

**State of North Dakota  
County of Burleigh**

**In District Court  
South Central Judicial District**

Danielle Mickelson, Lydia Gessele, Lonnie  
Thompson, Summer Joy Peterson, and Naina  
Agarwal,

Plaintiffs,

v.

The North Dakota Department of Health, the  
Health Council of the North Dakota Department  
of Health, and Julie Wagendorf in her official  
capacity as the Food and Lodging Director of the  
North Dakota Department of Health,

Defendants.

Case No. 08-2020-CV-01179

**AMENDED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF, NOTICE  
OF APPEAL, AND  
SPECIFICATIONS OF ERROR**

COME NOW PLAINTIFFS, Danielle Mickelson, Lydia Gessele, Lonnie Thompson, Summer Joy Peterson, and Naina Agarwal, by and through counsel, to bring this suit against Defendants, the North Dakota Department of Health, the Health Council of the North Dakota Department of Health, and Julie Wagendorf in her official capacity as the Food and Lodging Director of the North Dakota Department of Health (collectively, “Defendants” or “the Department”).

**INTRODUCTION**

[¶1] Plaintiffs bring this suit to protect their ability to continue selling homemade foods to their eager customers. The North Dakota Legislature passed a law in 2017 allowing for North Dakotans to sell almost any homemade food directly to consumers. Since then, Plaintiffs and others have been selling homemade foods, like soups, hot meals, and canned vegetables, to support their families and farms. The Department, however, has now passed administrative rules

that directly conflict with the 2017 law by banning the sale of many homemade foods, including those sold by Plaintiffs. As a result, the rules threaten Plaintiffs' livelihoods and the livelihoods of hundreds of others across the state. Plaintiffs request that this Court declare that these rules are invalid, or in the alternative, unconstitutional.

[¶2] In 2017, the Legislature passed the Cottage Food Act ("Act"), codified at N.D. Cent. Code §§ 23-09.5-01 to -02. The Act was intended to allow North Dakotans to sell all home-prepared foods, meals, and drinks ("cottage food products") directly to consumers, with the exception of non-poultry meats. The Department, however, repeatedly tried to persuade the Legislature to restrict which foods could be sold. When the Legislature refused, the Department adopted administrative rules that ban many cottage foods, including most foods requiring refrigeration, all poultry products (except raw poultry and some eggs), and many canned foods. *See* N.D. Admin. Code § 33-33-10-02(1)-(3).

[¶3] The rules went into effect on January 1, 2020. In adopting rules that conflicted with the Act and the Legislature's intent, the Department exceeded its authority. This Court should declare these rules invalid.

[¶4] Additionally, the rules violate the North Dakota Constitution's guarantee of Equal Protection by treating people who are alike in all relevant aspects differently. The rules arbitrarily ban homemade food producers from selling three types of foods, even though these foods are just as safe as—if not safer than—the permitted foods. First, the rules ban the sale of most perishable foods, while allowing others. For example, the rules allow a home baker to sell cheesecake, but ban a home pizza maker from selling cheese pizza. Second, the rules ban all poultry products except raw poultry. This allows a poultry farmer to sell raw and uninspected poultry, while banning a home cook from selling chicken noodle soup. Third, the rules ban the

sale of many canned vegetables, preventing a vegetable farmer from even selling home-canned radishes. These distinctions are irrational and unconstitutional.

[¶5] Finally, the Department’s rules violate the Equal Protection guarantee in another way: through a charitable exemption. Although the Department bans the sale of most homemade perishable foods and poultry products and all low-acid canned goods, it exempts homemade food producers from these rules as long as they are selling at a charitable or “public spirited” event. This exemption allows a home cook to sell chicken noodle soup to support charity, but a home cook cannot sell the same chicken noodle soup to support her family. This disparate treatment is not only unfair, but also unconstitutional.

[¶6] Accordingly, Plaintiffs request that the Court declare that the Department’s rules conflict with the Act and are thus beyond the scope of the Department’s authority to adopt. Alternatively, this Court should declare that the rules are unconstitutional under the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution.

### **JURISDICTION**

[¶7] Plaintiffs bring this lawsuit pursuant to the North Dakota Declaratory Judgment Act. *See* N.D. Cent. Code § 32-23-01. Plaintiffs seek a declaration that the Department’s rules, specifically, N.D. Admin. Code § 33-33-10-02(1)-(3), exceed the agency’s authority or violate the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution.<sup>1</sup> Plaintiffs also seek injunctive relief to protect themselves from the enforcement of

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<sup>1</sup> Plaintiffs challenge N.D. Admin. Code § 33-33-10-02(1) only to the extent that it bans poultry products that are not uninspected raw poultry or shell eggs. Plaintiffs do not challenge the rule’s prohibition against “[m]eat, wild game, fish, seafood, or shellfish, or products containing such items.” N.D. Admin. Code § 33-33-10-02(1).

the Department's rules. *See* N.D. Cent. Code §§ 32-06-01, 32-06-02. This Court has original jurisdiction to decide this case pursuant to N.D. Cent. Code § 27-05-06(1)-(3).

[¶8] In the alternative, and only if the Court deems it necessary, the Court may construe this action as a notice of appeal and specifications or error regarding the Department's rulemaking pursuant to the Administrative Agencies Practice Act, N.D. Cent. Code § 28-32-42.<sup>2</sup> If so, Plaintiffs request that the Court declare invalid the Department's rules at N.D. Admin. Code § 33-33-10-02(1)-(3) because they exceed the agency's authority and violate the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution. *See* N.D. Cent. Code § 28-32-47(b)-(d). Plaintiffs also seek a stay and injunctive relief to protect themselves from the enforcement of the Department's rules. *See* N.D. Cent. Code § 28-32-48; *see also* N.D. Cent. Code §§ 32-06-01, 32-06-02. The Court has appellate jurisdiction over an administrative appeal under N.D. Cent. Code §§ 27-05-06(4) and 28-32-42(2), (3)(b).

