

FILED
02-10-2021
Lafayette County
Clerk of Courts
2021CV000013
Honorable Duane M.
Jorgenson
Branch 1

STATE OF WISCONSIN

CIRCUIT COURT

LAFAYETTE COUNTY

Wisconsin Cottage Food Association

Mark Radl
1721 Green St.
Manitowoc, WI 54220

Case No.: ___ CV _____
Case Codes: 30701, 30704

Paula Radl
1721 Green St.
Manitowoc, WI 54220

Stacy Beduhn
W6572 Talon Dr
Greenville, WI 54942

Steph Zink
5314 Mansfield Dr
Greendale, WI 53129

Kriss Marion
1784 County Rd. H
Blanchardville, WI 53516

Lisa Kivirist
W7843 County Rd P
Browntown, WI 53522

Dela Ends
910 Scotch Hill Road
Brodhead, WI 53520

Plaintiffs,

v.

Wisconsin Department of Agriculture,
Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53718

Randy Romanski, in his official capacity as
Secretary of the Wisconsin Department of Agriculture,
Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53718

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within forty-five (45) days of receiving this Summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is:

Clerk of Circuit Court for Lafayette County
626 Main Street
P.O. Box 40
Darlington, Wisconsin 53530

and to Isaiah M. Richie, Plaintiffs' local counsel, whose address is:

Isaiah M. Richie
Schloemer Law Firm, S.C.
143 S. Main Street, Third Floor
West Bend, WI 53095

Plaintiffs also request that you please send copies of the answer to Plaintiffs' lead counsel, Erica Smith, and her colleague Suranjan Sen. Erica and Suranjan's pro hac vice applications are currently pending. Their address is:

Erica Smith

Suranjan Sen
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

You may have an attorney help or represent you.

If you do not provide a proper answer within forty-five (45) days, the court may grant judgment against you for the legal action requested in the Plaintiffs' Complaint, and you may lose your right to object to anything that is or may be incorrect in the Plaintiffs' Complaint. A judgment may be enforced as provided by law.

Dated this 10 day of February, 2021.



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**Applications for Admission Pro Hac Vice
pending*

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STATE OF WISCONSIN

CIRCUIT COURT

LAFAYETTE COUNTY

WISCONSIN COTTAGE FOOD
ASSOCIATION, MARK RADL, PAULA
RADL, STACY BEDUHN, STEPH ZINK,
KRISS MARION, LISA KIVIRIST, and
DELA ENDS,

Plaintiffs,

v.

THE WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION and RANDY
ROMANSKI, in his official capacity as
Secretary-designee of the Wisconsin
Department of Agriculture, Trade and
Consumer Protection,

Defendants.

Case No.: ___ CV _____
Case Codes: 30701, 30704

CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a civil rights lawsuit to vindicate the right of farmers, moms, and other Wisconsinites to earn an honest living by selling their safe and shelf-stable homemade foods to their friends, neighbors, and other consumers. Although Wisconsin allows the sale of some

homemade foods—including home-baked goods after this Court’s opinion in *Kivirist v. Wisconsin Department of Revenue*, 16-CV-06—it still arbitrarily bans the sale of most shelf-stable, homemade foods.¹

2. In the four years since the *Kivirist* decision, countless individuals have contacted Defendant Department of Agriculture, Trade and Consumer Protection asking if they could sell goods made in their home kitchen like chocolates, fudges, candies, donuts, and roasted coffee beans. But each time, the Department told them that the sale of these foods is still banned, even though they are shelf stable and commonly allowed in other states. In some instances, the Department ordered individuals to cease selling these items or face criminal penalties. The Department’s ban and enforcement has been especially hard on families during the pandemic.

3. Wisconsin maintains its ban despite having no genuine safety reason or other legitimate government interest in banning shelf-stable homemade foods. Banned shelf-stable foods are “not-potentially hazardous,” just like baked goods, and are likewise just as safe (and even safer) than other homemade foods Wisconsin allows to be sold. Wisconsin also allows the sale of *all* foods—even perishable foods and meals— if sold by a nonprofit entity or at a nonprofit event. Wisconsin’s ban, insofar as it prevents Wisconsinites from supporting themselves by selling their homemade shelf-stable foods, is thus arbitrary and irrational in violation of the Wisconsin Constitution’s Due Process and Equal Protection Clauses.

¹ In addition, Plaintiffs allege that the Department of Agriculture, Trade and Consumer Protection is still prohibiting the sale of some homemade, shelf-stable baked goods that, like granola, are not “flour based.” This contravenes the Court’s judgment in *Kivirist*. On February 10, 2021, Plaintiffs filed a motion to show cause in that case on this issue.

JURISDICTION AND VENUE

4. Plaintiffs Wisconsin Cottage Food Association, Mark Radl, Paula Radl, Stacy Beduhn, Steph Zink, Lisa Kivirist, Dela Ends, and Kriss Marion bring this lawsuit for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01 for violations of art. I, § 1 of the Wisconsin Constitution.

5. Plaintiffs seek declaratory and injunctive relief against the licensing requirements set forth at Wis. Stat. § 97.30(2)(a) and Wis. Admin. Code § ATCP 75.06(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.30 and Wis. Admin. Code ATCP ch. 75 & App., insofar as they apply to persons preparing and selling shelf-stable (or not “potentially hazardous”) homemade foods directly to consumers. As applied to such persons, these statutes and regulations violate the Due Process and Equal Protection Clauses of art. I, § 1 of the Wisconsin Constitution.

