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BY THE COURT:

DATE SIGNED: December 28, 2022

Electronically signed by Rhonda L. Lanford
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT LAFAYETTE COUNTY

WISCONSIN COTTAGE FOOD
ASSOCIATION, ET AL.,

Plaintiffs,

Case No. 21CV13

V.

WISCONSIN DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION, et al.,

Defendants.

DECISION AND ORDER ON SUMMARY JUDGMENT

This matter is before this Court on motions for summary judgment filed by both parties. The following is the Court's Decision and Order GRANTING Plaintiffs' Motion for Summary Judgment and DENYING Defendants' Motion for Summary Judgment.

INTRODUCTION

Prior to this matter being filed in LaFayette County, a similar case with similarly-situated Plaintiffs, based on the same statutes and regulations, based on the same underlying factual evidence and based on the same arguments, was decided by Judge Jorgenson in *Lisa Kivirist et al. v. Wisconsin Department of Agriculture, et al.* 16 CV 6 (LaFayette County Circuit Court). In *Kivirist*, Plaintiffs were a group of home bakers challenging the state's regulatory scheme which prevented them from selling baked goods out of their home because of various statutes and regulations discussed *infra*. In the case at bar, the Plaintiffs are a group of individuals who wish to sell shelf-stable, homemade foods based on the same rationale provided by the Court in *Kivirist*, and advance the same constitutional arguments.

This background is important, because while the parties cite various constitutional challenges, this case also involves the Court's authority to extend the injunction against enforcement issued in *Kivirist* to the individuals in this case, given that *Kivirist* was not appealed, and the injunction against enforcement of the statutes remains in place for the home bakers. The *Kivirist* Court held:

> Based upon the file before the Court and reasons stated herein, it is the determination of this Court that the application of the provisions of the Wisconsin Food Code that requires these Plaintiffs to be licensed and maintain a commercial kitchen as that requirement is set forth in the Wisconsin statutory scheme is unconstitutional under both the Wisconsin and U.S. Constitution as it is applied to those stated provisions of the Wisconsin Code as it bears no rational connection -- no rational or substantial or reasonable

> connection with the statute -- statutory purpose of the statutory scheme.
>
> Further, for the reasons stated and based upon the file before the Court, this Court determines that the application of the statutory scheme also violates equal protection and guarantees under both the U.S. Constitution and the Wisconsin Constitution as that statutory scheme applies to these Plaintiffs.
>
> Based upon that determination, this Court enjoins any enforcement of a licensing requirement or the requirement of a licensed commercial kitchen for the processing by these Plaintiffs of baked goods for the sale to consumers directly. Neither shall be subjected to any penalties under the statutory scheme as it now exists for the direct sale of their home-baked goods directly to any consumer wishing to purchase them, provided that those baked goods are, as has been termed in this action, nonhazardous and as that term has been used in this action; that they are shelf stable; and they are not in need of refrigeration from the time of baking to the time of sale.

Kivirist Transcr. at 29-31; *See also* Final Order dated September 29, 2017, LaFayette County Case No. 16 CV 6, Docket No. 188.

This Court must now decide the question of whether sellers of homemade, not-potentially hazardous foods such as chocolates, fudges, fried squash fritters, candies, dried herbs and roasted coffee beans can sell these items directly to friends, neighbors and other consumers. Essentially, the only difference between the *Kivirist* plaintiffs and these Plaintiffs is "baked" versus "unbaked." The injunction prevents enforcement of the statutes and regulations against those selling baked goods from being prosecuted, but does not provide the same relief to sellers of unbaked goods.

FACTS

The Court adopts some of the Plaintiffs' statement of facts as modified below at pages 5-23 of their Brief in Support of Summary Judgment, without incorporating their arguments on special interest groups, *see id.* at Part III, pages 23-25, because the Court does not rely on any of the political or legislative facts made in support of their Motion. The Court notes that the facts set forth regarding the involvement of special interest groups would only further support the Court's decision on the constitutionality of these regulations and statutes as applied to Plaintiffs. The facts set forth below are supported by the uncontested affidavits and undisputed facts filed in this matter, which the Court has reviewed in their entirety.

The regulations and statutes at issue in this case, which the Court refers to generally as regulations (Plaintiffs call them a "Ban"), are Wisconsin's food processing plant and retail food establishment licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stats. § 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.

A. The Plaintiffs.

The Wisconsin Cottage Food Association ("WCFA") is an unincorporated, nonprofit organization as defined by Wis. Stat. § 184.01(2). Marion Aff. ¶ 4. WCFA's

growing 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 and whose purpose is to support those who sell, or wish to sell, their safe, homemade foods within Wisconsin. Some WCFA members would like to sell their homemade, not-potentially foods to support themselves and their families. *Id.* ¶5.

