

PLAINTIFFS

Lisa Kivirist
W7843 County Rd P
Browntown, WI 53522

Case No.: 16 CV 06
Case Codes: 30701, 30704

Kriss Marion
1784 County Rd. H
Blanchardville, WI 53516

Dela Ends
910 Scotch Hill Road
Brodhead, WI 53520

Plaintiffs,

v.

FILED
LAFAYETTE CO.

JAN 13 2016

CATHERINE MCGOWAN
CLERK OF COURT

DEFENDANTS

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

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

Defendants.

CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is a civil rights lawsuit to vindicate the right of Lisa Kivirist, Kristine "Kriss" Marion, and Dela Ends to earn an honest living by legally selling safe and delicious home-baked goods to their friends, neighbors, and other consumers. Wisconsin is one of only two states that ban the sale of home-baked goods. This ban extends even to baked goods that the state does not

consider “potentially hazardous”—that is, baked goods, such as cookies, muffins, breads, and cakes, that do not require refrigeration, are shelf stable, and very safe. Wisconsin has no genuine safety reason or other legitimate governmental interest in maintaining the ban on selling home-baked goods that are not potentially hazardous. In fact, Wisconsin allows the sale of other homemade foods despite the fact that not potentially hazardous home-baked goods are just as safe as, or safer than, these other foods. Preventing the sale of home-baked goods that are not potentially hazardous is thus arbitrary and irrational in violation of the Wisconsin Constitution’s Due Process and Equal Protection Clauses.

JURISDICTION AND VENUE

2. Plaintiffs Lisa Kivirist, Kriss Marion, and Dela Ends bring this lawsuit for declaratory and injunctive relief under Wis. Stat. §§ 806.04 and 813.01 for violations of art. 1, § 1 of the Wisconsin Constitution.

3. Plaintiffs seek declaratory and injunctive relief against the licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stat. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 75 & App., insofar as they apply to persons preparing and selling not potentially hazardous home-baked goods 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.

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

5. Venue is proper in this Court pursuant to Wis. Stat. §§ 801.50(3)(a), 801.50(3)(b), and 227.40(1).

THE PARTIES

6. Plaintiff Lisa Kivirist is a resident of Green County, Wisconsin, where Lisa owns and runs a small farm and bed and breakfast (“B&B”), called Inn Serendipity, with her husband. Lisa often bakes muffins and other baked goods for her B&B guests.

7. Plaintiff Kriss Marion is a resident of Lafayette County, Wisconsin. Like Lisa, Kriss owns and runs a small farm and B&B, called Circle M. Market Farm, with her husband. Kriss routinely bakes muffins and breads for her guests.

8. Dela Ends is a resident of Rock County who owns and runs a small, USDA-certified organic farm, called Scotch Hill Farm, with her husband. Dela often bakes breads and other baked goods from the grains on her farm.

9. 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.*

10. Defendant Ben Brancel is the Secretary of the DATCP. Mr. Brancel 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. Brancel is sued in his official capacity.

STATEMENT OF FACTS

WISCONSIN'S BAN ON THE SALE OF HOME-BAKED GOODS

11. Wisconsin is one of only two states in the country (the other being New Jersey) that ban the sale of baked-goods made in a personal home kitchen.
12. This ban applies even if home bakers simply want to sell their goods directly to friends, neighbors, or farmers' market patrons.
13. Instead of allowing the sale of home-baked goods, Wisconsin requires all bakers who wish to sell their goods to be commercially licensed, by obtaining either a burdensome "food processing plant" or a burdensome "retail food establishment" license. *See Wis. Stat. §§ 97.29(2)(a), 97.30(2)(a).*
14. "Food processing" is defined, in part, as "the manufacture or preparation of food for sale through the process of . . . baking." Wis. Stat. § 97.29(1)(g). A "[r]etail food establishment," in turn, is defined to include "a permanent or mobile food processing facility where food processing is conducted primarily for direct retail sale to consumers at the facility." Wis. Stat. § 97.30(1)(c).
15. Generally speaking, a person who wishes to prepare baked goods for sale must be licensed as a food processing plant or, if the baked goods are prepared primarily for direct retail sale to consumers, as a retail food establishment.
16. The licensing requirements for food processing plants and retail food establishments are onerous, intrusive, and costly.
17. Food processing plants and retail food establishments require commercial-grade kitchens. Wis. Admin. Code § ATCP 70.04 (construction and maintenance requirements for food processing plants); § ATCP 75.05 (requiring compliance with Wisconsin Food Code for