6. This Court has jurisdiction under Wis. Stat. § 753.03.

7. Venue is proper in this Court pursuant to Wis. Stat. § 801.50(3)(a).

THE PARTIES

8. Plaintiff Wisconsin Cottage Food Association is a nonprofit association of people who make and support the sale of homemade foods within Wisconsin.

9. Plaintiffs Mark and Paula Radl are residents of Manitowoc County, Wisconsin, where they have set up a coffee bean roaster in their home. Both Mark and Paula are struggling

financially during the COVID-19 pandemic, and they would like to sell their homemade, shelf-stable roasted coffee beans to their friends and community. Yet Wisconsin will not allow it.

10. Plaintiff Stacy Beduhn is a resident of Outagamie County, Wisconsin. Due to the pandemic, Stacy closed the daycare she used to run and now legally sells baked goods from home while helping her son with his remote learning. Stacy would also like to sell homemade, shelf-stable desserts like cocoa bombs² or rice crispy treats, but Wisconsin prevents her.

11. Plaintiff Stephanie “Steph” Zink is a resident of Milwaukee County, Wisconsin. Steph used to rent a local commercial-grade kitchen for her granola business, but she had to stop renting the kitchen because she could no longer afford the rent. In addition, the hassle of taking her small children with her to the kitchen had become too great. She would like to use her home kitchen to make her granola for sale, but it would be illegal for her to do so.

12. Plaintiff Kriss Marion is a resident of Lafayette County, Wisconsin. Kriss and her husband own and run a small farm, called Circle M Market Farm, and they used to run a bed and breakfast (“B&B”) until the pandemic. Kriss sells bread that she makes in her home kitchen, but she would like to expand to selling other homemade, shelf-stable goods like energy bars and candies. It would, however, be illegal for her to do so. Kriss is also part of the Wisconsin Cottage Food Association’s Leadership Board.

13. Plaintiff Lisa Kivirist is a resident of Green County, Wisconsin. Lisa and her husband own and run a small farm, called Inn Serendipity, and they used to run a B&B until the pandemic. Lisa now sells shelf-stable breads and muffins, but she would like to sell other shelf-

² Cocoa bombs are balls of chocolate that turn hot milk or water into a dessert drink. They have recently become a popular confection.

stable treats like chocolates and fried donuts—homemade foods that Wisconsin prohibits from sale. Lisa is also part of the Wisconsin Cottage Food Association’s Leadership Board.

14. Plaintiff Dela Ends is a resident of Rock County, Wisconsin. Dela and her husband own and run a small, USDA-certified organic farm, called Scotch Hill Farm, and they used to run a B&B until the pandemic. Dela now sells her homemade baked goods, but she would like to expand to selling shelf-stable dried goods from her farm, such as dried vegetables, herbs, and drink mixes, but Wisconsin will not allow it. Dela is also part of the Wisconsin Cottage Food Association’s Leadership Board.

15. Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection (“DATCP”) is a governmental department of the State of Wisconsin created and empowered under Wis. Stat. §§ 15.13 and 93.06–.07. It is charged with enforcing and implementing laws, regulations, and policies to carry out the food regulation scheme set forth at Wis. Stat. §§ 97.01 *et seq.*

16. Defendant Randy Romanski is the Secretary-designee of the DATCP. Mr. Romanski has direct authority over DATCP personnel and the responsibility and practical ability to ensure that laws, regulations, and policies that the DATCP is charged with enforcing and implementing are enforced and implemented in accordance with the Wisconsin Constitution. Mr. Romanski is sued in his official capacity.

STATEMENT OF FACTS

WISCONSIN’S BAN ON THE SALE OF HOMEMADE FOODS

17. Unless specifically exempted, any sale of food made in a private home kitchen is illegal in Wisconsin.

18. Wisconsin's ban applies even to those who simply want to sell their homemade foods directly to friends, neighbors, or farmers' market patrons.

19. Instead, people who want to sell foods directly to consumers must obtain a "retail food establishment" license. Wis. Stat. § 97.30(2)(a).³ That license has numerous requirements.

20. The most burdensome requirement is that licensees use a commercial-grade kitchen, which cannot be a private home kitchen. *See, e.g.*, Wis. Admin. Code §§ ATCP ch. 75 App. 2-103.11(A), 3-201.11(B), 6-202.111. This results in an effective ban on selling homemade foods.

21. Building a commercial-grade kitchen is extremely expensive. Outfitting a commercial-grade kitchen can cost between \$40,000 and \$80,000.

22. Renting a commercial-grade kitchen is also burdensome and costly. It involves paying hefty hourly or monthly rates and other expenses, and often costs more than \$1,000 a month. Traveling to a commercial-grade kitchen is also inconvenient, sometimes prohibitively so, especially for mothers of young children.

23. For rural residents, finding a nearby commercial-grade kitchen to rent can be especially difficult or even impossible.

³ Those who wish to sell primarily at wholesale typically apply for a "food processing plant" license, which has similar requirements, including the use of a commercial-grade kitchen. *See* Wis. Stat. § 97.29(2)(a),

24. By law, commercial-grade kitchens used for retail food establishments also need to abide by burdensome structural and equipment requirements. *See, e.g.*, Wis. Admin. Code § ATCP 70.08; §§ ATCP ch. 75 App. 4-101.11–6-501.115.