Regarding the other named Plaintiffs, Stacy Beduhn is able to run a small bakery, Sweet Creations by Stacy, out of her home because of the *Kivirist* decision. Beduhn Aff. ¶ 3. Stacy used to run a daycare, but she had to close it because of the pandemic. *Id.* ¶ 4. As a result, she has focused on expanding her home bakery business. *Id.* ¶ 5. Many of Stacy's customers have requested not-potentially hazardous desserts that are not baked, such as cocoa bombs or Rice Krispies treats. *Id.* ¶ 8. Stacy would like to sell those desserts, but the she cannot unless she gives the money to a charitable or religious organization. *Id.* ¶ 10. The only way that Stacy may legally sell those desserts as part of her business would be if she obtained a license and commercial-grade kitchen, which is not feasible for her. For example, Cocoa bombs are an increasingly popular product. They consist of chocolate spheres filled with cocoa mix. When added to warm water or milk, they dissolve to form hot cocoa. Beduhn Aff. ¶ 9. Due to the current regulations, she cannot set this item out of her bakery.

Kriss Marion is a grandmother, wife, farmer, entrepreneur, and baker. Marion Aff. ¶ 8. The pandemic has been tough on Kriss and her husband. They have been forced to

close their bed & breakfast and replace the income by turning part of their property into a private campground. *Id.* ¶ 9. Kriss has received repeated requests from her guests and other potential customers to buy her homemade energy bars, which she used to provide to her bed & breakfast guests as part of their breakfast, along with other not-potentially hazardous foods like her homemade candy or dried goods. *Id.* ¶¶ 10–11. Because of the regulations, Kriss cannot. *Id.* ¶ 11. She could serve her food at the bed & breakfasts (at least to the extent the business serves the food as part of a "breakfast") because the regulations would allow that, but now that her guests sleep outside instead of inside, Kriss would risk prison or fines if she provided those exact same foods for breakfast as part of their campground fee. *Id.* ¶ 12. The only way that Kriss may sell these safe, homemade foods at this point would be if she obtained a license, which would require using an off-site, commercial-grade kitchen. *Id.* ¶ 14. That would not be economically feasible for Kriss, nor could she take the time to leave her farm unattended.

Lisa Kivirist, has received many requests from people wanting to buy her homemade foods, including not-potentially hazardous foods like Lisa's fried fritters, candies, baking mixes, and dried pastas. *Id.* ¶ 9. Lisa, however, cannot. She may only serve these foods (and could even serve potentially hazardous foods) to B&B guests as part of a single breakfast. *Id.* ¶ 10. Moreover, if her fritters were baked instead of fried, they would be completely exempted regardless of the time of day. *Id.* ¶ 12. Yet if Lisa were to sell even a single one of her fried fritters after breakfast time, she would risk prison or fines. The Ban would allow Lisa to sell those particular, not-potentially hazardous foods only if she obtained a license and gained use of a commercial-grade

kitchen. *Id.* ¶ 13. That, however, would not be economically feasible for Lisa, Lisa can make the particular foods covered by her original *Kivirist* case.

Dela Ends would like to sell her homemade, not-potentially hazardous dried foods—foods like soup mixes, tea mixes, dehydrated vegetables and produce, and herb mixes—to supplement her income. *Id.* ¶ 11. 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. *Id.* ¶ 12. If she could sell her home-dried foods now, then it would open more opportunities for restarting her CSA program and for selling to new vendors. The regulations in place do not allow Dela to sell her not-potentially hazardous, home-dried foods to support her family. *Id.* ¶ 13. She may freely sell such foods to fundraise for a charitable cause—perhaps to further international agricultural development. But should she sell the same foods to support herself, then she would be risking imprisonment or fines. Dela has been unable to find any available commercial-grade kitchen space for rent near her home in rural Rock County, and she certainly cannot afford the cost of constructing her own off-site, commercial-grade kitchen.

Mark and Paula Radl wanted to turn their passion into some additional income. M. Radl Aff. ¶¶ 3–4; P. Radl Aff. ¶¶ 3–4. A friend who sells honey and maple syrup suggested that, since Mark and Paula love coffee (and have roasted coffee beans as a hobby for years), they should sell roasted coffee beans. M. Radl Aff. ¶ 3; P. Radl Aff. ¶ 3. The Radls loved the idea. M. Radl Aff. ¶ 4; P. Radl Aff. ¶ 4. In pursuit of this new dream,

they paid thousands of dollars to set up a professional coffee bean roaster in their home. M. Radl Aff. ¶ 4; P. Radl Aff. ¶ 4. The Radls were shocked when their local health department told them that, although selling homemade honey and syrup is allowed, selling homemade roasted coffee beans is illegal. M. Radl Aff. ¶ 5; P. Radl Aff. ¶ 5. Although the Radls' coffee beans are not-potentially hazardous, Wisconsin prohibits their (for-profit) sale solely because they are roasted at home instead of in a commercial kitchen. M. Radl Aff. ¶¶ 5–6; P. Radl Aff. ¶¶ 5–6. The Radls tried to comply. M. Radl Aff. ¶ 7; P. Radl Aff. ¶ 7. They looked at commercial kitchens to rent, but the rent would have cost more than the revenue that they would have made from selling their roasted coffee beans. M. Radl Aff. ¶ 7; P. Radl Aff. ¶ 7. They even looked at the cost of building their own commercial kitchen, but that math was even worse. M. Radl Aff. ¶ 7; P. Radl Aff. ¶ 7. Thus, Mark and Paula's expensive, high-quality coffee roaster sits largely unused. M. Radl Aff. ¶ 8; P. Radl Aff. ¶ 8.9 II.