### VENUE

[¶9] Venue lies in this Court under N.D. Cent. Code § 28-04-05 because all Defendants' official places of business are located in Burleigh County, North Dakota. Alternatively, if this Court construes this action as an administrative appeal, venue lies in this Court under N.D. Cent. Code § 28-32-42(3)(b).

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<sup>2</sup> The right to exercise an administrative appeal of an agency's rulemaking is optional. *See* N.D. Cent. Code § 28-32-42(2) ("Any interested person who has participated in the rulemaking process of an administrative agency *may* appeal the agency's rulemaking action." (emphasis added)). Here, Plaintiffs maintain that right but assert that this action is properly brought as an original proceeding under the North Dakota Declaratory Judgment Act because, among other reasons, all of Plaintiffs are injured by the challenged rules, but only one would have the right to be an appellant in an administrative appeal because only one participated in the rulemaking process. Moreover, all Plaintiffs prefer to bring this action as an original proceeding.

## THE PARTIES

[¶10] Plaintiff Danielle Mickelson is a U.S. citizen, mother of six, and a resident of Rolette County, North Dakota, where she owns and operates a farm and a farmers market. Danielle had been selling homemade vegetable soups and wants to sell other foods that are now banned under the Department's rules.

[¶11] Plaintiff Lydia Gessele is a U.S. citizen, single mother of three children, and resident of Wells County, North Dakota, where she raises livestock. Lydia sold homemade food for years and wishes to start selling homemade chicken noodle soup, lasagna, and other hot meals, but she is banned from doing so because of the Department's rules.

[¶12] Plaintiff Lonnie Thompson is a U.S. citizen, father of three, and a resident of Morton County, North Dakota, where he owns and operates a small homemade food business with his wife, who has a serious seizure disorder and cannot work outside of their home. Since 2018, Lonnie sold homemade canned foods that are now banned under the Department's rules. During the rulemaking process, Lonnie testified before the Department to oppose the challenged rules.

[¶13] Plaintiff Summer Joy Peterson is a U.S. citizen, mother of three children, and resident of Grant County, North Dakota, where she owns and operates a ranch and farm. Summer Joy has sold homemade canned vegetables since August 2017, but these foods and other foods that Summer Joy wants to sell are now banned under the rules.

[¶14] Plaintiff Naina Agarwal is a legal nonimmigrant from India and resides in Burleigh County, North Dakota, where she works fulltime as a Certified Public Accountant. Since 2018, Naina has sold vegetarian Indian food that is now banned under the Department's rules.

[¶15] Defendant North Dakota Health Department is the governmental department of the State of North Dakota that adopted the challenged cottage food rules at N.D. Admin. Code § 33-33-10(1)-(3) and is in charge of enforcing them.

[¶16] Defendant Health Council of the North Dakota Department of Health is the Department's governing and advisory board. *See* N.D. Cent. Code § 23-01-03(3). The Health Council approved the challenged cottage food rules.

[¶17] Julie Wagendorf is the Food and Lodging Director of the North Dakota Department of Health. The Division enforces the rules regarding the retail sale of food in North Dakota, including the cottage food rules. Ms. Wagendorf has the duty, power, and ability to ensure those rules are consistent with, and enforced in a manner consistent with, the North Dakota Constitution and state law. Ms. Wagendorf also led the drafting, proposal, and adoption of the challenged rules. Ms. Wagendorf is sued in her official capacity.

### **STATEMENT OF FACTS**

#### ***The Legislature passed the Act to allow the sale of almost all cottage food.***

[¶18] In 2017, the North Dakota Legislature passed the Cottage Food Act ("Act"), codified at N.D. Cent. Code §§ 23-09.5-01 to -02.

[¶19] Before the Act was passed, North Dakotans' freedom to sell cottage food was severely restricted. State law allowed North Dakotans to sell cottage food only at farmers markets, and counties were free to adopt their own stricter rules for these sales.

[¶20] Many North Dakotans wanted more freedom to buy and sell cottage foods. In addition, the national trend was—and still is—to allow greater freedom to sell these foods. In response, the North Dakota Legislature passed the Act.

[¶21] The Act created a broad exemption to the state’s food licensing laws and rules. Without this exemption, persons preparing food for sale would have to use a licensed commercial kitchen and abide by hundreds of pages of rules. But the Act allowed people to prepare food for sale in their home kitchen without having to abide by these requirements.

[¶22] The Act allows the sale of almost all “[c]ottage food products.” N.D. Cent. Code § 23-09.5-01(2). The Legislature defines “cottage food products” as “baked goods, jams, jellies, *and other food and drink products* produced by a cottage food operator.” *Id.* (emphasis added). The Act defines a cottage food operator as “an individual who produces or packages cottage food products in a kitchen designed and intended for use by the residents of a private home.” N.D. Cent. Code § 23-09.5-01(1).

[¶23] “Cottage food products” include foods containing chicken or other poultry. The Act allows the sale of “products made from poultry,” as long as the cottage food operator slaughters no more than 1,000 birds per year, does not buy or sell poultry products other than their home-raised poultry products, and the poultry is not adulterated or misbranded. N.D. Cent. Code § 23-09.5-02(3)(d).

[¶24] The only cottage foods that the Act excludes are those involving other meat products, such as beef, pork, seafood, and poultry not meeting the Act’s requirements. N.D. Cent. Code § 23-09.5-02(3)(c).