retail food establishments); §§ ATCP 75 App. 4-1– 4-5 (Food Code’s requirements for kitchen construction and maintenance).

18. Use of a personal home kitchen as a food processing plant or retail food establishment is prohibited. *See, e.g.*, Wis. Admin. Code § ATCP 75 App. 2-103.11(A), 3-201.11(B).

19. Building a commercial-grade kitchen is extremely burdensome and costly. Outfitting a commercial-grade kitchen can cost a would-be baker between \$40,000 and \$80,000.

20. Alternatively, a would-be baker can rent existing commercial-grade kitchen space, but he or she would have to pay hefty hourly or monthly rates, as well as other related fees and expenses. Rates for a commercial-grade kitchen often cost more than \$1,000 per month.

21. For rural residents, finding a nearby commercial-grade kitchen to rent can be especially difficult.

22. The food processing plant and retail food establishment licenses have other requirements, as well.

23. Licensing as a food processing plant also involves governmental inspection, possible reinspection, payment of an annual licensing fee, and payment of reinspection fees when required. Wis. Stat. § 97.29(3).

24. Licensing as a retail food establishment similarly involves 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), 97.30(2)(c).

25. In short, Wisconsin residents are prohibited from selling baked goods made in their personal home kitchens and, instead, must build or lease a commercial-grade kitchen, receive licensure as a food processing plant or retail food establishment, subject themselves to governmental inspection, and pay the government costly fees.

26. Thus, Wisconsin's food licensing restrictions result in a ban on the sale of home-baked goods.

27. 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 home-baked good ban includes "not potentially hazardous" baked goods

28. Wisconsin's licensing requirements apply even to the sale of baked goods that are not "potentially hazardous"—that is, even baked goods that do not "require[] temperature control" and cannot "support rapid and progressive growth of infectious or toxicogenic microorganisms." Wis. Stat. §§ 97.27(1)(dm), 97.30(1)(bm); *see also id.* at § 97.29(1)(hm); Wis. Admin. Code § ATCP 75 App. 1-2 (definition of "[p]otentially hazardous food").

29. In layman's terms, "not potentially hazardous" food means food that does not require refrigeration, is shelf safe, and is safe for consumption.

30. Not potentially hazardous foods include many cookies, muffins, breads, and cakes that are commonly baked at home. Yet, these foods are all covered by Wisconsin's home-baked good ban.

**WISCONSIN DOES NOT BAN THE SALE OF OTHER FOODS PREPARED AT HOME;
IT INSTEAD ALLOWS THEIR UNLICENSED SALE**

31. Despite imposing licensure requirements that ban the sale of home-baked goods, Wisconsin does not prohibit the sale of other foods processed at home. Instead, Wisconsin allows these goods to be sold directly to consumers without a license. The State also excuses these goods from some or all of the regulations that are imposed on licensees, including the commercial-grade kitchen requirement.

32. The relevant license exemptions fall into two categories: (1) exemptions for individuals and businesses selling certain types of foods and (2) exemptions for churches, charitable organizations, and nonprofits selling many types of foods.

33. Not potentially hazardous baked goods are just as safe, or safer than, these other, exempted goods.

License Exemptions for Other Foods

34. Wisconsin allows the sale of various foods without a license and exempts them from some or all of the restrictions imposed on licensees selling baked goods, including the commercial-kitchen requirement.