25. The retail-food-establishment license has other requirements as well, including governmental inspection, possible reinspection, payment of an annual licensing fee and annual weights and measures inspection fee, and payment of reinspection fees when required. Wis. Stat. § 97.30(3) & (3m).

26. Failure to comply with these restrictions is punishable as a first offense by up to \$1,000 in fines, six months' imprisonment, or forfeiture of \$1,000. Subsequent offenses are punishable by up to \$5,000 in fines, one year's imprisonment, or forfeiture of \$1,000. Wis. Stat. § 97.72.

Wisconsin's Licensing Restrictions Apply Even to Shelf-Stable, Not "Potentially Hazardous" Foods

27. Wisconsin's licensing and commercial-grade kitchen requirements apply even to the sale of shelf-stable foods—*i.e.*, foods that are not “potentially hazardous.”

28. “Potentially hazardous” foods are those that “can support rapid and progressive growth of infectious or toxicogenic microorganisms.” Wis. Stat. §§ 97.27(1)(dm), 97.30(1)(bm); *see also id.* § 97.29(1)(hm); Wis. Admin. Code § ATCP 75 App. 1-2 (definition of “potentially hazardous food,” otherwise known as “Time/Temperature Control for Safety Food”).

29. In layman's terms, “potentially hazardous” foods are foods that require proper refrigeration for safety reasons.

30. By contrast, foods that are *not* “potentially hazardous” are shelf stable, do not require refrigeration, and are safe for consumption.

31. Not “potentially hazardous” foods include many classically homemade foods like fudge, donuts, dried goods and mixes, chocolates, candies, and roasted coffee beans.

32. Yet, Wisconsin bans the sale of all of those patently safe homemade foods and other foods like them if they are made without a commercial food license and a commercial-grade kitchen that must be separate from a home kitchen.

33. Defendants actively and aggressively enforce Wisconsin’s ban. Upon information and belief, Defendants and their agents have recently sent cease-and-desist letters to individuals who are selling shelf-stable homemade foods. Defendants and their agents have also called people selling such foods and told them to stop selling, under penalty of law.

WISCONSIN EXEMPTS SOME FOODS AND SOME FOOD SELLERS FROM ITS BAN

34. Wisconsin arbitrarily exempts some homemade food sales from its ban.

Exemptions for Specific Foods

35. Wisconsin allows a select few foods to be sold directly to consumers and even at wholesale without a license. As a result, these foods can be sold without meeting license requirements, like the commercial-grade kitchen, inspection, fees, and other requirements. Some of these foods are not regulated at all.

36. Persons producing and selling pasteurized cider, raw cider, pasteurized honey, raw honey, maple syrup, sorghum syrup, popcorn, fresh fruits, or fresh vegetables, for example, are generally unregulated when selling directly to consumers. Wis. Stat. § 97.30(2)(b)1.b

(honey, cider, maple syrup, fresh fruits, fresh vegetables); Wis. Stat. § 97.30(2)(b)1.d (popcorn); Wis. Admin. Code § ATCP 75.063(5) (sorghum syrup).

37. Some of those goods can also be sold at wholesale without a license and regulation. These include raw honey, maple syrup up to \$5,000 annually, and fresh fruits and vegetables. Wis. Stat. § 97.29(1)(h)8–9, 12; Wis. Admin. Code § ATCP 70.06(11)(e).

38. Likewise, persons selling eggs from home, through delivery, or at farmers' markets are exempted from licensure and regulation, so long as the seller has fewer than 150 egg-laying hens and properly stores and labels the eggs. Wis. Stat. § 97.28; Wis. Admin. Code § ATCP 70.02(22)(h).

39. In addition, persons who sell products prepared and canned at home directly to consumers are exempted from licensure and the regulations pertaining to such licensees, provided: “[t]he food products are pickles or other processed vegetables or fruits with an equilibrium pH value of 4.6 or lower,” “[t]he person sells the food products at a community or social event or a farmers' market in [Wisconsin],” “[t]he person receives less than \$5,000 per year from the sale of the food products,” and “[t]he person displays a sign at the place of sale stating: ‘These canned goods are homemade and not subject to state inspection.’” Wis. Stat. § 97.29(2)(b)2.

40. Finally, after this Court's 2017 decision in *Kivirist v. Wisconsin Department of Agriculture* (16-CV-06), individuals may sell their homemade “baked goods” directly to consumers as long as those foods are shelf stable. Defendants have interpreted baked goods to include only “flour-based” baked goods, which precludes the sale of baked goods that are

primarily made of other ingredients, like granola. The sale of baked goods made with flour does not require licensure or regulation.

41. The banned shelf-stable homemade foods are just as safe as, or safer than, pasteurized cider, raw cider, pasteurized honey, raw honey, maple syrup, sorghum syrup, popcorn, fresh fruits, fresh vegetables, eggs, canned goods, and baked goods made with flour.

License Exemption for Certain Organizations

42. Wisconsin's regulators also exempt certain organizations and functions from the retail-food-establishment licensing requirement and associated regulations. Wis. Admin. Code § ATCP 75.063(6)–(7).