[¶25] Cottage food operators may sell their foods as long as they sell directly to consumers and the consumer is informed that the product is homemade and not inspected. N.D. Cent. Code § 23-09.5-02(5), (8).

[¶26] The Act prohibits a state agency from imposing additional requirements on cottage food producers, like requiring them to obtain licenses, undergo inspections, or use

specific labels. N.D. Cent. Code § 23-09.5-02(1). The Act does not authorize the Department to further refine the list of permitted cottage foods. Rather, the Act allows the Department to provide “assistance, consultation, or inspection, upon request, of a producer.” *Id.*

[¶27] The Legislature modeled the Act after Wyoming’s Food Freedom Law, passed in 2015. Like North Dakota’s Act, Wyoming’s law allows the sale of almost any homemade food or drink. *See* Wyo. Stat. 1977 § 11-49-103.<sup>3</sup>

[¶28] Representative Luke Simons, the sponsor of HB 1433—the bill that was codified as the Act—stated that the purpose of the bill was to allow people the freedom to buy and sell homemade meals and other foods. When he introduced the bill to the Legislature, Representative Simons stated, “Do we not find it sad that in a free country you cannot sell a bowl of chicken noodle soup?”

[¶29] Representative Simons also said the bill was “about liberty and freedom to choose” and that it was time for government to step back and “[l]et supply and demand work its magic.”

[¶30] The Act has been very successful. Since its passage in August 2017, it led to the creation of hundreds of small homemade food businesses, which include Plaintiffs’ small businesses. There have been no reports of any problems with food sold under the Act.

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<sup>3</sup> Previously, Wyoming’s law allowed sales only directly to consumers. In March 2020, Wyoming expanded its law to allow sales of some homemade foods to retail shops and grocery stores. H.B. 0084, 65 Leg., 2020 Budget Sess. (Wyo. 2020).



*The Department opposes the sale of many cottage food products.*

[¶31] The Department, however, wanted to restrict the types of cottage food products that North Dakotans could buy and sell.

[¶32] While the Legislature was considering HB 1433, the Department asked the Legislature to restrict what cottage food products could be sold under the bill. Specifically, the Department asked the Legislature to amend the bill to allow the sale of only shelf-stable foods and a few other foods. The Department wanted to ban the sale of cottage foods requiring refrigeration or freezing (“perishable” food), except for baked goods and a few other narrow exceptions. The Department also wanted to ban the sale of certain types of canned food, known as “low-acid” canned foods. Low-acid canned foods lack acidity (in contrast to jams and pickles) and include many canned vegetables. The Legislature rejected these proposed amendments.

[¶33] After the Act passed, the Department continued to try to restrict which cottage food products could be sold. A few months after the Act passed, the Department proposed rules that were similar to its proposed amendments to the Legislature and would have banned the sale of almost all perishable foods and low-acid canned foods. 2018 N.D. Reg. Text 483603 (Feb. 21, 2018) (proposed rules) (attached hereto as Exhibit A).

[¶34] After the rules were proposed, the undersigned law firm wrote the Department a letter stating that the proposed rules would conflict with the Act’s clear text and legislative intent and that the rules would thus be invalid. In response, the Department withdrew the proposal.

[¶35] Still determined to ban certain cottage food products, the Department returned to the Legislature. In January of 2019, the Department worked with five legislators to introduce a

new bill that would amend the Act—SB 2269. The new bill had bans on the sale of cottage foods virtually identical to those in the Department’s withdrawn proposed rules.

[¶36] SB 2269 failed to pass in April 2019.

***The Department bans many cottage food products.***

[¶37] In December 2019, the Department enacted rules that are almost identical to the restrictions in the Department’s withdrawn February 2018 proposal and the failed SB 2269.

[¶38] Under the rules, the Department bans the sale of almost all perishable cottage food products and the sale of low-acid home-canned foods.

[¶39] The Department’s rules ban the sale of almost all perishable cottage food products, with only three exceptions: (1) “[b]aked goods,” including “custard pies,” “cheesecakes,” and “pastries with . . . fillings”; (2) “[h]ome-processed fresh cut fruits and vegetables that are dehydrated or freeze dried” or “that are blanched and frozen”; and (3) “[u]ninspected raw poultry,” subject to certain restrictions. N.D. Admin. Code § 33-33-10-02(1), (3); *see id.* at § 33-33-10-01 (defining key terms).

[¶40] Any perishable cottage food product that does not meet one of these narrow exceptions is prohibited. Thus, the sale of perishable meals and drinks, including soups, pizza, and lasagna, are banned under the rules. N.D. Admin. Code § 33-33-10-02(3). Similarly, the rules ban the sale of all food products made from poultry, including chicken noodle soup. N.D. Admin. Code § 33-33-10-02(1), (3).

[¶41] The rules also severely restrict which home-canned foods can be sold. The rules allow the sale of only home-canned cottage food products that are “high acid” or “acidified,” like jams, jellies, and pickles. N.D. Admin. Code § 33-33-10-02(2); *see* N.D. Admin. Code

§ 33-33-10-01(11) (defining “[h]igh acid” or “acidified foods”). The rules ban all low-acid home-canned cottage food products, including many canned vegetables.

[¶42] Failure to comply with these rules is punishable as a class B misdemeanor offense, which carries a maximum penalty of 30 days’ imprisonment, a \$1,500 fine, or both. N.D. Cent. Code § 23-09-21; *see* N.D. Cent. Code § 12.1-32-01(6).

[¶43] When the Department proposed the rules, it received 61 public comments. All but three opposed the proposed rules.

[¶44] Nevertheless, the Department enacted the rules and published them on January 1, 2020. They became effective that day.