35. 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 exempted from the retail food establishment license requirement and some or all of the regulations pertaining to such licensees. 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

75.03(9)(g) (honey, cider, sorghum syrup, maple syrup, fresh fruits, fresh vegetables). These goods can thus be sold directly to consumers without a license.

36. Some of these goods can also be sold at wholesale without a license. Persons producing and selling raw honey, producing and selling maple syrup up to \$5,000 annually, or washing and packaging fresh fruits and vegetables for sale are exempt from the food processing plant license requirement and some or all of the regulations pertaining to such licensees. Wis. Stat. § 97.29(1)(g)5 & 6; Wis. Admin. Code § ATCP 70.03(7)(e).

37. Therefore, persons can produce and sell pasteurized cider, raw cider, pasteurized honey, raw honey, maple syrup, sorghum syrup, popcorn, fresh fruits, or fresh vegetables directly to consumers without either a retail food establishment license or a food processing plant license and without complying with some or all of the regulations pertaining to such licensees.

38. Likewise, persons selling eggs on their premises, at farmers' markets, or on egg sales routes (regular deliveries to homes) are exempted from the retail food establishment and food processing plant license requirements and some or all of the regulations pertaining to licensees, 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(16)(h).

39. Finally, persons who sell products prepared and canned at home directly to consumers are exempted from the retail food establishment and food processing plant license requirements 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. Wisconsin is the only state in the nation that allows the sale of canned goods prepared in a personal home kitchen but not baked goods prepared in a personal home kitchen.

41. Not potentially hazardous home-baked goods 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, and canned goods.

License Exemption for Churches, Charitable Organizations, and Nonprofits

42. Wisconsin also exempts churches, charitable organizations, and non-profit organizations from the retail food establishment licensing requirement and regulations pertaining to such licensees for up to twelve days per year. Wis. Admin. Code § ATCP 75.03(9)(h). That means that these organizations can sell food directly to consumers without either a retail food establishment or food processing plant license.

43. Under this license exemption, such organizations can prepare and sell not only not potentially hazardous baked goods, but virtually any processed good, whether it is potentially hazardous or not. These foods can be prepared in a home or on premises, without a commercial-grade kitchen.

44. Not potentially hazardous home-baked goods are just as safe as, or safer than, some or all of the foods permitted under § ATCP 75.03(9)(h).

ILLEGITIMATE RATIONALE BEHIND HOME-BAKED GOOD BAN

45. The reason Wisconsin requires a food processing plant or retail food establishment license for selling home-baked goods appears to be to protect licensed bakers and other commercial food producers from competition from would-be home bakers.

46. 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 not potentially hazardous home-baked goods annually. AB 182, 2013-2014 State Assemb., Reg. Sess. (Wis. 2013); SB 435, 2013-2014 S., Reg. Sess. (Wis. 2013).

47. Lobbyists pressured legislators not to pass the "cookie bills" in order to protect licensed businesses from competition.

48. 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 floor vote in the Assembly.

49. New "cookie bills" that would allow the unlicensed, direct sale of not potentially hazardous home-baked goods, up to \$7,500 annually, were introduced in the Senate and Assembly in October 2015. AB 417, 2015-2016 State Assemb., Reg. Sess. (Wis. 2015); SB 330, 2015-2016 S., Reg. Sess. (Wis. 2015).

50. Lobbyists, such as the Wisconsin Bakers Association, are again lobbying against the "cookie bills" to protect themselves from competition.

PLAINTIFF LISA KIVIRIST

51. Plaintiff Lisa Kivirist is a mother, farmer, business owner, and avid baker. Lisa and her husband own and run a small farm, as well as a licensed bed and breakfast ("B&B") in their home called Inn Serendipity.

52. Lisa regularly uses her home kitchen to bake delicious muffins and other not potentially hazardous baked goods for her B&B guests' breakfast.