B. Requirements of the Regulations at Issue.

Regulations require food producers to obtain a retail food-establishment license before they may conduct direct-to-consumer sales. Wis. Stat. § 97.30(2)(a). To obtain that license, one must either build, buy, or rent a commercial-grade kitchen. *See generally* Wis. Admin. Code. ATCP ch. 75 App. The Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") administers the license and its requirements. *See, e.g.,* Wis. Stat. §§ 97.30(2)(a); 97.01(4). The required commercial kitchen must satisfy multiple criteria. Requirements include a non-hand-operated hand-washing sink; an

additional three-compartment sink or an approved dishwasher; approved refrigerators, ovens, and other equipment; and washable floors (not made of wood) and walls. *See* Wis. Admin. Code ATCP ch. 75 App. 4-3. Moreover, the commercial kitchen cannot be the food processor's home kitchen as the regulations prohibit licensees from using their personal, home kitchen as the qualifying commercial-grade kitchen. Wis. Admin. Code ATCP ch. 75 App. 3-201.11(B) ("Food prepared in a private home may not be used or offered for human consumption in a food establishment.") Pearson Aff. Ex. B, at 16:7–18:4. Thus, unless exempted, Plaintiffs would have to gain access to a commercial-grade kitchen outside of their homes. Buying or building a commercial-grade kitchen can cost tens of thousands of dollars, and renting is not much better. One might pay to rent an entire space, a space in a shared kitchen, or a cafeteria or church kitchen during these kitchens' off hours. *See* M. Radl Aff. ¶ 7; Pearson Aff. Ex. M, at 22:1–6 (deposition of DATCP's director of Food and Recreational Businesses, Troy Sprecker). Those rental costs are often not economically justifiable—particularly for a small operation. *See, e.g.*, M. Radl Aff. ¶ 7. And even if they could afford to rent, many rural Wisconsinites, including some Plaintiffs, do not live near any available commercial-grade kitchens, so doing so is simply not an option regardless of whether they could afford it. *See, e.g.*, Kivirist Aff. ¶ 14. In addition to requiring a commercial-grade kitchen, obtaining a retail food-establishment license carries other burdens. For example, applicants are subject to an initial inspection and a fee. Wis. Stat. § 97.30(2)(c), (3).

C. Expert Testimony.

The record reflects that Defendants have admitted many of Plaintiffs' assertions, but the experts also agree. Plaintiffs' expert is Dr. Catherine Donnelly, a food scientist with more than thirty years of academic, research, and field experience both as a professor at the University of Vermont and in various other roles (such as a consultant for the federal government and an editor for scientific journals). *See* Pearson Aff. Ex. G, at 11:12–18 (deposition of Plaintiffs' expert witness, Dr. Catherine Donnelly), Ex. H (resume of Dr. Catherine Donnelly). DATCP's expert is James Kaplanek, whose expertise derives solely from the fact that he works at DATCP. *Id.* Ex. A, at 19:15–20:5. In Mr. Kaplanek's words, Dr. Donnelly is "highly respected" and has conducted "[v]ery extensive research." Mr. Kaplanek does not question Dr. Donnelly's expertise or credibility at all, nor does he "disagree with any of the scientific information" presented in her report. *Id.* at 17:3–8, 55:8–16 (emphasis added). Indeed, he has clarified that he makes "no comment[] on the scientific research that was done" by Dr. Donnelly in preparation for this lawsuit. *Id*. at 55:8–19.

Both experts agree that foods that are not-potentially hazardous are extremely safe. These foods, by virtue of their physical qualities such as moisture content, do not need to be refrigerated; they "can be stored at ambient temperature without posing any microbiological safety issues." *Id.* Ex. G, at 57:1–3; *see also id.* Ex. B, at 15:11–17. Unlike potentially hazardous foods—foods like chicken or potato salad—a piece of fudge can be left out on the counter for weeks; it "might taste a little stale, but in no way does

that jeopardize the safety of that product." *Id.* Ex. G, at 57:17–18. These foods, in other words, "are generally considered safe." *Id.* Ex. B, at 27:14–17. Although there is a wide variety of not-potentially hazardous food—from some types of baked goods to fudges to roasted coffee beans and beyond—two foods are "considered non potentially hazardous, they would be equally safe," as Mr. Kaplanek testified. *Id.* at 55:25–56:1. As Dr. Donnelly explained in her report, these "are foods that individuals routinely make in their own homes and are regularly consumed and enjoyed without causing foodborne illness." *Id.* at Ex. I ¶ 15.