43. The exemption allows “a religious, charitable or nonprofit organization as defined under 26 USC 501 (c)” to serve non-meals to the general public, up to twelve days per year. Wis. Admin. Code § ATCP 75.063(6). *See also id.* § ATCP 75.04(28) (twelve-day annual maximum for non-meals).

44. The exemption further allows “a church; religious, fraternal, youth, or patriotic organization; service club; or civic organization, as defined under 26 USC 501 (c),” to serve meals to the general public, up to three days per year. Wis. Admin. Code § ATCP 75.063(7). *See also id.* § ATCP 75.04(28) (three-day annual maximum for meals).

45. The only distinction between a “meal” and a non-meal is that a “meal” is served “in a ready-to-eat form with the expectation of immediate consumption.” Wis. Admin. Code § ATCP 75.04(21). Both “meals” and non-meals may contain “potentially hazardous” foods.

46. Upon information and belief, Defendants do not enforce the three- or twelve-day annual maximums, meaning that these exemptions allow unlimited days of serving food and selling food.

47. Exempted organizations may thus freely prepare and sell not only shelf-stable foods, but virtually *any* food item—including “potentially hazardous foods”—directly to consumers without obtaining a license or commercial-grade kitchen.

48. Exempted organizations may sell such foods even if they were made in a private home kitchen.

49. In addition, individuals may legally sell any shelf-stable food if the individual gives all profits to charity. *See* Wis. Admin. Code § ATCP 75 App. 1-201.10 (“‘Food Establishment’ does not include . . . [a] kitchen in a private home if only food that is not time/temperature control for safety food[] is prepared for sale or service at a function such as a religious or charitable organization's bake sale”) (capitalizations omitted).

50. Yet individuals may not legally sell unexempted homemade foods, even shelf-stable ones, if they will be using the profits to support themselves and their families.

ILLEGITIMATE RATIONALE BEHIND HOMEMADE FOOD BAN

51. The reason Wisconsin bans the sale of most homemade goods is to protect commercial food producers from competition.

52. In Wisconsin’s 2013–2014 legislative session, for example, two so-called “cookie bills” were introduced to allow the unlicensed, direct sale of up to \$10,000 of shelf-stable home-

baked goods annually. AB 182, 2013–2014 State Assemb., Reg. Sess. (Wis. 2013); SB 435, 2013–2014 State S., Reg. Sess. (Wis. 2013).

53. Lobbyists pressured legislators not to pass the “cookie bills” in order to protect licensed businesses from competition.

54. Although the “cookie bill” that originated in the Senate was voted out of the Senate with broad bipartisan support, Assembly Speaker Robin Vos, who owns a licensed food business, refused to allow the bill a hearing in the Assembly.

55. New “cookie bills” that would have allowed (or expanded) the unlicensed, direct sale of shelf-stable homemade goods, including baked goods and canned goods, were introduced in the Senate and Assembly in October 2015. AB 417, 2015–2016 State Assemb., Reg. Sess. (Wis. 2015); SB 330, 2015–2016 State S., Reg. Sess. (Wis. 2015). Both bills passed the Senate overwhelmingly. But again, Speaker Vos never scheduled them for a hearing in the Assembly.

56. In 2017, CBS Sunday Morning reported on Speaker Vos’s opposition to easing Wisconsin’s restrictions on selling homemade foods. When asked to comment, the speaker explained that he wished to protect “businesses” from the competition of “new entrepreneurs.”⁴

57. Lobbyists, such as the Wisconsin Bakers Association and Wisconsin Grocers Association, have also lobbied against allowing the sale of homemade foods to protect themselves from competition.

58. Further, the Wisconsin Bakers Association has contacted individual sellers of homemade foods to tell them to stop selling their food. For example, the Executive Director of

⁴ *In Wisconsin, selling cookies can land you in jail*, CBS News (Apr. 9, 2017), <https://www.cbsnews.com/news/in-wisconsin-selling-cookies-can-land-you-in-jail/>.

that association, Jessica Hoover, sent an email to a 15-year-old girl selling macarons on January 29, 2021. In the email, Ms. Hoover told the girl that her activities are “illegal” and that the Bakers Association “wanted to bring this to your attention so that you can take corrective action.” This girl and her mother are members of Plaintiff Wisconsin Cottage Food Association.

59. In its 2017 decision, this Court found that “[t]he level of special interest influence” over Wisconsin’s food ban (and exemptions) was “undeniable.”⁵

60. That remains true today. Neither the legislature nor the agency has eased Wisconsin’s restrictions on the sale of homemade, shelf-stable foods. And with Speaker Vos still in power, any proposed legislation freeing the sale of shelf-stable, homemade foods would be futile.

PLAINTIFF WISCONSIN COTTAGE FOOD ASSOCIATION

61. Wisconsin Cottage Food Association (“WCFA”) is an unincorporated, nonprofit organization as defined by Wis. Stat. § 184.01(2). It is led by Plaintiffs Lisa Kivirst, Kriss Marion, and Dela Ends.

62. WCFA’s purpose is to support those who sell, or wish to sell, their safe, homemade food products within Wisconsin.

63. WCFA’s membership is open to anyone who is a Wisconsin resident and believes that Wisconsinites should be able to sell their safe, homemade foods without unreasonable or unfair governmental burdens. Many members sell or wish to sell such foods themselves.

⁵ Oral Op’n on Mots. for Summ. J. 12, *Kivirst v. Wisc. Dep’t of Agric.*, 16-CV-06 (May 31, 2017).