53. When Lisa's B&B guests end their stay, they frequently request to buy these baked goods. However, Lisa must decline. While Wisconsin law allows Lisa to serve these goods to her B&B guests for breakfast, *see* Wis. Stat. § 254.61(1)(b); Wis. Admin. Code DHS § 197.13(3), the ban on the sale of home-baked goods prohibits Lisa from selling the same exact baked goods to her guests—or anyone else.

54. Lisa must either give her extra baked goods away or throw them away.

55. In addition, Lisa often goes to social events, community events, and farmers' markets and legally sells her home-canned goods. While she wishes she could also sell her not potentially hazardous home-baked goods at these events and markets, the law prohibits it.

56. In fact, Lisa would attend more of these events if she were allowed to sell her home-baked goods there.

57. Wisconsin law bars Lisa from selling any of her not potentially hazardous homemade baked goods.

58. Wisconsin law allows Lisa to sell baked goods made only with a retail food establishment or food processing plant license.

59. Lisa cannot meet the requirements for such licenses, as she does not have access to a commercial-grade kitchen. Lisa cannot afford to spend the thousands of dollars to either acquire or rent a commercial-grade kitchen. Lisa is also 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 with her baked goods.

60. Using an offsite commercial-grade kitchen is also not compatible with Lisa's operation of her B&B. Traveling to an offsite commercial-grade kitchen to bake would require her to neglect her B&B guests, who expect her to be on the premises and available. In addition, a major appeal of Lisa's baked goods to her B&B guests is that they are homemade, fresh out of the oven, and often made right in front of the guests. These desirable qualities would be lost if Lisa had to make the goods elsewhere and transport them back to her home.

61. Moreover, Lisa does not want to work in a commercial-grade kitchen because she enjoys baking in her kitchen at home.

62. But if Lisa were to sell her not potentially hazardous baked goods without the requisite license and commercial-grade kitchen, she would risk fines, jail time, or forfeiture under Wisconsin law.

63. Lisa estimates that she could make approximately \$1,000 in profits annually if she were able to sell her not potentially hazardous baked goods to her B&B guests. Lisa also loses income from other lost opportunities; if not for the ban, she would bake more often and attend more events and markets in order to sell her baked goods.

64. If not for the fact that Wisconsin bans her from doing so, Lisa would immediately begin selling her not potentially hazardous baked goods directly to consumers, including to friends, neighbors, and B&B guests, as well as customers at social events, community events, and farmers' markets.

PLAINTIFF KRISS MARION

65. Plaintiff Kriss Marion is a mother, farmer, business owner, and baker. She owns and runs a small farm, called Circle M. Market Farm, with her husband, where she offers a community supported agriculture (“CSA”) program.¹ Kriss and her husband also operate a licensed B&B in their home.

66. In addition, Kriss started a farmers’ market in Blanchardville near her home last year, at which she sells every other week. Kriss legally sells fresh vegetables, which do not require a license. Kriss also sells her fresh vegetables at another bi-weekly farmers’ market in a neighboring town.

67. Kriss regularly uses her home kitchen to bake delicious muffins and other not potentially hazardous baked goods for her B&B guests for breakfast.

68. Although Kriss receives frequent requests from her guests to buy these home-baked goods—for example, when they go on canoeing or hiking day trips, or when they depart her B&B—she must decline. While serving these foods to her guests for breakfast is perfectly legal, the home-baked-good ban prohibits Kriss from selling the same exact baked goods to her guests—or anyone else.

69. Kriss must instead give her extra baked goods away or feed them to her pigs and chickens.

¹ 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.

70. Kriss also wishes to include her not potentially hazardous home-baked goods in the monthly produce boxes that she provides to the subscribers of her CSA program. This would be especially helpful in the months in which it is harder to fill boxes, such as in early spring, as well as at times when particular crops may not do well.

