



INSTITUTE FOR JUSTICE

January 3, 2024

**Via Email**

Joseph Guthrie, Commissioner  
Kevin Schmidt, Director, Office of Policy, Planning and Research  
Virginia Department of Agriculture and Consumer Services  
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Richmond, VA 23219  
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**Re: *VDACS' Ban on Online Advertising of Cottage Foods***

Dear Mr. Guthrie and Mr. Schmidt:

My name is Caroline Grace Brothers and I am an attorney at the Institute for Justice (IJ). I am writing concerning VDACS' decision to implement a ban on online advertising for cottage food businesses exempted from regulation under Virginia Code § 3.2-5130(C)(3). As explained below, this ban violates the First Amendment at a bedrock level. Selling cottage foods is legal in Virginia, and the First Amendment requires that talking about a legal activity must be legal too. The ban is also a poor policy choice because it stifles Virginians' ability to start or grow their small businesses. We therefore urge VDACS to rescind its ban and allow cottage food businesses to advertise their products online.

**About the Institute for Justice**

IJ is a national nonprofit law firm that has been fighting to protect individuals' constitutional rights for over 30 years. We have litigated our cases in the U.S. Supreme Court as well as in state and federal courts across the country. One of the rights IJ defends is the First Amendment right of entrepreneurs to truthfully advertise their lawful business. IJ has successfully challenged laws that infringe on our clients' right to commercial speech, including in [Florida](#), [Maryland](#), [Mississippi](#), [North Dakota](#), and [Washington](#).

IJ also fights against laws that irrationally burden people's right to pursue their chosen livelihood. One of our areas of expertise is homemade food laws, also known as "cottage food" laws. We assist legislatures and local municipalities that are considering changes to their cottage food laws and have helped over half the states and several municipalities reform their laws. When necessary, we also [litigate](#) to protect the rights of cottage food producers.

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### **VDACS' Ban on Online Advertising**

One of those entrepreneurs is a Richmond resident named Kelly Phillips.<sup>1</sup> Kelly has been baking for her entire life, and she started KP's Kake Pops over 10 years ago when she made her first cake pop. She sells primarily cake pops, but also hot cocoa bombs, French macarons, drop cookies, and other baked goods for customers to use for birthdays, weddings, baby showers, and other events. Because none of those treats require time or temperature control, Kelly's business is exempted from most of the regulatory requirements for food establishments. *See* Va. Code § 3.2-5130(C)(3). KP's Kake Pops is both a useful "side hustle" and a way for Kelly to do something that she loves and to use skills passed down from her mother.

Creating custom cake pops and other treats has also helped connect her with her community. For years, Kelly used social media accounts and a website to post pictures of her custom creations to spread the word about her business. She estimates that about half of her sales resulted from customers seeing pictures of her products and contacting her to place an order.

But a few weeks ago, a VDACS representative contacted Kelly and informed her that she could not use either her website or social media accounts to advertise her business without "being permitted" as a food establishment, noting that her baked goods "appear to be for sale for consumers on your Facebook page."<sup>2</sup> The representative referenced Section 3.2-5130(C)(3), which prohibits exempted cottage foods from being "offered for sale over the Internet or in interstate commerce." But Kelly has only ever used social media and her website to advertise her baked goods online by posting pictures, providing menus, and letting people know where she plans to sell her goods in person. When a customer is interested in placing an order, she contacts Kelly via email or phone to discuss the order and arrange a time to pick it up in person.

In response to a separate inquiry, a different representative of VDACS confirmed via email that "the VDACS Office of Policy and Planning has clarified that 'offered for sale' includes advertising on the Internet." Though the representative was asked for a copy of this "clarified" guidance, none has been produced.

This ban on online advertising is breathtakingly unconstitutional. The Supreme Court has made it clear that the First Amendment protects commercial speech—such as advertising—that "concern[s] lawful activity" and is "not . . . misleading." *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). In other words, if a product is legal to sell, it is legal to discuss.

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<sup>1</sup> We are not currently representing Kelly, but that is subject to change.

<sup>2</sup> We would be happy to provide you with these emails upon request.

VDACS cannot therefore authorize the sale of cottage foods on the one hand and forbid the truthful advertising of cottage foods on the other. The Supreme Court has repeatedly invalidated similar bans on the advertisement of legal products and services. *See, e.g., Cent. Hudson*, 447 U.S. at 571–72 (striking down New York’s ban on advertising by electric utilities); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down Rhode Island’s ban on advertising of liquor prices), *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430–31 (1993) (striking down Cincinnati’s “sweeping ban” on distributing otherwise-legal commercial publications on sidewalk news racks).

