary absence  
3           regarding any public health, safety,  
4           morals or general welfare problem or  
5           concern.  Uncontested is the assertion by  
6           Dr. Montville in his January 6th, 2017,  
7           deposition, where he simply states, "baked  
8           goods are not a microbiological hazard."  
9           The question posed was:

10                        So is it your opinion that baked  
11           goods are never a microbiological hazard?

12                        Answer:  It is my opinion that I  
13           am unaware that there are -- that -- I am  
14           unaware of there ever having been a  
15           microbiological hazard that's caused a  
16           food-borne outbreak.

17                        The answer in reference to the  
18           consumption of baked goods.  That's found  
19           on page 13 of his deposition from the  
20           January 6th, 2017 date.

21                        Because the statutory scheme  
22           does not have a rational connection with  
23           the stated objective of the statute, its  
24           application to the Plaintiffs has what the  
25           Court views as the unintended consequence

1 of economic protectionism. Clearly, these  
2 regulations burden the Plaintiffs without  
3 any corresponding public benefit.  
4 Clearly, not a legitimate exercise of  
5 governmental authority. This is not the  
6 only problem the statutory scheme has  
7 applied to these Plaintiffs.

8 As this Court understands, two  
9 of the Plaintiffs operate and maintain a  
10 bed and breakfast, something that this  
11 Court alluded to in oral arguments, as a  
12 bed and breakfast operator, these  
13 Plaintiffs can, in their noncommercial  
14 kitchens, make a batch, say, of ten loaves  
15 of bread. Those ten loaves of bread can  
16 be part of the same batch, use the same  
17 contaminated or uncontaminated flour  
18 purchased from the same flour supplier  
19 that the bakery three blocks down the road  
20 or down the street uses, use the same  
21 water, use the same yeast, spices,  
22 ingredients, use the same butter, milk or  
23 other bakery supplies. All these supplies  
24 stored in the same manner, surrounded --  
25 using the same utensils -- or using the

1 same -- stored in the same surroundings,  
2 using the same utensils, baked in the same  
3 oven, baked at the same temperature for  
4 the same length of time at the same time.  
5 But my experience when my mother baked  
6 bread was that she did it quite -- which  
7 she did quite often as I was growing up --  
8 that meant 350 degrees for about 20 to  
9 25 minutes until golden brown, exceeding  
10 substantially the 170 degrees for  
11 11 minutes required to kill any harmful  
12 bacteria or any harmful microbiological  
13 organisms.

14 Of those ten loaves, five can  
15 legally be served to the bed and breakfast  
16 customers, but under the law, the  
17 remaining five could not be sold to those  
18 same customers who wish to take them home  
19 and consume them at their home over their  
20 dining room table. Herein lies the  
21 layman's view of the irrationality of the  
22 statutory scheme as that scheme is applied  
23 to the Plaintiffs and others like them.

24 Having dealt with the issue of  
25 rational basis, I turn to the assertion

1           that the Wisconsin statutory scheme for  
2           the regulating of food processing and  
3           retail food establishments or food  
4           processing facilities, violates equal  
5           protection under both State -- under both  
6           the State and the U.S. Constitution as  
7           applied to these Plaintiffs. Plaintiffs  
8           argue that they are part of a discreet  
9           group and class and that they are treated  
10          disparately from the other members of the  
11          same group.

12                           Plaintiff correctly points to  
13          food processors of high acid canned goods,  
14          apple cider, both pasteurized and  
15          unpasteurized, popcorn, maple syrup,  
16          sorghum, honey, eggs and produce. That  
17          all process -- all processed foods, some  
18          as small producers and others of those  
19          producers enjoy an exemption from the  
20          requirement of the retail food  
21          establishment license or a food processing  
22          license and the maintaining or the use of  
23          a commercial grade kitchen as a  
24          requirement to engage in the processing or  
25          preparation of these foods and then the

1 selling of those foods for a profit  
2 directly to the consumer.