[¶45] As a result, hundreds of cottage food operators across the state are now prohibited from selling the foods that they had been selling legally for years. Now, if they dare to sell, they risk criminal prosecution.

***The Department allows a charitable exemption.***

[¶46] The Department exempts some people selling cottage foods from its rules. Specifically, the Department has a custom, policy, and practice of allowing the sale of virtually all homemade food and meals at charitable and community events, without regulation.

[¶47] The Department’s policy is rooted in the state Food Preparer Education Act (“FPEA”), enacted in 1989. The FPEA allows people to sell homemade food at a “bake sale” or “similar enterprise,”<sup>4</sup> as long as the seller is “not regularly engaged” in a food business. N.D. Cent. Code § 23-09.2-01 (Note stating the FPEA’s “legislative intent”). The FPEA exempts

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<sup>4</sup> The FPEA also used to govern the sale of homemade foods at farmers markets, but that aspect of the FPEA has since been superseded by the Cottage Food Act.

these sellers from regulation, instead only allowing the Department to provide them with “educational support.” *Id.* at §§ 23-09.2-01, 23-09.2-02.

[¶48] The Department interpreted the FPEA to allow the sale of virtually any homemade food at charitable or “public spirited” community events.<sup>5</sup> For example, Defendant Julie Wagendorf testified to the Legislature in 2019 that the Department allows the sale of homemade perishable foods, such as sloppy joes, at baseball games.

[¶49] Meanwhile, the Department’s rules forbid cottage food operators from supporting themselves and their families by selling homemade foods from their homes, at farmers markets, and at other similar venues.

[¶50] As a result, many cottage food operators have had to make the difficult choice to stop selling their foods to comply with the rules, even though this means less income for their families and farms. Five cottage food operators harmed by the rules are Plaintiffs.

***Plaintiff Danielle Mickelson***

[¶51] Danielle Mickelson sold perishable foods, like homemade soups, for the past year under the Act. Now, she is banned from selling many of her foods.

[¶52] Danielle is a farmer, mother of six, a former English teacher, and a member of her town’s local government in Rolette County, North Dakota.

[¶53] Danielle also runs her local farmers market, called Lena’s Fresh Farmers Market (“Lena’s”). Lena’s has been in Danielle’s family for several generations, and now she and her husband own and operate it. Lena’s serves as a hub of fresh, local food for the community.

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<sup>5</sup> The Department has stated it does not allow the sale of canned foods under this exemption.

[¶54] After the Act passed, Danielle began selling several perishable cottage food products at Lena's. For example, she sold homemade frozen soups, like French onion and tomato-basil, that were made with fresh produce from her farm. Danielle also sold pizza crust and home-canned pizza sauce in Mason jars.

[¶55] In addition, Danielle wanted to start selling new foods. She wanted to sell frozen pizzas, made from her popular crusts and sauces. Danielle also wanted to start selling low-acid canned vegetables gathered from her farm, such as carrots, beets, green beans, and peas, which she has been canning for her family for years.

[¶56] Danielle received consistent praise for her foods and never a single complaint.

[¶57] The Department's rules forced Danielle to stop selling her soups because they are perishable. Danielle has also had to turn down many requests for her foods to the disappointment of her customers.

[¶58] But for the rules, Danielle would immediately resume selling the homemade frozen soups that she had legally sold, and she would also start selling frozen pizzas and low-acid home-canned goods.

### ***Plaintiff Lydia Gessele***

[¶59] Lydia Gessele sold homemade foods for three years under the Act. She wanted to expand her home-food business and start selling homemade chicken noodle soup, chili, tater-tot hotdishes, and lasagna. But now, the Department has banned her from selling these foods.

[¶60] Lydia is a farmer and a single mother of three children and lives in Wells County, North Dakota. She also raises about 80 chickens on her farm.

[¶61] After the Act passed in 2017, Lydia began selling homemade tea blends, home-baked goods, and eggs from her home and at farmers markets.

[¶62] Lydia also wants to start selling hot meals. Lydia already legally donates many hot meals to charity, including homemade chicken noodle soup (made from the chickens that she raises on her farm), chili, tater-tot hotdishes, and lasagna. Lydia wants to sell these same meals to support her family.

[¶63] The need for hot meals in Lydia's community is particularly acute. Many families struggle to find enough fresh food and ingredients, as there is a dearth of grocery stores and there have recently been shortages of basic staples such as eggs, salt, sugar, and flour.

[¶64] Lydia adjusted her business to address these needs with the way she sells eggs. Lydia takes orders for her eggs in advance, and then places the egg cartons in a box at a predetermined place on her property. Customers get the egg cartons out of the box and leave cash for her next to the box.

[¶65] Lydia wants to start selling chicken noodle soup, chili, tater-tot hotdishes, and lasagna from her home as well.

[¶66] Lydia has received consistent praise for her homemade foods and never a single complaint.

[¶67] The Department's rules, however, prohibit Lydia from selling her homemade chicken noodle soup because it contains poultry and is perishable. The rules also prohibit her from selling her chili, tater-tot hotdishes, and lasagna because they are perishable.

[¶68] Lydia has had to turn down many requests from potential customers for these foods to their disappointment.

[¶69] But for the rules, Lydia would immediately begin selling her hot dishes.

***Plaintiff Lonnie Thompson***

[¶70] Lonnie Thompson sold low-acid home-canned foods for two years under the Act. Now, the Department has banned him from selling those foods.

[¶71] Lonnie lives in Morton County, North Dakota, works as a fulltime cook at a local restaurant, and has three children, including a five-year-old son with autism. Since 2018, he and his wife have owned and operated Taste of Underland—a homemade foods and goods business—from their home. Taste of Underland is a reference to the Alice in Wonderland book *Through the Looking Glass*.