Moreover, as DATCP acknowledges, many states allow home-based food producers. Mr. Kaplanek is the section manager for DATCP's retail food and recreational program. Pearson Aff. Ex. B, at 6:2–3. He is also DATCP's designated corporate witness under Wis. Stat. § 804.05(2)€. DATCP is unaware of any incident associated with any homemade, not-potentially hazardous food. *Id.* at 116:5–9. This includes the fact that DATCP is unaware of any health incidents resulting from the exemption for homemade, not potentially hazardous baked goods that resulted from *Kivirist. Id.* at 29:5–8. C.

Furthermore, as testified to by the expert witness, the regulations exempt a variety of food sellers from licensure (including the commercial-grade kitchen requirement) that are potentially hazardous. Dr. Donnelly's report describes at length how Defendants' exemptions allow for unregulated sales of foods that are unequivocally riskier than not-potentially hazardous foods. *See, e.g., id.* Ex. I ¶ 35. Mr. Kaplanek's report did not

address those exemptions one way or the other, but he readily agrees with all of Dr. Donnelly's scientific opinions, id. Ex. A, at 55:8–16, including specifically that Plaintiffs' foods are categorically as safe or safer than exempted foods, id. Ex. B at 113:21–25. In fact, Mr. Kaplanek repeatedly agreed that, from a public health standpoint, the disparity between Plaintiffs and the exempted sellers "doesn't make any sense." *Id.* Ex. A at 51:4; see also id. at 22:23–23:13, 45:20–46:2. In fact, every single DATCP employee who testified in this case stated that the disparate treatment between Plaintiffs and categorically riskier exempted food sellers **is unjustifiable as a matter of food safety**. *See id.* Ex. C, at 123:14–16 ("Potentially factors other than public health at the time of statutes being passed may have been considered").

The parties exempted from the regulations and the requirements that Plaintiffs are subject to fall into two categories: (1) exemptions based on the specific food being sold; and (2) exemptions based on the purpose of the sale. Both categories of exempted food sales pose a variety of hazards that are not present in Plaintiffs' desired sales of not-potentially hazardous foods. *See id.* Ex. B, at 30:8–12. The exemptions and their associated hazards are described more fully in Plaintiffs' Brief in Support of Motion for Summary Judgment. Producers and sellers of the following potentially hazardous foods are exempt: high-acid home-canned foods, cider (pasteurized or raw), eggs (from up to 150 hens at a time), raw poultry (up to 1,000 birds per year), unprocessed fruits and vegetables, not-potentially hazardous home-baked goods, honey (pasteurized or raw), maple syrup, sorghum syrup, and popcorn. They may sell their foods directly to consumers—without needing to obtain any kind of license or commercial-grade kitchen.

See Wis. Stat. § 97.28 (eggs); *id.* § 97.29(2)(b)(2) (canned goods); *id.* § 97.30(2)(b)(1)(b) (honey, cider, maple syrup, and fresh fruits and vegetables); *id.* § 97.30(2)(b)(1)(d) (popcorn); *id.* § 97.42(11) (raw poultry); Wis. Admin. Code ATCP § 75.063(5) (sorghum syrup); *Kivirist*, Case No. 16-CV-06 (Order, Feb. 26, 2018) (not-potentially hazardous home-baked goods). It is undisputed that each of these foods is no safer—or significantly less safe—than the prohibited homemade, not-potentially hazardous foods at issue in this case. *See* generally expert reports of Dr. Donnelly and Mr. Kaplanek.

Especially relevant in this case, as a result of the decision in *Kivirist*, which Defendants elected not to appeal, DATCP allows the direct-to-consumer sales of homemade, not-potentially-hazardous foods—so long as they are baked. *See Kivirist*, Case No. 16-CV-06 (Order, June 15, 2017); *see also id.* (Order, Feb. 26, 2018). As Mr. Kaplanek stated—**homemade, not-potentially-hazardous baked goods are equally safe as homemade, not-potentially-hazardous foods that are not baked.** *Se*e Pearson Aff. Ex. B, at 55:25–56:1 The same Wisconsinites can make the baked foods for sale in their exact same home kitchens but cannot do the same for the specific foods at issue in the case at hand that are non-baked.

Other producers are exempted from licensing based on who they are, or what they plan to do with the proceeds. Some food sales—including sales of potentially hazardous foods—are exempt from the regulations based on the identity of seller, or the purpose of the sale. *See* Pearson Aff. Ex. I ¶ 36. Taverns may serve "popcorn, cheese, crackers, pretzels, cold sausage, cured fish, or bread and butter" without obtaining any food license. Wis. Admin. Code § 75.04(35)(a). This exemption includes foods (such as fish

and sausage) that are potentially hazardous and, as such, carry the risk of bacterial illness. *See* Pearson Aff. Ex. G, at 74:23–75:9. Despite being far riskier than Plaintiffs' foods, these foods may be served by taverns without any kind of kitchen inspection or fulfilling any kind of equipment or food training requirement. *Id.* Ex. C, at 90:12–20.