3 Defendant argues that there is  
4 no distinct class or group, and,  
5 therefore, the argument that the statute  
6 is not susceptible to an equal protection  
7 argument.

8 Frankly, the Court finds that  
9 this analysis of these arguments to be  
10 rather straightforward. One only needs to  
11 turn to the statute at 97.29(1)(g), which  
12 it defines food processors. "Food  
13 processing" means the manufacturing or the  
14 preparation of foods for sale through the  
15 process of canning, extracting,  
16 fermenting, distilling, pickling,  
17 freezing, baking, drying, smoking,  
18 grinding, cutting, fixing, coating,  
19 stuffing, packing, bottling or packaging  
20 or through any other treatment or  
21 preservation process.

22 The Court concludes that this  
23 defines the class. Class is further  
24 defined by a set of citizens who engage or  
25 seek to engage in such an activity that



1           either has a low volume of sales, or, by  
2           the very nature, tends to be a low-volume,  
3           high-margin enterprise.

4                         Because this is not a case of a  
5           class of one, the Court must then be  
6           guided by the findings of **Merrifield v.**  
7           **Lockyer** -- Merrifield is  
8           M-E-R-R-I-F-I-E-L-D -- Lockyer is  
9           L-O-C-K-Y-E-R -- at 547 F.3d 978. Also  
10          **United States v. Moore**, at 543 F.3d 891.  
11          And **Marcavage, M-A-R-C-A-V-A-G-E v. City**  
12          **of Chicago**. That's found at 659 F.3d 626.  
13          That's a Seventh Circuit case.

14                         Here, we have the same -- have  
15          some seven types of low-volume sales food  
16          processors that sell high acid canned  
17          goods, apple cider, both pasteurized and  
18          unpasteurized, popcorn, maple syrup,  
19          sorghum, honey, eggs and produce, that are  
20          all provided exemptions from food  
21          processing requirements and the  
22          requirements of being -- and the  
23          requirement to have a commercial kitchen  
24          to process the foods that they seek to  
25          sell directly to the consumer. This

1 exemption -- those exemptions are built  
2 into the statutory scheme. These food  
3 processors are alike in almost all  
4 relevant respects. Again, see **Merrifield**  
5 and **Marcavage**. These are alike in the  
6 following ways:

7                   They are business  
8 enterprises seeking to make a profit.

9                   They are food processors as  
10 that term is defined under 97.29(1)(g).

11                   They are doing their food  
12 processing outside of a  
13 commercial-licensed kitchen or seeking to  
14 do so.

15                   Each are processing foods  
16 that are shelf stable and do not need  
17 refrigeration.

18                   Here eggs and produce may  
19 need refrigeration to prolong their useful  
20 life but not as a condition of sale.

21                   Fifth, they seek to sell their  
22 foods directly to consumers; and,

23                   They are generally considered to  
24 be low-volume sellers of food with -- with  
25 yearly sales that generally tend to be

1 low; although there are some exceptions to  
2 that that really don't -- are of no  
3 concern here.

4 This group of food processors,  
5 who in which I would include the  
6 Plaintiffs, as they aspire to do the same,  
7 certainly make up a distinct group of  
8 similarly situated individuals. This is  
9 in fact -- this is a fact that could not  
10 be plainer. Certainly when this Court  
11 applies the same analysis as that applied  
12 in the **Merrifield** case, we do have a  
13 distinct group.

14 Moving then, having established  
15 that, we move to the second prong of the  
16 equal protection analysis; whether the law  
17 treats the class, being the Plaintiffs and  
18 others like them, significantly  
19 differently than others similarly  
20 situated. The analysis here is  
21 straightforward as well. Bakers, in this  
22 particular case, home bakers as they call  
23 themselves, were selling a low volume of  
24 sales, are clearly treated differently  
25 from similarly situated low-volume food

1 processors. Processors that process and  
2 sell the various products and foods that  
3 I've already identified a couple of times.