[¶72] Having a home-based business is vital to Lonnie’s family because his wife can work only from home due to a serious seizure disorder. His family often struggles to make ends meet, and the income from Taste of Underland is vital to his family’s financial wellbeing.

[¶73] Lonnie is passionate about food. After the Act passed in 2017, he began canning specialty low-acid cottage food products, such as canned beets, bell pepper relish, spicy salsas, and apple butter, and selling them in Mason jars. He became especially popular for his home-canned vegetable mixes, which his customers would often purchase to cook in stir-fries.

[¶74] Lonnie received consistent praise for his foods and never a single complaint.

[¶75] In October 2019, after the Department proposed the rules, Lonnie orally testified before the Department opposing them.

[¶76] The Department’s rules forced Lonnie to stop selling many of his home-canned foods. He has also had to turn down many requests from customers for these foods to their disappointment.

[¶77] For example, Lonnie had to refuse one customer's order for low-acid canned beets, and the customer began to cry because those were the only canned beets that he could find that were like those made by his deceased mother .

[¶78] But for the rules, Lonnie would immediately resume selling the low-acid canned foods he legally sold for two years.

***Plaintiff Summer Joy Peterson***

[¶79] Summer Joy Peterson sold low-acid canned vegetables for three years under the Act, but these foods are now banned under the rules. Summer Joy also wanted to expand her home-food business and start selling vegetarian soups, relishes, and chicken dishes, including chicken noodle soup, but these foods are also now banned under the rules.

[¶80] Summer Joy is a mother of three children and lives in Grant County, North Dakota. She and her husband own and operate their family's fourth-generation ranch and farm, where she raises livestock and about 50 chickens.

[¶81] After the Act passed in 2017, Summer Joy began selling home-baked goods, eggs, and low-acid canned vegetables from her ranch and at farmers markets. Summer Joy's low-acid canned vegetables included corn and beans grown on her ranch.

[¶82] Summer Joy also wanted to start selling additional homemade foods made with ingredients from her ranch, including cooked chicken meals, chicken noodle soup, canned and fresh vegetarian soups, and low-acid canned mustard corn relish.

[¶83] Like in Lydia's community, many families in Summer Joy's rural community struggle to find enough fresh food and ingredients. There is a shortage of grocery stores, and there have recently been shortages of basic staples.



[¶84] Like Lydia, Summer Joy adjusted her business to address these needs with the way she sells eggs. Summer Joy takes orders for her eggs in advance, and then places the egg cartons in a box at a predetermined place on her ranch. Customers pick up the egg cartons out of the box and leave cash for her by the box.

[¶85] Summer Joy also wants to start selling her hot meals and low-acid canned foods from her ranch.

[¶86] Summer Joy received consistent praise for her homemade foods and canned goods and never a single complaint.

[¶87] The Department's rules, however, prohibit Summer Joy from selling her fresh vegetarian soups because they are perishable and her cooked chicken meals, including chicken noodle soup, because they contain poultry and are perishable. The rules also prohibit her from selling canned vegetables, canned vegetarian soups, and canned mustard corn relish because they are low-acid.

[¶88] Summer Joy has had to turn down many requests from potential customers for these homemade foods and canned goods to their disappointment.

[¶89] But for the rules, Summer Joy would immediately resume selling the low-acid canned vegetables that she lawfully sold for three years under the Act and would begin selling the cooked chicken meals, vegetarian and chicken noodle soups, and low-acid canned vegetables from her ranch and at farmers markets to support her family.

*Plaintiff Naina Agarwal*

[¶90] Naina Agarwal occasionally sold homemade Indian food for two years under the Act. Now, the Department banned her from selling those foods.

[¶91] Naina was born and raised in India. In the fall of 2017, she moved to Bismarck in Burleigh County, North Dakota. She works as a Certified Public Accountant.

[¶92] There are no Indian restaurants in the Bismarck or Mandan areas. To satisfy her cravings for her native food, Naina cooks it.

[¶93] As Naina got to know her new community, she discovered BisMarket. BisMarket is a seasonal farmers market open on Saturdays that allows vendors to sell a variety of fresh homemade and home-grown foods directly to informed consumers. BisMarket also serves as a community gathering space.

[¶94] Naina applied to become a BisMarket vendor to sell her Indian food on weekends, and her community embraced her. Naina became one of the market's most popular vendors. She sold vegetarian Indian street foods, like vada pav (a deep fried potato dumpling placed inside a bread bun that is sliced in half), pav bhaji (a thick vegetable curry served with a soft bread roll), and chana chaat (a tangy snack made from white chickpeas). Naina frequently sold out her offerings.

[¶95] Being able to sell her native foods at BisMarket was personally fulfilling for Naina. Her customers often told her how great it was that she was selling vegetarian Indian foods because there were no commercial restaurants in the area selling these foods. Naina's success also gave her a sense of belonging in her new community and fueled her entrepreneurial spirit.

[¶96] Naina received consistent praise for her foods and never a single complaint.

[¶97] The Department’s rules forced Naina to stop selling her Indian food. She has also had to disappoint many customers by turning down requests for her unique foods.

[¶98] But for the rules, Naina would immediately resume selling her Indian food.

**COUNTS**  
***(AS TO ALL DEFENDANTS)***

**COUNT I: THE DEPARTMENT’S COTTAGE FOOD RULES ARE INVALID BECAUSE THEY CONFLICT WITH THE ACT AND, THEREFORE, EXCEED THE DEPARTMENT’S AUTHORITY.**

[¶99] Plaintiffs reallege and incorporate by reference the allegations contained in all preceding paragraphs.