Food can be sold at a bed and breakfast establishment, regardless of the food's safety category, if prepared as part of a "breakfast" in an owner-occupied bed-and-breakfast establishment ("B&B"). Wis. Admin. Code § 75.04(35)(d). The same safety analysis applies to exempted sales of not-potentially hazardous popcorn, maple syrup, sorghum syrup, and honey. As Mr. Kaplanek explained, if any two foods are "both considered non-potentially hazardous, they would be equally safe." Pearson Aff. Ex. B, at 55:25– 56:1. Thus, as a matter of food safety, it is arbitrary to exempt these foods but not Plaintiffs.' *See, e.g., id.* at 62. As this exemption covers all foods (regardless of how hazardous), it necessarily includes foods that are riskier than Plaintiffs'. Pearson Aff. Ex. B, at 26:3–27:17. And, as with the canned-goods exemption mentioned above, B&B foods are not merely allowed to be homemade—the foods must be homemade. Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B) (definition of "food establishment"); Pearson Aff. Ex. B, at 26:7–16.

In addition, Defendants do not require a license for food served or sold in conjunction with a religious event (such as a church cafe). Wis. Admin. Code § 75.04 (17)(c); Pearson Aff. Ex. D, at 24:4–8, 54:21–55:1 (deposition of DATCP Senior Licensing Specialist Mark Lehman). And the State allows totally unregulated food sales

at concession stands for youth sporting events (though, inexplicably, not for youth non-sporting events like spelling bees). Wis. Admin. Code § 75.04 (36)(g); Pearson Aff. Ex. B, at 18:16–23. As this exemption covers all foods—even potentially hazardous foods—it necessarily poses safety risks beyond Plaintiffs' not-potentially hazardous foods. Pearson Aff. Ex. I ¶¶ 39– 40.

Defendants have also exempted 501(c) nonprofit organizations from most food regulation. These organizations may sell any food (including potentially hazardous foods) at any volume.

Finally, and perhaps most arbitrary when looked at in conjunction with Plaintiffs' claims, the regulations exempt direct-to-consumer sales of exactly the same foods that Plaintiffs wish to sell—so long as the proceeds are given away. Specifically, the Wisconsin Food Code categorically exempts from licensure persons using "[a] kitchen in a private home [to prepare] food that is not time/temperature control for safety food [in other words, not potentially hazardous]," if benefitting a charitable cause "such as [at] a religious or charitable organization's bake sale." Wis. Admin. Code ATCP ch. 75 App. 1-201.10(B).

STANDARD OF REVIEW

Both parties have moved for summary judgment. Summary judgment is appropriate when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Section 802.08(2), Stats. When both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the

trial court to decide the case on the legal issues. *Millen v. Thomas*, 201 Wis. 2d 675, 682–83, 550 N.W.2d 134, 137 (Ct. App. 1996).

In this case, the challenge is to the constitutionality of the statutes and regulations as applied to Plaintiffs and others similarly situated. A challenge to the constitutionality of a law as applied to a plaintiff and others like the plaintiff is considered a "hybrid" challenge:

> Although the parties disagreed whether to treat the claim as a facial or an as-applied challenge, the Court observed that "[i]t obviously ha[d] characteristics of both":
>
> The claim is "as applied" in the sense that it does not seek to strike the [public records law] in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.
>
> Explaining that "[t]he label is not what matters," the Court identified an essential attribute of the hybrid challenge: "plaintiffs' claim and the relief that would follow ... reach beyond the particular circumstances of these plaintiffs." Consequently, the Court determined that the plaintiffs could prevail only if they met the standards for a facial challenge.

Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶ 28, 376 Wis. 2d 147, 169, 897 N.W.2d 384, 395 (citations omitted). Plaintiffs here must meet the standard for a facial challenge, and demonstrate that the regulations and statutes as applied to them and others like them cannot be constitutionally enforced under any circumstances. *See id.* ¶ 29.

Statutes and regulations are presumed constitutional. *See Mayo v. Wisconsin Injured Patients & Fams. Comp. Fund*, 2018 WI 78, ¶ 25, 383 Wis. 2d 1, 23, 914 N.W.2d 678, 689. In this challenge, the Court applies rational basis scrutiny, where statutes are upheld if there is any rational basis for the legislation. Id. The basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification. *Id.* ¶ 29. Under the rational basis test, a statute is unconstitutional if the legislature applied an irrational or arbitrary classification when it enacted the provision. *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 129, 613 N.W.2d 849, 866.