64. Wisconsin would allow WCFA members to sell unexempted, shelf-stable foods directly to consumers only if they obtained a retail-food-establishment license.

65. WCFA members cannot meet the requirements for that license, as they do not have access to a commercial-grade kitchen. Many cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen for themselves. Others would find it difficult to afford renting a commercial-grade kitchen—that is, if one is even available locally. And renting a commercial-grade kitchen is not economically feasible for WCFA’s members to make a profit selling their homemade, shelf-stable foods directly to consumers.

66. Moreover, WCFA members do not want to work in a commercial-grade kitchen. They enjoy working out of their own homes and the flexibility it grants them. And even otherwise, the charm and attraction of “homemade” foods—both for the producer and the consumer—is precisely that they are made in the home.

PLAINTIFFS MARK AND PAULA RADL

67. Mark Radl and his wife Paula are residents of Manitowoc County. Mark works for a company that supplies medical equipment to nursing homes, and Paula is an artist who teaches art classes in her home studio.

68. The COVID-19 pandemic has greatly affected both of their jobs: Mark’s work has been cut back, and Paula has had to cancel teaching classes. They had already been thinking of ways to supplement their income as they approach retirement, but now they are more focused on making ends meet.

69. Mark and Paula would like to support themselves doing activities they love—and they love coffee.

70. A friend who sells honey and maple syrup suggested that they sell roasted coffee beans. The Radls loved the idea and paid thousands of dollars to set up a professional coffee bean roaster in their garage. To ensure safety and cleanliness, they also invested in upgrades, such as a stainless-steel table.

71. The Radls' coffee beans are heated to temperatures in excess of 400°F, are shelf-stable (*i.e.*, not “potentially hazardous”), and are safe to be used for brewing coffee.

72. The Radls had no idea that they needed a license and commercial-grade kitchen to sell their coffee beans. They thought that, so long as they sell directly to consumers, they would be exempted from licensure—like their friend who sells honey and maple syrup.

73. As a precaution, however, Mark and Paula contacted their local county health department—an agent of the Defendants—to approve their setup. Wisconsin inspectors then visited their home.

74. While admitting that Mark and Paula's setup was clean and safe, the inspectors told them that they nevertheless could not legally sell their roasted coffee beans directly to consumers—even directly to Mark and Paula's *own family*—without a retail-food-establishment license. Mark and Paula were shocked.

75. Mark and Paula cannot meet the requirements for that license, as they do not have access to a commercial-grade kitchen. They cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen for themselves or to install the necessary roasting equipment in someone else's rental kitchen. Nor would renting a commercial-grade kitchen be otherwise

economically feasible for Mark and Paula to make a profit with their shelf-stable, roasted coffee beans.

76. Moreover, Mark and Paula do not want to work in a commercial-grade kitchen, as they enjoy working out of their own home and the flexibility it grants them.

77. Mark and Paula estimate that they would make at least \$6,000 in profits annually if they were allowed to sell their roasted coffee beans directly to consumers.

PLAINTIFF STACY BEDUHN

78. Stacy Beduhn is a mother who owns and runs a small dessert shop, named Sweet Creations by Stacy, out of her home in Outagamie County. Stacy previously ran a small daycare, but she had to close it because of the pandemic. Meanwhile, because of this Court's 2017 order, Stacy legally sells her homemade, shelf-stable baked goods directly to customers to help support her family.

79. Stacy has developed a loyal customer base, that, especially during the pandemic, feels more comfortable buying baked goods from her than visiting a retail store.

80. Many of Stacy's customers have requested shelf-stable desserts that are not baked, such as cocoa bombs or Rice Krispies treats. Stacy would like to sell such desserts, but Wisconsin will not allow it. As a result, Stacy has had to decline those requests.

81. Stacy's shelf-stable desserts are not "potentially hazardous" and are safe for consumption.

82. Wisconsin would allow Stacy to sell unexempted, shelf-stable foods directly to consumers only if she obtained a retail-food-establishment license.

83. Stacy, however, cannot meet the requirements for that license, as she does not have access to a commercial-grade kitchen. She cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen. Nor would paying to access a commercial-grade kitchen be economically feasible for Stacy to make a profit with her shelf-stable desserts.

84. Moreover, Stacy does not want to work in a commercial-grade kitchen, as she enjoys working in her kitchen in her home and the flexibility it grants her to supervise her son, who is taking high-school classes online at home during the pandemic.

85. Stacy estimates that she would make at least \$2,000 in additional profits annually if she were allowed to sell any homemade, shelf-stable food—such as her cocoa bombs or rice crispy treats—directly to consumers.

PLAINTIFF STEPH ZINK

86. Stephanie “Steph” Zink is a stay-at-home mother who lives in Milwaukee County with her husband and two small children. During the pandemic, she also works as contact-tracer for the state.

87. When Steph read a newspaper article about this Court’s then-recent *Kivirist* decision and order, she was encouraged to start selling her homemade granola.

88. When Steph looked into selling at farmers’ markets, however, DATCP told her that she needed a license and commercial-grade kitchen because Steph’s granola, though shelf stable and baked in her home oven, does not contain flour and it thus does not fall under this Court order.

89. As a result, Steph obtained a retail-food-establishment license, and, as required, she rented a local commercial-grade kitchen for nearly two years.