[¶100] The Department’s rules at N.D. Admin. Code § 33-33-10-02(1)-(3) conflict with the Act and are thus beyond the scope of the agency’s authority to adopt.

[¶101] A regulation is beyond the scope of the Department’s authority to adopt if the regulation conflicts with the legislative intent of the statute it implements. A regulation conflicts with legislative intent if it conflicts with either (1) a statute’s clear text or, (2) if the text of the statute is unclear, the intent of the Legislature as shown through extrinsic aids, such as legislative history.

[¶102] Here, the challenged rules conflict with the legislative intent behind the Act as shown through both the Act’s clear text and its legislative history.

[¶103] The clear text of the Act allows the sale of all homemade “food and drink products” produced by a cottage food operator, except non-poultry meat products. N.D. Cent. Code §§ 23-09.5-01(2), 23-09.5-02(3)(c)-(d).

[¶104] The clear text of the Act also allows the sale of “uninspected products made from poultry” as long as the cottage food operator slaughters no more than 1,000 of their own birds and meets other minor requirements. N.D. Cent. Code § 23-09.5-02(3)(d).

[¶105] The clear text of the Act also prevents the Department from further restricting the types of cottage foods that may be sold under the Act. Under the Act, the Department is authorized only to educate cottage food operators on safe food handling and preparing practices, and only if the cottage food operator requests this assistance. N.D. Cent. Code § 23-09.5-02(1).

[¶106] In addition, extrinsic aids, including the legislative history, show that the Legislature intended the Act to allow the sale of all homemade food and drink products produced by a cottage food operator, except non-poultry meat products and poultry products that do not meet the Act's requirements. In fact, the sponsor of the bill specifically stated the bill would allow the sale of homemade chicken noodle soup.

[¶107] The Department's rules, however, prohibit the sale of most perishable foods, including any food products made from poultry. N.D. Admin. Code § 33-33-10-02(1), (3). It also bans the sale of low-acid canned foods. *Id.* at § 33-33-10-02(2).

[¶108] The rules thus conflict with the Legislature's intent and, as a result, exceed the scope of the Department's authority and are invalid.

[¶109] Unless the rules banning the sale of most perishable cottage food, including food products made from poultry, and all low-acid canned foods at N.D. Admin. Code § 33-33-10-02(1)-(3) are declared invalid and permanently enjoined as to Plaintiffs and all other cottage food operators, Plaintiffs and others across the state will continue to suffer great and irreparable harm.

[¶110] Accordingly, Plaintiffs ask the Court to enter a judgment (1) declaring that the Department's cottage food rules banning the sale of certain foods—N.D. Admin. Code § 33-33-10-02(1)-(3)—are invalid and (2) enjoining their enforcement.

**COUNT II: THE DEPARTMENT’S BAN ON SELLING SOME PERISHABLE COTTAGE FOOD PRODUCTS BUT NOT OTHER PERISHABLE COTTAGE FOOD PRODUCTS VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE NORTH DAKOTA CONSTITUTION.**

[¶111] Plaintiffs reallege and incorporate by reference the allegations contained above.

[¶112] The Department’s rules violate North Dakota’s Equal Protection guarantee by allowing the sale of some perishable cottage food products, but not others. N.D. Admin. Code § 33-33-10-02(1), (3).

[¶113] The Equal Protection guarantee of the North Dakota Constitution provides that “[no] citizen or class of citizens [may] be granted privileges or immunities which upon the same terms shall not be granted to all citizens,” N.D. Const. art. I, § 21, and that “[a]ll laws of a general nature shall have a uniform operation,” N.D. Const. art. I, § 22.

[¶114] The Equal Protection guarantee prohibits the government from treating individuals differently who are alike in all relevant aspects.

[¶115] The Department’s rules at N.D. Admin. Code § 33-33-10-02(1) and (3) allow homemade perishable foods to be sold only if they are specifically listed in the rules. The only perishable foods listed in the rules are baked goods; fresh cut produce that has been dehydrated, freeze dried, or blanched and frozen; and uninspected raw poultry (“listed homemade perishable foods and poultry”).

[¶116] Section 33-33-10-02(3) bans all other perishable foods, including all meals, such as soups, pizzas, and lasagna, as well as all food products made from poultry, such as chicken noodle soup (“unlisted homemade perishable foods and poultry”).

[¶117] Those who wish to sell unlisted homemade perishable foods and poultry directly to consumers and those who wish to sell listed homemade perishable foods and poultry directly

to consumers are alike in all relevant aspects. Yet those who wish to sell unlisted homemade perishable foods and poultry are prohibited from doing so.

[¶118] There is no substantial, reasonable, or rational reason to regulate those who wish to sell unlisted homemade perishable foods and poultry directly to consumers more harshly than exempted persons selling listed homemade perishable foods and poultry directly to consumers.

[¶119] There is no substantial, reasonable, or rational distinction between those who wish to sell unlisted homemade perishable foods and poultry directly to consumers and those exempted persons selling listed homemade perishable foods and poultry directly to consumers.

[¶120] Classifying those who wish to sell, directly to consumers, unlisted homemade perishable foods and poultry differently than exempted persons who sell listed homemade perishable foods and poultry directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

[¶121] Those who wish to sell, directly to consumers, unlisted homemade perishable foods and poultry are not different from exempted persons who sell listed homemade perishable foods and poultry directly to consumers in any way that reasonably suggests the propriety of substantially different rules for these groups.

[¶122] The unlisted homemade perishable foods and poultry are at least as safe as the listed homemade perishable foods and poultry.

