



March 16, 2018

VIA EMAIL AND CERTIFIED MAIL

Mylynn K. Tufte
State Health Officer
North Dakota Department of Health
600 East Boulevard Avenue
Bismarck, ND 58505-0200

RE: Proposed Rules for the Food Freedom Act

Dear Ms. Tufte:

I am writing to you regarding the proposed rules for administering North Dakota's Food Freedom Act, which were proposed on February 15. These proposed rules contradict the plain text of the Act and would thus be *ultra vires*. Accordingly, we strongly suggest that you withdraw the proposed rules from consideration.

I am a constitutional attorney at the Institute for Justice, a national nonprofit organization that fights against laws that irrationally burden people's right to pursue their chosen livelihood. One of my areas of expertise is cottage food law. I was the attorney who successfully sued Minnesota (*Astramecki v. Department of Agriculture*) and Wisconsin (*Kivirist v. Department of Agriculture*) concerning their unconstitutionally restrictive cottage food laws, and I am currently litigating against New Jersey regarding its total ban on the sale of cottage foods. In addition, I litigate against state agencies that enact *ultra vires* rules. See, e.g., *Espinoza v. Mont. Dep't. of Rev.*, No. DV-15-1152(D) (Mont. Dist. Ct. Mar. 31, 2016).

My colleague Jennifer McDonald and I were recently alerted to the Department's proposed rules by residents within your state. Upon investigation, we have concluded that these rules would, if promulgated, substantially curtail the rights granted to homemade food producers under the Food Freedom Act. While the statute allows the sale of all homemade foods and drinks besides certain meat and poultry products, the proposed rules would allow the sale of only a few, extremely restricted foods.

The statutory language of the Food Freedom Act is clear. Section 23-09.5-02(1) states that "a state agency or political subdivision may not" regulate "the preparation or sale of cottage food products." "Cottage food product," in turn, is defined as a "food and drink product[] produced by a cottage food operator," and "cottage food operator" is defined as a person who makes food in a private home kitchen. § 23-09.5-01(1) & (2). The only homemade foods that the Act does not permit the sale of are certain "uninspected products made from meat" and certain "uninspected products made from poultry" (unless the poultry producer meets certain

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requirements). § 23-09.5-02(3). The Act thus covers all homemade “food and drink” that is not meat or poultry.

In contrast, the proposed rules would severely limit the homemade foods allowed to be sold to baked goods, certain home-canned goods, dry goods, and a few other limited items. The rules would also severely restrict the sale of even these items. For instance, the rules would require that home-baked goods that need refrigeration be frozen when sold. Not only would this prohibit the sale of many “fresh” baked goods, but it would also prevent the sale of baked goods to customers who want to eat them shortly after purchase. The rules would also require that home-canned goods have a pH level of 4.6 or lower, preventing many fruits and vegetables from being canned and sold by a home producer.

Rules that contradict the language of a statute are ultra vires and invalid. *See, e.g., Shiek v. North Dakota Workers Compensation Bureau*, 1998 ND 139, ¶16 (stating the courts “will defer to a reasonable interpretation of a statute by the agency enforcing it However, an interpretation that does contradict clear and unambiguous statutory language cannot be called reasonable.”); *see also Guthmiller v. Dir.*, 2018 ND 9, ¶8 (“We defer to the interpretation of a statute by the agency administering the law unless that interpretation contradicts clear statutory language.”).

Finally, it bears noting that North Dakota’s Food Freedom Act is an important piece of legislation that has the potential to create thousands of jobs across the state. According to new research by the Institute for Justice, cottage foods provide an attractive avenue to entrepreneurship, as they allow people to start businesses with little capital. Cottage food producers are overwhelmingly female, live in rural areas, and have below-average income. By hamstringing the Food Freedom Act, the Department would deprive such vulnerable people, and others like them, from realizing the economic opportunity that the Act was intended to provide. The Department’s rules would also severely limit consumers from making their own choices when it comes to where their food comes from.

Therefore, we strongly encourage you to withdraw these rules. Cottage food producers should be allowed to sell all foods not explicitly excluded by statute. Thank you, and please contact me if you have any questions. My number is (703) 682-9320.

Sincerely,



Erica Smith
Attorney
INSTITUTE FOR JUSTICE

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cc:

Governor Doug Burgum (via email and certified mail)

Lieutenant Governor Brent Sanford (via email and certified mail)

Jennifer McDonald, Institute for Justice research analyst (via email)

Darleen Bartz, Chief of Health Resources Section: (via email)

Julie Wagendorf, Director of Food & Lodging (via email)

LeAnn Harner, North Dakota Food Freedom organization (via email)