90. The costs and hassles of the license and commercial-grade kitchen requirements forced Steph to close her granola business.

91. Steph's homemade granola is shelf stable (or not "potentially hazardous") and is safe for consumption.

92. Wisconsin would allow Steph to sell unexempted, shelf-stable foods directly to consumers only if she obtained a retail-food-establishment license.

93. Steph, however, cannot meet the requirements for that license, as she cannot afford to acquire a commercial-grade kitchen. And she has already experienced first-hand that it is not economically feasible for her to rent a commercial-grade kitchen and make a profit selling her granola.

94. Moreover, Steph does not want to work in a commercial-grade kitchen, as it is too difficult to care for her small children while visiting a commercial-grade kitchen.

95. Steph has received many notes from customers expressing their sadness that she is no longer in business. She estimates that she would make at least \$10,000 in additional profits annually if she were allowed to sell any homemade, shelf-stable food—such as her granola—directly to consumers.

PLAINTIFF KRISS MARION

96. Plaintiff Kriss Marion is a grandmother, farmer, business owner, and baker. She and her husband live in Lafayette County, where they own and run a small farm, called Circle M

Market Farm. Because of this Court's 2017 order, Kriss legally sells her muffins and breads to her neighbors and community, and she offers various workshops on her farm.

97. Kriss ordinarily runs a licensed B&B out of her house, but she had to close it temporarily during the pandemic. She is preparing to reopen with a reduced number of available rooms, and she will serve her guests coffee and simple foods (like raw energy bars) on her porch instead of inside the house.

98. Wisconsin allows Kriss to serve not only those shelf-stable goods, but also "potentially hazardous" foods—to her B&B guests for breakfast. *See* Wis. Stat. § 97.01(1g)(a); Wis. Admin. Code § ATCP 75 App. 1-201.10.

99. Although Kriss has received requests to buy energy bars, as well as other shelf-stable foods like Kriss's homemade candy or dried goods, Kriss must decline. While serving those foods to her guests for breakfast is perfectly legal, Wisconsin's general ban on the sale of shelf-stable homemade foods prohibits Kriss from otherwise selling the exact same treats to her guests—or to anyone else.

100. Kriss's shelf-stable foods are not "potentially hazardous" and are safe for consumption.

101. Wisconsin would allow Kriss to sell unexempted shelf-stable foods directly to consumers only if she obtained a retail-food-establishment license.

102. Kriss cannot meet the requirements that license, as she does not have access to a commercial-grade kitchen. She cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen, and she cannot rent one while tending to her farm responsibilities and

watching her young grandson. Once Kriss reopens her B&B, she also will want to be near her guests and not working offsite in a commercial kitchen. Nor would paying to access a commercial-grade kitchen be economically feasible for Kriss to make a profit with her foods.

103. Moreover, Kriss does not want to work in a commercial-grade kitchen, as she enjoys working in her kitchen in her own home where she can supervise her grandson.

104. Kriss estimates that she would make at least \$5,000 in additional profits annually if she were allowed to sell any homemade, shelf-stable food—such as her energy bars, candy, and dried goods—directly to consumers.

PLAINTIFF LISA KIVIRIST

105. Plaintiff Lisa Kivirist is a mother, farmer, business owner, and avid baker. Lisa and her husband live in Green County, where they own and run a small farm, called Inn Serendipity. Because of this Court's 2017 order, she legally sells her bread and muffins to her neighbors and community.

106. Lisa used to open her home to B&B guests and serve them home-cooked breakfasts, but she has had to pause temporarily during the pandemic. She would like to restart her B&B once the pandemic allows.

107. Lisa has received many requests from departing B&B guests, as well as from friends and neighbors, to buy her homemade foods, including shelf-stable foods like Lisa's fried donuts, candies, baking mixes, and dried pastas. Lisa, however, must decline. Although Lisa may serve B&B guests any food as part of a single breakfast, Wisconsin does not otherwise allow her to sell most foods, even most shelf-stable foods.

108. Lisa's shelf-stable foods are not "potentially hazardous" and are safe for consumption.

109. Wisconsin law would allow Lisa freedom to sell unexempted shelf-stable foods directly to consumers only if she obtained a retail-food-establishment license.

110. Lisa cannot meet the requirements for the license. She cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen. And she is not aware of any available commercial-grade kitchen space to rent near her home in Green County. Nor would paying to access a commercial-grade kitchen be economically feasible for Lisa to make a profit selling her shelf-stable treats.

111. Moreover, Lisa does not want to work in a commercial-grade kitchen because she enjoys cooking in her kitchen at home, where she can be near her farm and her B&B guests (when she returns to hosting them).

112. Lisa estimates that she would make at least \$5,000 in additional profits annually if she were allowed to sell any homemade, shelf-stable food—such as her donuts, confections, and dry mixes—directly to consumers.

PLAINTIFF DELA ENDS

113. Dela Ends lives in Rock County, where she owns and runs a small, USDA-certified organic farm, called Scotch Hill Farm, with the help of her husband and, occasionally, her grown children.

114. Dela legally sells fresh fruits and vegetables from her farm, as well as her canned goods and (since this Court's 2017 order) baked breads, to help support her family.