[¶123] Indeed, unlisted homemade perishable foods and poultry are safer than some listed homemade perishable foods and poultry.

[¶124] The Department's ban on unlisted homemade perishable foods and poultry set forth in N.D. Admin. Code § 33-33-10-02(1) and (3) violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution both as applied and on its face.

[¶125] But for the Department’s rules, Plaintiffs would sell currently banned unlisted homemade perishable foods and poultry directly to consumers, as they lawfully did before the rules went into effect.

[¶126] Plaintiffs have no other legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights caused by the regulatory provisions set forth in N.D. Admin. Code § 33-33-10-02(1) and (3).

[¶127] Unless the ban on unlisted homemade perishable foods and poultry set forth in N.D. Admin. Code § 33-33-10-02(1) and (3) is declared unconstitutional and permanently enjoined as to Plaintiffs and all other cottage food operators, Plaintiffs and others across the state will continue to suffer great and irreparable harm.

[¶128] Accordingly, Plaintiffs ask the Court to enter a judgment (1) declaring that the ban on unlisted homemade perishable foods and poultry in N.D. Admin. Code § 33-33-10-02(1) and (3) is invalid because it violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution and (2) enjoining the enforcement of N.D. Admin. Code § 33-33-10-02(1) and (3).

**COUNT III: THE DEPARTMENT’S BAN ON SELLING LOW-ACID HOME-CANNED COTTAGE FOOD PRODUCTS BUT NOT OTHER COTTAGE FOOD PRODUCTS VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE NORTH DAKOTA CONSTITUTION.**

[¶129] Plaintiffs incorporate the above paragraphs.

[¶130] The Department’s rules violate North Dakota’s Equal Protection guarantee by allowing the sale of low-acid home-canned goods, but not other similar cottage food products. N.D. Admin. Code § 33-33-10-02(2).

[¶131] Those who wish to sell low-acid home-canned foods directly to consumers and those who wish to sell the listed homemade perishable foods and poultry products directly to

consumers are alike in all relevant aspects. Yet those who wish to sell low-acid home-canned foods are prohibited from doing so.

[¶132] There is no substantial, reasonable, or rational reason to regulate those who wish to sell low-acid home-canned foods directly to consumers more harshly than exempted persons who sell the listed homemade perishable foods and poultry products directly to consumers.

[¶133] There is no substantial, reasonable, or rational distinction between those who wish to sell low-acid home-canned foods directly to consumers and exempted persons who sell the listed homemade perishable foods and poultry products directly to consumers.

[¶134] Classifying those who wish to sell low-acid home-canned foods directly to consumers differently than exempted persons who sell the listed homemade perishable foods and poultry products directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

[¶135] Those who wish to sell low-acid home-canned foods directly to consumers are not different from exempted persons who sell the listed homemade perishable foods and poultry products directly to consumers in any way that reasonably suggests the propriety of substantially different rules for these groups.

[¶136] The banned low-acid home-canned canned foods are at least as safe as the listed homemade perishable foods and poultry products.

[¶137] Indeed, low-acid home home-canned foods are safer than some listed homemade perishable foods and poultry products.

[¶138] The Department's ban on low-acid home-canned foods set forth in N.D. Admin. Code § 33-33-10-02(2) violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution both as applied and on its face.



[¶139] But for the Department’s rules, Plaintiffs would continue selling currently banned low-acid home-canned foods directly to consumers, as they lawfully did before the rules went into effect.

[¶140] Plaintiffs have no other legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights caused by the regulatory provisions set forth in N.D. Admin. Code § 33-33-10-02(2).

[¶141] Unless the ban on low-acid home-canned foods in N.D. Admin. Code § 33-33-10-02(2) is declared unconstitutional and permanently enjoined as to Plaintiffs and all other cottage food operators, Plaintiffs and others across the state will continue to suffer great and irreparable harm.

[¶142] Accordingly, Plaintiffs ask the Court to enter a judgment (1) declaring that the ban on low-acid home-canned foods in N.D. Admin. Code § 33-33-10-02(2) is invalid because it violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution and (2) enjoining the enforcement of N.D. Admin. Code § 33-33-10-02(2).

**COUNT IV: THE DEPARTMENT’S ENFORCEMENT OF THE BAN OF PROHIBITED PERISHABLE COTTAGE FOOD PRODUCTS AGAINST SELLERS OF THESE FOODS FOR PROFIT BUT NOT AGAINST SELLERS OF THESE SAME FOODS FOR CHARITABLE PURPOSES VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE NORTH DAKOTA CONSTITUTION.**

[¶143] Plaintiffs reallege and incorporate by reference the above allegations.

[¶144] The Department violates North Dakota’s Equal Protection guarantee by enforcing the ban against unlisted homemade perishable foods and poultry contained in N.D. Admin. Code § 33-33-10-02(1) and (3) generally against sellers of these foods for profit, but not against sellers of these same foods for charitable purposes or at “public-spirited” events.

[¶145] Those who wish to sell unlisted homemade perishable foods and poultry directly to consumers to support themselves and their families and those who sell the same cottage foods

directly to consumers for charitable purposes are alike in all relevant aspects. Yet the Department has a policy and practice of exempting from the ban those selling directly to consumers for charitable purposes.

[¶146] In addition, those who wish to sell unlisted homemade perishable foods and poultry directly to consumers and those who sell the same cottage foods directly to consumers at “public-spirited” events are alike in all relevant aspects. Yet the Department has a policy and practice of exempting from the ban those selling directly to consumers at “public-spirited” events.

[¶147] There is no substantial, reasonable, or rational reason to regulate those who wish to sell unlisted homemade perishable foods and poultry directly to consumers to support themselves and their families more harshly than exempted sellers who sell the same cottage foods directly to consumers for charitable purposes or at “public-spirited” events.