4 Plaintiffs, and others like them  
5 here, are greatly burdened under the  
6 statutory scheme as it exists. Where the  
7 other food processors mentioned are given  
8 an exemption, in essence, they're given a  
9 pass on licensing, inspection and the  
10 commercial kitchen requirements. I find,  
11 based upon that, the second prong is  
12 satisfied as well.

13 That leads us to the third  
14 prong. Under the -- I use as my guide  
15 here, the ***Metro Association v. City of***  
16 ***Milwaukee***, at 332 Wis. 2d 85. The  
17 question there is whether the disparate  
18 treatment lacks a rational basis. Because  
19 I have already reviewed in some detail the  
20 lack, as I see it, of rational basis to  
21 the statutory scheme, I will not repeat  
22 myself, nor the rationale of the Court  
23 other than to indicate that it applies  
24 here. I will simply state there is no  
25 rational basis for exempting those food

1 processors mentioned but not exempting  
2 Plaintiffs and any others like them. All  
3 evidence presented by both parties shows  
4 this Court that these exempted, in fact --  
5 that those food processors exempted, in  
6 fact, have a higher probability of being a  
7 threat to food safety than the Plaintiffs'  
8 activities of home baking and selling to  
9 the -- to the consumer directly.

10 Therefore, the Court concurs  
11 with Plaintiffs. Based upon the file  
12 before the Court and reasons stated  
13 herein, it is the determination of this  
14 Court that the application of the  
15 provisions of the Wisconsin Food Code that  
16 requires these Plaintiffs to be licensed  
17 and maintain a commercial kitchen as that  
18 requirement is set forth in the Wisconsin  
19 statutory scheme is unconstitutional under  
20 both the Wisconsin and U.S. Constitution  
21 as it is applied to those stated  
22 provisions of the Wisconsin Code as it  
23 bears no rational connection -- no  
24 rational or substantial or reasonable  
25 connection with the statute -- statutory

1           purpose of the statutory scheme.

2                           Further, for the reasons  
3           stated and based upon the file before the  
4           Court, this Court determines that the  
5           application of the statutory scheme also  
6           violates equal protection and guarantees  
7           under both the U.S. Constitution and the  
8           Wisconsin Constitution as that statutory  
9           scheme applies to these Plaintiffs.

10                           Based upon that determination,  
11           this Court enjoins any enforcement of a  
12           licensing requirement or the requirement  
13           of a licensed commercial kitchen for the  
14           processing by these Plaintiffs of baked  
15           goods for the sale to consumers directly.  
16           Neither shall be subjected to any  
17           penalties under the statutory scheme as it  
18           now exists for the direct sale of their  
19           home-baked goods directly to any consumer  
20           wishing to purchase them, provided that  
21           those baked goods are, as has been termed  
22           in this action, nonhazardous and as that  
23           term has been used in this action; that  
24           they are shelf stable; and they are not in  
25           need of refrigeration from the time of

1                   baking to the time of sale.

2                   This is the order of the Court.

3                   Any questions, Counsel?

4                   MS. SMITH: No, your Honor.

5                   MR. JOHNSON-KARP: Your Honor,  
6                   just to be clear, this -- your ruling  
7                   applies only to these Plaintiffs; is that  
8                   correct?

9                   THE COURT: That's the  
10                  application. It's an application -- the  
11                  application was as applied to these  
12                  Plaintiffs. That's what's before the  
13                  Court.

14                  MR. JOHNSON-KARP: Your Honor,  
15                  Defendants would ask this Court to stay  
16                  its decision pending appeal. This Court  
17                  has, within its discretion, the authority  
18                  to stay an order in a case like this  
19                  holding that a legislative and regulatory  
20                  scheme violates the Constitution. I think  
21                  the factors in favor of a stay support the  
22                  Court's exercise of discretion here. The  
23                  Plaintiffs do not face any substantial  
24                  harm if this Court were to stay its order,  
25                  whereas -- as well as the public -- face

1 the possibility of irreparable harm if any  
2 of these baked goods were to make somebody  
3 sick.