Nor could VDACS carry its burden to justify its ban as consistent with the First Amendment. *See Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999). Any regulation that restricts the exchange of truthful information about a legal product must directly advance a substantial governmental interest and be narrowly tailored to achieve that interest. *See Central Hudson*, 447 U.S. at 564–66. But Virginia has no substantial interest in suppressing truthful information about cake pops. There are already laws on the books that criminalize advertisements that would deceive the public. *See, e.g., Va. Code* § 18.2-216 (making “untrue, deceptive or misleading” advertising a misdemeanor). In fact, the only reason VDACS seems to have for its ban on online advertising is a broad interpretation of the phrase “offered for sale over the Internet” in Section 3.2-5130(C)(3).<sup>3</sup> But even if the state had *any* interest in suppressing cottage food producers’ speech, a “blanket ban” on truthful advertising is not narrowly tailored to any potential state interest. *Central Hudson*, 447 U.S. at 566 n.9.

At bottom, VDACS’ policy is that people are free to sell cottage foods at their home or at farmers’ markets but forbidden from posting about that same food on Facebook or Instagram. That is an obvious violation of the First Amendment.

In addition to its constitutional flaws, the ban is also bad policy because it inhibits entrepreneurship and economic self-sufficiency. Like Kelly, most cottage food producers use their businesses to supplement their income from their full-time jobs.<sup>4</sup> These businesses provide

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<sup>3</sup> On top of the glaring constitutional issue with banning advertising, VDACS’ interpretation of “offered for sale” to include “advertising” is overly broad. Merely marketing products online—by posting pictures or describing products—is distinct from conducting transactions online. Indeed, many other state laws distinguish between the two terms. *See, e.g., Va. Code* § 18.2-217(a) (making it a misdemeanor to “advertise[] or offer[] for sale to the public” products “with intent not to sell, or with intent not to sell at the price or upon the terms advertised or offered” (emphases added)). And as many courts have noted, an advertisement does not usually constitute a binding offer of sale. *See, e.g., Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 122–23 (S.D.N.Y. 1999); *see also Chang v. First Colonial Sav. Bank*, 410 S.E.2d 928, 391 (Va. 1991).

<sup>4</sup> *See Jennifer McDonald, The Relationship Between Cottage Food Laws and Business Outcomes: A Quantitative Study of Cottage Food Producers in the United States*, 84 Food Pol’y

their owners with financial independence and flexibility and control over their own schedules, enabling them to use their earnings to cover necessary expenses such as bills, food, clothing, healthcare, and housing.<sup>5</sup> Home-based businesses can therefore be a huge benefit to the community, especially for women, low-income families, and racial and ethnic minorities.<sup>6</sup>

VDACS' ban will be devastating to businesses like these and the communities they serve. Most small business owners depend on sharing pictures and information about their products on social media to build their customer base. Kelly, for example, estimates that fully half of KP's Kake Pops' sales resulted from customers seeing pictures of her baked goods on her website or on social media. And although many cottage food business owners hope to expand their business in the future, that type of growth would be all but impossible in Virginia if cottage food businesses cannot use the Internet to market their products. The ban would also cut off any potential new cottage food ventures at the knees.

### Conclusion

We therefore urge you to rescind any guidance or draft policies that prevent or restrict cottage food businesses from advertising online. We also ask that you clarify on your website that these businesses are allowed to use the internet to advertise. These actions would not only resolve the First Amendment issue, but would also benefit all Virginians—entrepreneurs and consumers alike—by allowing cottage food producers to spread the word about their businesses. If you have any questions, I would be happy to discuss this with you further. I can be reached at the phone number and email address below.

Sincerely,



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21 (2019), <https://www.sciencedirect.com/science/article/abs/pii/S0306919218303889?via%3Dihub>.

<sup>5</sup> See *id.*

<sup>6</sup> See generally Jennifer McDonald, *Work Entrepreneur From Home: How Home-Based Businesses Provide Flexibility and Opportunity—and How Cities Can Get Out of Their Way*, Institute for Justice (2022), <https://ij.org/wp-content/uploads/2022/01/entrepreneur-from-home.pdf>.