71. But the home-baked-good ban prohibits Kriss from including the baked goods in her produce boxes.

72. Kriss also wishes to sell her not potentially hazardous homemade muffins every week at the farmers' markets that she attends. But the law prohibits this as well.

73. The law prohibits Kriss from selling any of her home-baked goods.

74. Wisconsin law only allows Kriss to sell baked goods with a retail food establishment or food processing plant license.

75. Kriss cannot meet the requirements for such licenses, as she does not have access to a commercial-grade kitchen. Kriss cannot afford to spend the thousands of dollars to either acquire or rent a commercial-grade kitchen. Kriss is also not aware of any available commercial-grade kitchen space to rent near her home in Lafayette County. Nor would paying to access a commercial-grade kitchen be economically feasible for Kriss to make a profit with her baked goods.

76. In addition, renting a commercial-grade kitchen is not compatible with Kriss's operation of her B&B. Traveling to an offsite commercial-grade kitchen to bake would require her to neglect her B&B guests, who expect her to be on the premises and available. In addition, a major appeal of Kriss's baked goods to her B&B guests is that they are homemade, fresh out of the oven, and often made right in front of her guests. These desirable qualities would be lost if Kriss had to make the goods elsewhere and transport them back to her home.

77. Renting a commercial-grade kitchen is also not compatible with Kriss's farm responsibilities. From June to October, Kriss must be on her farm all day to tend to her crops and supervise her farm crew. It would not be feasible for Kriss to repeatedly leave the farm during this period to travel to a commercial-grade kitchen. In contrast, using her home kitchen during this time is very convenient.

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

79. But if Kriss were to sell her not potentially hazardous baked goods without having the requisite license and commercial-grade kitchen, she would risk fines, jail time, or forfeiture under Wisconsin law.

80. Kriss estimates that she could make at least \$2,000 in profits annually if she were allowed to sell her not potentially hazardous home-baked goods. This includes income from selling baked goods to her B&B guests, offering baked goods to her CSA membership, and selling baked goods at the farmers' markets that she attends.

81. If not for the fact that Wisconsin bans her from doing so, Kriss would frequently sell her not potentially hazardous home-baked goods directly to consumers, including to friends, neighbors, B&B guests, and CSA subscribers, as well as to customers at social events, community events, and farmers' markets.

PLAINTIFF DELA ENDS

82. Dela Ends is a resident of Rock County who owns and runs a small, USDA-certified organic farm, called Scotch Hill Farm, with her husband and children. Dela and her family are passionate about sustainable agriculture. For instance, Dela and her husband

volunteer in Africa teaching sustainable farming practices to women, and Scotch Hill Farm offers CSA membership. Another way that Dela practices sustainable agriculture is by baking breads and other not potentially hazardous baked goods with grains from her farm.

83. Selling her home-baked goods would allow Dela to help support her family.

84. Supplementing Dela's family income has become more important in recent years. Demand for Scotch Hill's organic crops has suffered since the recession, and it has become difficult for Dela and her husband to make ends meet.

85. In addition, as Dela gets older, it is more difficult for her to work the fields. She recently had a double-knee replacement and wants to contribute to her family's income in a way that is less physically taxing.

86. Dela used to frequently sell her home-baked goods at farmers' markets and would often sell out. But Dela stopped selling her baked goods when she was informed that it was illegal.

87. Dela still attends winter farmers' markets often, where she sells her homemade soaps, homemade Christmas ornaments, and home-canned goods. Dela wishes she could resume selling not potentially hazardous home-baked goods at these events, specifically her home-baked breads. But the home-baked-good ban prohibits Dela from doing so.

88. Dela also wishes to include her home-baked goods in the monthly produce boxes for her CSA subscribers. This would be especially helpful in the months in which it is harder to fill boxes, as well as at times when particular crops may not do well. Dela's baked goods would have special appeal to her CSA members, as she uses ingredients from her own farm to make them.