To succeed, Plaintiffs must prove that the statute is unconstitutional beyond a reasonable doubt. *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 17, 357 Wis. 2d 360, 370–71, 851 N.W.2d 302, 308. While this burden of proof is often associated with the requisite proof of guilt in a criminal case, in the context of a challenge to the constitutionality of a statute, the phrase "beyond a reasonable doubt" expresses the "force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute or its application can be set aside." *Id.* (citations omitted).

ANALYSIS AND DECISION

Plaintiffs are asking this Court to find that the regulations at bar are unconstitutional because they violate both equal protection and due process. Furthermore, given that the *Kivirist* decision has already found the regulations

unconstitutional as to baked homemade foods, and this case was not appealed, if this Court finds the regulations unconstitutional as applied to these Plaintiffs, it follows that this Court then must decide whether to extend the injunction prohibiting Defendants from enforcing the ban against them as similarly situated, nearly identical parties.

First, the Court rejects the premise that Plaintiffs cannot challenge constitutionality based on "exemptions." The Court agrees with Plaintiffs that both *Nankin v. Village of Shorewood*, 2001 WI 92 and *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203 (1982) are based on similar challenges to those Plaintiffs bring here. In *Nankin*, the plaintiff sought relief based on being excluded from tax assessment appeal procedures. In *Grand Bazaar*, plaintiff sought relief based on status as an exempted class. Here, Plaintiffs seek relief based on being certain classes being exempt from the regulations when they are not. This is an appropriate challenge to the constitutionality of the regulations.

To the extent the decision in the *Kivirist* case and the supplemental decisions that follow support this Court's analysis and decision, this Court fully adopts and incorporates those decisions from LaFayette County Case Number 2016 CV 6.

I. EQUAL PROTECTION CHALLENGE.

` Essentially, the Plaintiffs challenge in this case is to the regulations that require them to obtain a "retail food establishment" license and submit to inspection and other food safety regulations as a condition precedent to selling their products. The focus of Defendants arguments supporting their claims are all food safety issues, and they devote

their argument to various food safety issues surrounding the regulations they wish to enforce against Plaintiffs. This is Defendants' position notwithstanding that their own experts concur with Plaintiffs' experts that Plaintiffs homemade food is just as safe as and sometimes safer than exempted foods.

A statute violates equal protection only when "the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy. *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 61, 332 Wis. 2d 85, 116, 796 N.W.2d 717, 732.

The Court agrees with and adopts the analysis of the Plaintiffs set forth at pages 43- 61 that exempting some food producers from the regulations creates a distinct class that is afforded significantly different treatment. Plaintiffs here have met the threshold for being similarly situated to the sellers of exempted food. With that threshold met, the Court turns to the analysis of whether this significantly different treatment has a rational basis.

The Supreme Court has restated on frequent occasions the five-fold test for reviewing equal protection challenges to classificatory schemes:

> (1) All classification must be based upon substantial distinctions;
>
> (2) the classification must be germane to the purpose of the law;
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> (3) the classification must not be based on existing circumstances only;
>
> (4) the law must apply equally to each member of the class; and
>
> (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation.

State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 105 Wis. 2d 203, 215, 313 N.W.2d 805, 811 (1982). The regulations fail prongs 1, 2 and 5, and a failure of any of the prongs is sufficient to find the law unconstitutional beyond a reasonable doubt under the rational basis test. *See, e.g. Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 64 ("Under this test, Act 86 fails to satisfy the first, second, and fifth criteria [and is unconstitutional beyond a reasonable doubt]).

A. The Classifications Are Not Based Upon Substantial Distinctions.

As referenced in the fact situation, *infra*, and especially in light of the *Kivirist* decision, there is no reasonable distinction between the Plaintiffs here and the exempted parties, either by regulation or by judicial pronouncement. For example, why is it a food safety issue that requires compliance with the regulations when a seller wants to make and sell a Cocoa Bomb for her own profit, but not a food safety issue when she wants to make and sell a Cocoa Bomb and donate the proceeds to a charitable organization? Why is it a food safety issue that requires compliance with regulations when a seller wants to make and sell roasted coffee for a profit, but not a food safety issue when a seller is a non-profit group that wants to sell roasted coffee for a profit? There is no distinction based on food safety that would justify under a rational basis analysis treating for-profit and non-profit or charitable differently. The food is the same, prepared in the same way. The regulations at bar fail the rational basis test as to this prong of the analysis.

B. The Classifications Are Not Germane to the Purpose of the Law: Food Safety.

The primary purpose of the regulations is food safety. The Court cannot contemplate any legal basis for enacting these regulations if not for the purpose of food safety. The facts presented by both parties, but primarily by Plaintiffs cannot justify the disparate treatment of the exempted parties and the Plaintiffs. The exempted parties and Plaintiffs' foods have the exact same food safety concerns, sometimes because it's the exact same food being sold, just for different purposes (profit versus non-profit). Indeed, as set forth in the expert reports of Dr. Donnelly and Mr. Kaplanek, many foods that are exempted are less safe than the Plaintiffs' foods. Exempted foods have the exact same cross-contamination, allergen and norovirus concerns as Plaintiffs' foods. Even Defendants' expert repeatedly testified that the distinctions between exempted foods and Plaintiffs' food do not make any sense because the risks are the same. The facts presented overwhelmingly show that the classifications between the exempt parties and the Plaintiffs are not germane to food safety, and could not be found under any rational reading.