4 MS. SMITH: Your Honor, we would  
5 strenuously oppose that request.  
6 Plaintiffs have waited a year and a half  
7 in this case for resolution. And I am not  
8 aware of any similar case where such a  
9 stay was granted.

10 THE COURT: Well, I'm -- I will  
11 tell you that I'm inclined not to grant a  
12 stay. I will, if the parties wish, grant  
13 a hearing so I can consider what the legal  
14 standards are for granting the stay. But  
15 my inclination, because, as indicated,  
16 this is a decision that is, as applied, to  
17 these three Plaintiffs. And I think, as  
18 I've made clear in my decision, I don't  
19 see that there is a rational basis for the  
20 statutory scheme. And I, frankly, don't  
21 see any -- I haven't seen any evidence of  
22 any real risk of harm to the public in  
23 general. That's what I base my decision  
24 on.

25 MR. JOHNSON-KARP: Just to be



1 clear, your Honor. Is that a denial of  
2 the request for a stay, or would the Court  
3 accept briefing on the matter?

4 THE COURT: I will accept  
5 briefing on the matter. I certainly --  
6 why not? We've had briefing on everything  
7 else.

8 MR. JOHNSON-KARP: Thank you,  
9 your Honor.

10 THE COURT: The -- I take it,  
11 Counsel, that you would be anticipating  
12 filing that brief. Do you want it  
13 scheduled now, or do you simply want to  
14 contact my judicial assistant to make  
15 arrangements for that?

16 MR. JOHNSON-KARP: We could have  
17 something to the Court within a week, your  
18 Honor. I don't expect a long motion and  
19 brief.

20 THE COURT: Okay. Response to  
21 that, Counsel?

22 MS. SMITH: We would ask a week  
23 to respond, your Honor.

24 THE COURT: Okay. So we could  
25 have Defendants' brief by June 9, response

1 by the 16th?

2 MR. JOHNSON-KARP: Yes, your  
3 Honor.

4 THE COURT: And, Madame Clerk,  
5 can you find us a half hour with a  
6 shoehorn?

7 MR. JOHNSON-KARP: Your Honor --

8 THE COURT: Sure.

9 MR. JOHNSON-KARP: -- for the  
10 ease of the Court and the parties,  
11 Defendants wouldn't need a hearing unless  
12 Plaintiffs are interested.

13 MS. SMITH: We don't need a  
14 hearing either, your Honor.

15 THE COURT: Okay.

16 MS. SMITH: But, your Honor, may  
17 I request -- can we actually -- I was  
18 scheduled to be away from June 11th to  
19 June 17th. Would it be all right if I  
20 gave it to you the week after that?

21 THE COURT: Okay.

22 MS. SMITH: Thank you, your  
23 Honor.

24 THE COURT: Make it the --  
25 you're (indicating) by the 9th; you're by

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the 23rd.

MS. SMITH: That works. Thank  
you, your Honor.

THE COURT: Okay. And I would  
anticipate that I would have a decision  
within a relatively short period of time  
as well.

MR. JOHNSON-KARP: Thank you,  
your Honor.

THE COURT: Anything else?

MS. SMITH: No, your Honor.

THE COURT: Okay. Very well.  
Judgment's entered. We're in recess.

(End of proceedings.)

\* \* \*

1 STATE OF WISCONSIN )  
 )  
2 COUNTY OF LAFAYETTE )

3

4 I, Margaret Ciembronowicz, Official Court Reporter  
5 in and for the State of Illinois, Lafayette County, do  
6 hereby certify that on May 31, 2017; I reported the  
7 proceedings had in the above-entitled matter before the  
8 Honorable Duane M. Jorgenson, and that the same is a true,  
9 correct, and complete transcription of said proceedings held  
10 on said date.

11 Dated this 5th day of June, 2017.

12

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14 \_\_\_\_\_  
MARGARET CIEMBRONOWICZ  
15 Official Court Reporter  
State of Wisconsin

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