89. But Wisconsin law prohibits Dela from including her baked goods in her CSA boxes.

90. Wisconsin law prohibits Dela from selling any of her not potentially hazardous home-baked goods.

91. Wisconsin law only allows Dela to sell baked goods with a retail food establishment or food processing plant license. But Dela cannot meet the requirements for such licenses, as she does not have access to a commercial-grade kitchen. Dela cannot afford to spend the thousands of dollars to either acquire or rent a commercial-grade kitchen. Dela 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 baked goods.

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

93. But if Dela were to sell her not potentially hazardous baked goods without the requisite license and commercial-grade kitchen, she would risk fines, jail time, or forfeiture under Wisconsin law.

94. Dela estimates that she could make at least \$2,000 in profits annually if she were allowed to sell her not potentially hazardous home-baked goods at farmers' markets. In addition, if Dela were able to offer these baked goods to her CSA membership, she estimates that she could make an additional \$5,000 or more a year.

95. If not for the fact that Wisconsin bans her from doing so, Dela would frequently sell her not potentially hazardous home-baked goods directly to consumers, including to friends, neighbors, CSA subscribers, and customers at farmers' markets.

CONSTITUTIONAL VIOLATIONS

CLAIM I: DUE PROCESS

96. Plaintiffs re-allege and incorporate by reference the allegations contained in all of the preceding paragraphs.

97. 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.”

98. 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.

99. As applied to persons producing and selling home-baked goods that are not potentially hazardous directly to consumers, Wisconsin's food processing plant and retail food establishment license requirements that ban the sale of home-baked goods are arbitrary, irrational, unreasonable, and oppressive.

100. As applied to persons selling home-baked goods that are not potentially hazardous directly to consumers, the ban restricts and prohibits the ability of Lisa, Kriss, Dela, and other Wisconsin home bakers to pursue their chosen calling.

101. Not potentially hazardous baked goods are safe for human consumption whether or not they are produced under a license and whether or not they are produced in a commercial-

grade kitchen. Accordingly, Wisconsin's prohibition against the sale of not potentially hazardous home-baked goods serves no public health or safety objective.

102. Wisconsin has no compelling, substantial, or legitimate governmental interest in prohibiting the sale of not potentially hazardous home-baked goods directly to consumers.

103. Wisconsin's home-baked good ban, as it applies to the sale of not potentially hazardous goods 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.

104. The actual purpose of the home-baked good ban appears to be to protect existing commercially licensed food businesses from competition.

105. Protecting existing commercially licensed food businesses from competition is not a legitimate governmental interest.

106. As applied to persons producing and selling not potentially hazardous home-baked goods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stat. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 75 & App., violate the Due Process Clause of art. I, § 1 of the Wisconsin Constitution.

107. But for the fact that the statutory and regulatory provisions set forth in paragraph 106, above, prevent from them from doing so, Lisa, Kriss, and Dela would sell not potentially hazardous home-baked goods directly to consumers.

108. Lisa, Kriss, 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 paragraph 106, above.

109. Unless the statutory and regulatory provisions set forth in paragraph 106, above, are declared unconstitutional and permanently enjoined as applied to persons producing and selling not potentially hazardous home-baked goods directly to consumers, Lisa, Kriss, and Dela will continue to suffer great and irreparable harm.

CLAIM II: EQUAL PROTECTION

110. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

111. 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.”

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

113. Those who wish to sell not potentially hazardous home-baked goods directly to consumers are similarly situated to those who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers. Yet those who wish to sell not potentially hazardous home-baked goods are prohibited from doing so. Instead, a person can only sell baked goods with either a retail food establishment or food processing plant license, while those selling popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers are exempted from licensure requirements and some or all of the regulations on licensees.

114. There is no rational reason to regulate those who wish to sell not potentially hazardous home-baked goods directly to consumers more harshly than exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers.

115. There is no substantial distinction between those who wish to sell not potentially hazardous home-baked goods directly to consumers and exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers.