[¶148] There is no substantial, reasonable, or rational distinction between those who wish to sell unlisted homemade perishable foods and poultry directly to consumers to support themselves and their families and exempted sellers who sell the same cottage foods directly to consumers for charitable purposes or at “public-spirited” events.

[¶149] Treating those who wish to sell unlisted homemade perishable foods and poultry directly to consumers to support themselves and their families differently than exempted sellers who sell the same cottage foods directly to consumers for charitable purposes or at “public-spirited” events is not germane to furthering any compelling, substantial, or legitimate governmental interest.

[¶150] Those who wish to sell unlisted homemade perishable foods and poultry directly to consumers to support themselves and their families are not different from exempted sellers

who sell the same banned cottage foods directly to consumers for charitable purposes or at “public-spirited” events in any way that reasonably suggests the propriety of substantially different treatment for these groups.

[¶151] Indeed, the unlisted homemade perishable foods and poultry sold directly to consumers are just as safe as the cottage foods sold directly to consumers for charitable purposes or at “public-spirited” events because they are the same foods.

[¶152] The Department’s policy and practice of enforcing the ban against unlisted homemade perishable foods and poultry under N.D. Admin. Code § 33-33-10-02(1) and (3) against sellers of these foods directly to consumers, but not against sellers of these same foods for charitable purposes or at “public-spirited” events, violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution as applied.

[¶153] But for the Department’s policy and practice of enforcing the ban, Plaintiffs would resume selling currently banned unlisted homemade perishable foods and poultry directly to consumers, just as they lawfully did before the rules went into effect.

[¶154] Plaintiffs have no other legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights caused by the Department’s policy and practice of enforcing the regulatory provisions set forth in N.D. Admin. Code § 33-33-10-02(1) and (3) against them.

[¶155] Unless the enforcement of N.D. Admin. Code § 33-33-10-02(1) and (3) is declared unconstitutional and permanently enjoined as to Plaintiffs and all other cottage food operators who wish to sell such foods, Plaintiffs and others across the state will continue to suffer great and irreparable harm.

[¶156] Accordingly, Plaintiffs ask the Court to enter a judgment (1) declaring that the Department’s policy and practice of enforcing the ban against unlisted homemade perishable foods and poultry under N.D. Admin. Code § 33-33-10-02(1) and (3) against sellers of those foods directly to consumers, while not enforcing the ban against sellers of the same foods for charitable purposes or at “public-spirited” events, is invalid because it violates the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution and (2) enjoining the enforcement of N.D. Admin. Code § 33-33-10-02(1) and (3) against anyone who wishes to sell directly to consumers.

**NOTICE OF APPEAL AND SPECIFICATIONS OF ERROR**

[¶157] Appellant Lonnie Thompson realleges and incorporates by reference the allegations contained above.

[¶158] If this Court determines that the cottage food rules at N.D. Admin. Code § 33-33-10-02(1)-(3) may be challenged only in an administrative appeal, then Appellant issues this notice of appeal regarding those rules pursuant to the North Dakota Administrative Agencies Practice Act at N.D. Cent. Code § 28-32-42.

[¶159] Appellant appeals to the District Court of Burleigh County in North Dakota’s South Central Judicial District the Department of Health’s rulemaking that resulted in the cottage food rules at N.D. Admin. Code § 33-33-10-02(1)-(3), published on January 1, 2020.

[¶160] For all the reasons stated above, the Department’s rules at N.D. Admin. Code § 33-33-10-02(1)-(3) are beyond the scope of the Department’s authority to adopt; violate the Equal Protection guarantee of Article I, Sections 21 and 22 of the North Dakota Constitution; and are, on the face of the language adopted, an arbitrary or capricious application of authority. *See* N.D. Cent. Code § 28-32-47(b)-(d).

## **REQUEST FOR RELIEF**

NOW THEREFORE, based upon the foregoing, Plaintiffs request this Court enter judgment as follows:

1. A declaratory judgment that the Department's rules banning the sales of certain cottage food products, as set forth in N.D. Admin. Code § 33-33-10-02(1)-(3), are invalid because they are beyond the scope of the Department's authority to adopt;
2. A declaratory judgment that the Department's ban on the sale of unlisted homemade perishable foods and poultry as set forth in N.D. Admin. Code § 33-33-10-02(1) and (3), but not listed homemade perishable foods and poultry, is unconstitutional both as applied and on its face under the Equal Protection guarantee of the North Dakota Constitution;
3. A declaratory judgment that the Department's ban on the sale of low-acid home-canned cottage food products as set forth in N.D. Admin. Code § 33-33-10-02(2), but not listed homemade perishable foods and poultry, is unconstitutional both as applied and on its face under the Equal Protection guarantee of the North Dakota Constitution;
4. A declaratory judgment that the Department's ban on the sale of unlisted homemade perishable foods and poultry set forth in N.D. Admin. Code § 33-33-10-02(1) and (3), but not the same homemade food products when sold for charity or at a "public-spirited" events, is unconstitutional both as applied and on its face under the Equal Protection guarantee of the North Dakota Constitution;
5. Permanent and preliminary injunctive relief barring Defendants' enforcement of N.D. Admin. Code § 33-33-10-02(1)-(3) against Plaintiffs and all other persons producing and selling any cottage food products directly to consumers;
6. Reasonable costs and attorneys' fees; and

7. Such other legal or equitable relief as this Court may deem appropriate and just.

Dated this 5<sup>th</sup> day of May, 2020.

Respectfully submitted,

*/s/ David J. Chapman*

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