115. Supplementing Dela's family income is more important now than ever. Because of the pandemic, Dela cannot offer her homesteading classes or open her home to B&B guests. Venues that used to buy from Dela are now closed. Dela's husband has had to take a full-time job based in Washington, DC, and Dela, often alone at the farm, has had to suspend her farm's CSA operations.⁶

116. Dela wishes she could sell her homemade shelf-stable dried foods, like soup mixes, tea mixes, dehydrated vegetables and produce, and herb mixes to supplement her income. Dela and her family have previously made volunteer trips to Senegal to train farmers on sustainable agriculture and to construct solar food dehydrators, which preserve food by drying them. Dela now wishes to sell dried foods to support her family. But Wisconsin's ban on such homemade, shelf-stable foods prohibits Dela from doing so.

117. Dela would restart her CSA program if she could mail subscribers dried foods. If she could fill CSA boxes with dried vegetables, fruits, herbs, and tea mixes, then she could reduce spoilage and crop loss. Moreover, it would make the boxes themselves lighter and thus easier for Dela herself to transport. Wisconsin, however, will not allow Dela to sell her dried foods to CSA subscribers.

118. Dela's dried foods are shelf stable (or not "potentially hazardous") and are safe for consumption.

119. Wisconsin would allow Dela to sell unexempted, shelf-stable foods directly to consumers only if she obtained a retail-food-establishment license.

⁶ A CSA program allows individuals to pay a farm to share in its harvest through periodic food boxes from that farm. CSA boxes can include produce and other farm goods.

120. Dela, however, cannot meet the requirements for that license, as she does not have access to a commercial-grade kitchen. She cannot afford to spend the thousands of dollars to acquire a commercial-grade kitchen. She is also not aware of any available commercial-grade kitchen space to rent near her home in Rock County. Nor would paying to access a commercial-grade kitchen be economically feasible for Dela to make a profit with her shelf-stable foods.

121. Moreover, Dela does not want to work in a commercial-grade kitchen, as she enjoys working in her kitchen in her home.

122. Dela estimates that she would make at least \$10,000 in additional profits annually if she were allowed to sell any homemade, shelf-stable food—such as her dried foods—directly to consumers.

CONSTITUTIONAL VIOLATIONS

CLAIM I: DUE PROCESS

123. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1–122.

124. The Due Process Clause of art. I, § 1 of the Wisconsin State Constitution provides in relevant part that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.”

125. The Due Process Clause protects, among other things, the right to pursue a chosen calling and operate a lawful business without arbitrary, irrational, unreasonable, or oppressive governmental interference.

126. As applied to persons producing and selling homemade, shelf-stable (or not “potentially hazardous”) foods—such as chocolates, candies, donuts, dried goods, granola, or roasted coffee beans—directly to consumers, Wisconsin’s license and commercial-grade kitchen requirements are arbitrary, irrational, unreasonable, and oppressive.

127. As applied to persons selling homemade foods that are not “potentially hazardous” directly to consumers, Wisconsin’s ban restricts and effectively prohibits the ability of members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Lisa, Dela Kriss, and many other ordinary Wisconsinites from pursuing their chosen calling.

128. Shelf-stable or not “potentially hazardous” foods are safe for human consumption—regardless of whether they are produced under license and in a commercial-grade kitchen. Accordingly, Wisconsin’s prohibition against the sale of such homemade foods serves no public health or safety objective.

129. Wisconsin has no compelling, substantial, or legitimate governmental interest in prohibiting the sale of shelf-stable homemade goods directly to consumers.

130. Wisconsin’s homemade foods ban, as it applies to the sale of shelf-stable foods directly to consumers, is not necessary to achieve, narrowly tailored to, reasonably related to, or rationally related to any compelling, substantial, or legitimate governmental interest.

131. Although Plaintiffs are not required to prove that the ban’s intended purpose is illegitimate for it to be unconstitutional, Wisconsin’s ban has the illegitimate purpose of protecting existing commercially licensed food businesses from competition.

132. Protecting existing commercially licensed food businesses from intrastate competition is not a compelling, substantial, or legitimate governmental interest.

133. As applied to persons producing and selling shelf-stable homemade foods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.30(2)(a) and Wis. Admin. Code § ATCP 75.06(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.30 and Wis. Admin. Code § ATCP 75 & App., violate the Due Process Clause of art. I, § 1 of the Wisconsin Constitution.

134. But for the fact that the statutory and regulatory provisions set forth in paragraphs 1–122, above, prevent them from doing so, members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, and Dela would sell a variety of shelf-stable homemade foods directly to consumers.

135. Members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, and Dela have no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights caused by the statutory and regulatory provisions set forth in paragraphs 1–122, above.

136. Unless the statutory and regulatory provisions set forth in paragraphs 1–122, above, are declared unconstitutional and permanently enjoined as applied to persons producing and selling shelf-stable, homemade foods directly to consumers, members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, Dela, and many other Wisconsinites will continue to suffer great and irreparable harm.

CLAIM II: EQUAL PROTECTION

137. Plaintiffs re-allege and incorporate all of the allegations contained in paragraphs 1–122, above.

138. The Equal Protection Clause of art. I, § 1 of the Wisconsin State Constitution provides in relevant part that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.”