116. Classifying those who wish to sell not potentially hazardous home-baked goods directly to consumers differently than exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

117. Those who wish to sell not potentially hazardous home-baked goods directly to consumers are not so different from exempted persons who sell popcorn, honey, maple syrup, sorghum syrup, cider, vegetables, fruits, eggs, and/or canned goods directly to consumers as to reasonably suggest the propriety of substantially different legislation for these groups.

118. Indeed, not potentially hazardous home-baked goods are just as safe as, if not safer than, some or all of these other goods.

119. Those who wish to sell not potentially hazardous home-baked goods directly to consumers are also similarly situated to churches, charitable organizations, and non-profit organizations that sell food, whether potentially hazardous or not, directly to consumers and are

exempted from Wisconsin's retail food establishment licensing requirement and regulations up to twelve days annually.

120. There is no rational reason to regulate those who wish to sell not potentially hazardous baked goods directly to consumers more harshly than exempted churches, charitable organizations, and non-profit organizations that sell food, whether potentially hazardous or not, directly to consumers.

121. There is no substantial distinction between those who wish to sell not potentially hazardous home-baked goods directly to consumers and exempted churches, charitable organizations, and non-profit organizations that sell food, whether potentially hazardous or not, directly to consumers.

122. Classifying those who wish to sell not potentially hazardous home-baked goods differently than exempted churches, charitable organizations, and non-profit organizations that sell food, whether potentially hazardous or not, directly to consumers is not germane to furthering any compelling, substantial, or legitimate governmental interest.

123. Those who wish to sell not potentially hazardous home-baked goods directly to consumers are not so different from exempted churches, charitable organizations, and non-profit organizations that sell food, whether potentially hazardous or not, directly to consumers as to reasonably suggest the propriety of substantially different legislation for these groups.

124. Indeed, not potentially hazardous home-baked goods are just as safe as, if not safer than, the foods sold by these exempted churches, charitable organizations, and non-profit organizations.

125. The actual purpose for regulating the direct sale of not potentially hazardous home-baked goods more harshly than the exempted sale of popcorn, honey, maple syrup,

sorghum syrup, cider, vegetables, fruits, eggs, and canned goods directly to consumers—and more harshly than the exempted sale of food, whether potentially hazardous or not, by churches, charitable organizations, and non-profit organizations directly to consumers—appears to be to protect existing commercially licensed food businesses from competition.

126. Protecting commercially licensed food businesses from competition is not a legitimate governmental purpose.

127. As applied to persons producing and selling not potentially hazardous home-baked goods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stat. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 75 & App., violate the Equal Protection Clause of art. I, § 1 of the Wisconsin Constitution.

128. But for the fact that the statutory and regulatory provisions set forth in paragraph 127, above, prevent from them from doing so, Lisa, Kriss, and Dela would sell not potentially hazardous home-baked goods directly to consumers.

129. Lisa, Kriss, 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 paragraph 127, above.

130. Unless the statutory and regulatory provisions set forth in paragraph 127, above, are declared unconstitutional and permanently enjoined as applied to persons producing and

selling not potentially hazardous home-baked goods directly to consumers, Lisa, Kriss, and Dela 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 not potentially hazardous home-baked goods directly to consumers, the licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stat. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 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. § 97.29(2)(a), Wis. Stat. § 97.30(2)(a), Wis. Admin. Code § ATCP 70.03(1), and Wis. Admin. Code § ATCP 75.03(1), as well as the statutes and regulations governing such licensees set forth at Wis. Stat. § 97.29, Wis. Stat. § 97.30, Wis. Admin. Code § ATCP 70, and Wis. Admin. Code § ATCP 75 & App., against Plaintiffs and other persons producing and selling not potentially hazardous home-baked goods directly to consumers;

D. Reasonable costs and attorneys' fees; and

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

Dated: January 13, 2016

Respectfully submitted,



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**Lead Counsel for Plaintiffs; Application for
Admission Pro Hac Vice pending.*