C. There is No Public Benefit in Treating Plaintiffs Differently than the Exempted Food Producers.

Preventing certain Wisconsin residents from making and selling their homemade food products for profit while allowing other exempted parties to sell the exact same products without being subject to state regulations is not in the public interest. Plaintiffs in this case are being denied the same opportunities as the exempted parties simply because they wish to make a profit themselves – there are no food safety issues that would support this distinction.

Under the rational basis test, a statute is unconstitutional if the legislature applied an irrational or arbitrary classification when it enacted the provision. *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 57, 237 Wis. 2d 99, 129, 613 N.W.2d 849, 866. The exempted parties and the Plaintiffs are irrational and arbitrary classifications. The regulations challenged by the Plaintiffs are unconstitutional as applied to them and others similarly situated and violate Plaintiffs' guarantee of equal protection under the law.

II. DUE PROCESS CHALLENGE

The Court need not analyze the due process challenge, as the regulations already fail and are unconstitutional as applied to these Plaintiffs and others similarly situated.

III. THE *KIVIRIST* DECISION WARRANTS EXTENSION OF INJUNCTION AGAINST DEFENDANTS' ENFORCEMENT OF THE REGULATIONS AGAINST PLAINTIFFS AND OTHERS SIMILARLY SITUATED.

. The Court now turns to the remedy the Plaintiffs seek: application of the *Kivirist* injunction against enforcement by the Defendants as to these Plaintiffs and others similarly situated. The following exchange occurred at the oral argument in this case:

> THE COURT: So you don't have to be challenging the exemptions as unconstitutional; you are just asking that the judicially created exception be extended to your people too?
>
> ATTORNEY PEARSON: Yes, your Honor. We argue that the ban -- or what we call "the ban" is creating three different unconstitutional distinctions. So, first, your Honor, we have the category of exemptions based on the specific foods being sold. And so, for example, it's perfectly legal in Wisconsin right now to sell unlicensed homemade popcorn,

> but my clients can't sell their roasted coffee beans; and it's perfectly legal in Wisconsin right now to sell unlicensed unproduced honey, but my clients cannot sell their Rice Krispie treats. And, again, defendants' own designated representative repeatedly and expressly said that these distinctions "do not make sense." And repeatedly conceded that my clients' foods were as safe or safer as all of the exempted foods. And then, of course, your Honor, there's the second distinction that we have been talking about between my clients' foods and the baked goods in Kivirist.
>
> I also want to point out that there won't be a cascade of lawsuits because there are only two categories –
>
> THE COURT: I was just going to ask whether that's a concern. Whether you think I should give any weight to Attorney Johnson-Karp's scenario that we're going to see multiple sequential lawsuits all looking to extend this ruling.
>
> ATTORNEY PEARSON: Sorry. I apologize. I didn't mean to interrupt, your Honor. But, your Honor, I mean, the Kivirist ruling already covers baked not-potentially hazardous foods. This case is about not baked not-potentially hazardous foods. There are no other not-potentially hazardous foods left after this case, so I don't see that as a reasonable concern, your Honor. And then turning to the third class of distinctions, your Honor, as your Honor alluded to earlier: There are also the exceptions based on who is selling the food. This covers, you know, charities, anyone donating their profits to charities, people selling at youth sporting events. And there is a dispute here over the extent of those exemptions; but, again, there is no dispute over the fact that my clients' foods are as safe or safer than all of the foods ever sold under any of those exemptions. And, again, in the words of defendants' own designated representative, the distinction between my clients not being allowed to sell their foods and all those groups being allowed to sell the same foods "does not make sense." So for all of those three reasons -- and we only have to win on one of them, your Honor -- we think it's an equal protection violation.

Oral Arg. Transcr. at 20-23.

In addition, the Court asked how the *Kivirist* case should play into its ruling when looking at this matter in light of fairness and justice:

> THE COURT: But -- so tell me how I deal with this decision sitting out there in *Kivirist*. When now we have a group of people, who by your expert's own admission, are, basically, in the same boat except their food is not baked; right? I mean, that's -- so what do I do with that decision? Because now I have a situation where, as a judge, my job is to do justice and my job is to make sure that my decision conforms to the law. While understanding that a circuit court case in another county -- in the same county actually. This is Lafayette County technically, even though I'm a Dane County Judge. We have two cases in the same county: One, stands on the proposition that people selling baked stuff get to keep selling it; and I decide in your favor and say, "the rest of you, who are exactly in the same boat except for the method of cooking, don't get to do that." What do I do with that case? How is that justice? How is that serving similarly -- it sounds to me, similarly situated people by telling them they can't, but the others can?
>
> ATTORNEY JOHNSON-KARP: Two points, your Honor: First, even if we accept their premise that *Kivirist* created a legally cognizable class –
>
> THE COURT: Well, it did not do that. It, basically, said -- well, okay. I will let you finish that thought, and then I will give you my thought.
>
> ATTORNEY JOHNSON-KARP: Even if we accept their premise -- the reason that I assume plaintiffs have brought this lawsuit is because they are talking about a materially different class that the -- we're not talking about the same type of food, and that's where we would have the equal protection violation. If we had somebody making cakes but for some reason was being denied the same treatment, then under the *Kivirist* decision that might be a problem. But we have different foods here, which is why, presumably, the plaintiffs have brought a different lawsuit. And this, I think, again –
>
> THE COURT: Well, popcorn and coffee beans seem pretty similar to me.

ATTORNEY JOHNSON-KARP: On the food safety rationale, yes. I think, again, the plaintiffs have focused on the similarity with regard to food safety; but that doesn't eliminate the rationale of maintaining the blanket licensing requirement for the additional conceivable reasons that we have discussed. That as a general matter, the State of Wisconsin has decided that we want people selling food to the public to get a license. And if anybody making potentially or not-potentially hazardous food were granted an exemption, then we sort of have a one-way ratchet. That as soon as one ratchet -- or as soon as one exemption is granted, then there would be no way for the legislature to constitutionally draw that line. And here, the legislature has drawn those lines narrowly. And the judicial task, I think, respectfully, is to respect those lines.

THE COURT: Well, I understand that. My question was more along the lines of in my role as a judge and doing justice and treating people neutrally who come before the courts. Here, we have two cases in the same county, two different judges making two different decisions about people who are pretty close to doing the same thing or similarly situated. What do I do with that?

ATTORNEY JOHNSON-KARP: With regard to, again, the similarly situated, we dispute that somebody Case making different foods is similarly situated.

THE COURT: What if I think they are similarly situated, then what do I do with that?

ATTORNEY JOHNSON-KARP: I would commend to the Court the additional rationales that support upholding the existing licensing requirement.

THE COURT: And just ignore the other case entirely? It doesn't matter what happened there? It doesn't matter if your neighbor next door is able to bake a cake and sell it commercially, but you want to roast some coffee, and you can't. I ignore that; and I just look at the statute, the exemptions, apply the rational basis, and we're done?

ATTORNEY JOHNSON-KARP: Respectfully, your Honor, I think that's exactly right. And, frankly, the fallout of any

> disparity between the decisions will fall on our shoulders, your Honor.

Oral Arg. at 26-28.

As discussed *supra*, the Court has found the Plaintiffs here to be similarly situated to the *Kivirist* plaintiffs. When deciding how to fashion a remedy for parties like the Plaintiffs, the United Supreme Court instructs that there are really two alternatives:

> [A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. When the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Sessions v. Morales-Santana, 198 L. Ed. 2d 150, 137 S. Ct. 1678, 1698 (2017) (quotations omitted).

In determining whether to extend or withdraw, Courts have turned to Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S., at 361–367, 90 S.Ct. 1792 in considering whether the legislature would have struck and exception and applied the general rule or instead would have broadened the exception to cure the equal protection issue. *Sessions v. Morales-Santana*, 198 L. Ed. 2d 150. That is, should the exemptions be extended to these Plaintiffs, or should the exempted parties (charitable organizations, taverns, school concession stands, churches, etc.) all be subjected to the requirements set forth in the regulations? In answering this question, the Court looks to measure the intensity of commitment to the residual policy—the main rule, not the

exception—and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation. *Id.*

In looking at the totality of the circumstances, the goal of these regulations is food safety. While this is an important and laudable purpose for the people of the State of Wisconsin, the legislature has already carved out exemptions to the statutory requirements and regulations for certain classes of people making the exact same foods (charitable organizations, etc. discussed *supra*). *Kivirist* further extended these exemptions to home bakers. It would clearly disrupt the statutory scheme for the Court to extend the regulations to all parties, including those exempted by statute and by *Kivirist*. However, extending these exemptions to Plaintiffs who wish to sell their homemade non-baked goods will not cause any or at most minimal disruption to the statutory scheme. It will simply place them on equal footing with the currently exempted parties. The only difference between the *Kivirist* plaintiffs and Plaintiffs here is whether the food is baked or not baked. It would be unjust and unfair to Plaintiffs not to extend the injunction against enforcement to them.

ORDER

For all of the reasons discussed *supra*, this Court GRANTS Plaintiffs' Motion for Summary Judgment and ENJOINS Defendants from enforcing Wisconsin's food processing plant and retail food establishment licensing requirements set forth at Wis. Stat. § 97.29(2)(a), Wis. Stats. § 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 against the Plaintiffs and all other similarly-situated individuals.

Defendants' Motion for Summary Judgment is DENIED.

This is a FINAL ORDER for purposes of appeal.