139. The Equal Protection Clause protects the right of similarly situated individuals to be treated similarly.

140. The challenged regulations violate the Equal Protection Clause in two ways.

141. First, those who wish to sell unexempted, shelf-stable (or not “potentially hazardous”) foods—such as chocolates, candies, donuts, dried goods, granola, or roasted coffee beans—directly to consumers are similarly situated to those who sell exempted popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods, or baked goods directly to consumers. Yet persons selling unexempted homemade foods are effectively prohibited from selling their safe, homemade foods, while persons selling exempted foods do not need to obtain a license or use a commercial-grade kitchen.

142. There is no rational reason to exempt persons selling popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods, or baked goods from licensing and commercial-grade kitchen requirements, while harshly regulating persons wishing to sell unexempted, shelf-stable homemade foods.

143. There is no substantial distinction between unexempted persons wishing to sell their shelf-stable homemade foods directly to consumers and exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, or canned goods directly to consumers.

144. Classifying those who wish to sell unexempted, shelf-stable homemade foods directly to consumers differently from exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods, or baked goods directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

145. Those who wish to sell their unexempted, shelf-stable homemade foods directly to consumers are not so different from exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods, or baked goods directly to consumers as to reasonably suggest the propriety of substantially different regulations for these groups.

146. Indeed, unexempted shelf-stable homemade foods are just as safe as, if not safer than, some or all of these other goods.

147. Second, those who wish to sell their unexempted, shelf-stable homemade foods directly to consumers are also similarly situated to churches, charitable organizations, and other organizations that may sell any food—including foods that are “potentially hazardous” and made in a private home—directly to consumers and are exempted from Wisconsin’s retail food establishment licensing requirement and regulations up to twelve days annually.

148. There is no rational reason to regulate those who wish to sell unexempted, shelf-stable homemade foods directly to consumers more harshly than exempted churches, charitable organizations, and other organizations that may sell any food directly to consumers.

149. There is no substantial distinction between those who wish to sell unexempted, shelf-stable homemade foods directly to consumers and exempted churches, charitable organizations, and other organizations that may sell any food directly to consumers.

150. Classifying those who wish to sell unexempted, shelf-stable homemade foods differently from exempted churches, charitable organizations, and other organizations that may sell any food directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

151. Those who wish to sell unexempted, shelf-stable homemade foods directly to consumers are not so different from exempted churches, charitable organizations, and other organizations that may sell any food directly to consumers as to reasonably suggest the propriety of substantially different regulations for these groups.

152. Indeed, unexempted, shelf-stable homemade foods are just as safe as, if not safer than, the foods sold by these exempted churches, charitable organizations, and non-profit organizations.

153. Although Plaintiffs are not required to prove that the law's intended purpose is illegitimate for it to be unconstitutional, the actual purpose for regulating the direct sale of unexempted, shelf-stable homemade goods more harshly than the exempted sale of popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, canned goods, and baked goods directly to consumers—and more harshly than the exempted sale of any food by churches, charitable organizations, and other organizations directly to consumers—appears to be to protect existing commercially licensed food businesses from competition.

154. Protecting commercially licensed food businesses from intrastate competition is not a legitimate government purpose.

155. As applied to persons producing and selling unexempted, shelf-stable homemade foods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.30(2)(a) and Wis. Admin. Code § ATCP 75.06(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.30 and Wis. Admin. Code ATCP ch. 75 & App., violate the Equal Protection Clause of art. I, § 1 of the Wisconsin Constitution.

156. But for the fact that the statutory and regulatory provisions set forth in paragraphs 1–122, above, prevent from them from doing so, members of the Wisconsin Cottage Foods Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, and Dela would sell a variety of shelf-stable, homemade goods directly to consumers.

157. Members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, and Dela have no other legal, administrative, or other remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights caused by the statutory and regulatory provisions set forth in paragraphs 1–122, above.

158. Unless the statutory and regulatory provisions set forth in paragraphs 1–122, above, are declared unconstitutional and permanently enjoined as applied to persons producing and selling shelf-stable, homemade foods directly to consumers, members of the Wisconsin Cottage Food Association, Mark, Paula, Stacy, Steph, Kriss, Lisa, Dela, and many other Wisconsinites will continue to suffer great and irreparable harm.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

A. A declaratory judgment that, as applied to Plaintiffs and other persons producing and selling shelf-stable homemade foods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.30(2)(a) and Wis. Admin. Code § ATCP 75.06(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.30 and Wis. Admin. Code ATCP ch. 75 & App., violate the Due Process and Equal Protection Clauses of art. I, § 1 of the Wisconsin Constitution;

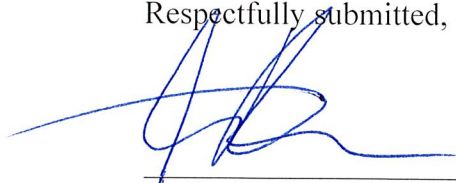
B. A preliminary and permanent injunction prohibiting Defendants from enforcing the licensing requirements set forth at Wis. Stat. § 97.30(2)(a) and Wis. Admin. Code § ATCP 75.06(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.30 and Wis. Admin. Code ATCP ch. 75 & App., against Plaintiffs and other persons producing and selling shelf-stable homemade foods directly to consumers;

C. Reasonable costs and attorneys' fees; and

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

Dated: February 10, 2020

Respectfully submitted,



Isaiah M. Richie (SBN 1106573)

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**Lead Counsel for Plaintiffs; Application for Admission Pro Hac Vice for Erica Smith has been filed. Application for Admission Pro Hac Vice for Suranjan Sen will be filed.*