No. _____

In The Supreme Court of the United States

KIM POWERS, DENNIS BRIDGES, and MEMORIAL CONCEPTS ONLINE, INC.,

Petitioners,

v.

JOE HARRIS, STEPHEN HUSTON, CHARLES BROWN, TERRY CLARK, CHRIS CRADDOCK, KEITH STUMPFF, and SCOTT SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit erred when it held, in direct conflict with the Sixth Circuit and with precedents of this Court forbidding government action based on raw favoritism or prejudice, that States may impose arbitrary and irrelevant credentialing requirements on casket retailers for the sole purpose of protecting state-licensed funeral directors from competition.

PARTIES TO THE PROCEEDING

Petitioners, who were plaintiffs below, are Kim Powers, Dennis Bridges, and Memorial Concepts Online, Inc.

Respondents, who were defendants below, are the seven members of the Oklahoma State Board of Embalmers and Funeral Directors: Joe Harris, Stephen Huston, Charles Brown, Terry Clark, Chris Craddock, Keith Stumpff, and Scott Smith.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Memorial Concepts Online, Inc. does not have any parent corporations and no publicly held company owns 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 379 F.3d 1208, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1-35. The District Court's opinion is unreported, and is reprinted at Pet. App. 36-76.

JURISDICTION

The Court of Appeals entered its judgment on August 23, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution. Pet. App. 77. The statute involved is Oklahoma's Funeral Services Licensing Act, Okla. Stat., Tit. 59, § 395.1, *et seq*. The pertinent provisions are reproduced in the Appendix at Pet. App. 78-86. Selected provisions of the Oklahoma Administrative Code are reproduced at Pet. App. 87-96.

STATEMENT

A. Factual Background

Kim Powers and Dennis Bridges sell caskets and other funeral merchandise over the Internet at prices far below what funeral homes charge for the exact same items. Neither Kim nor Dennis is licensed by the State of

Oklahoma as a funeral director, nor is their Oklahoma-based company, Memorial Concepts Online, licensed as a "funeral establishment." Accordingly, it is a crime for them to sell caskets within the State.

Buying caskets and other funeral merchandise from third-party retailers is a cost-effective and increasingly popular alternative to purchasing them from funeral homes. For example, Costco announced plans last summer to test-market caskets at several of its stores in Illinois. The story received widespread coverage from National Public Radio, *USA Today*, CNN, the *Economist*, and a slew of other outlets. Today, there are over 200 casket retailers nationwide. But in Oklahoma and nine other states, only state-licensed funeral directors may sell caskets to the public.[1]

Historically, the funeral industry has been quite hostile to competition. As chronicled by Jessica Mitford in her bestseller *American Way of Death*, members of the industry have a record of exploiting customers in various ways, including the use of inappropriate sales tactics to increase the amount people spend on caskets – a practice some Oklahoma funeral homes continue to employ. Pet. App. 44.

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[1] *See* Alabama (Ala. Code §§ 34-13-1(a)(15), 34-13-1(a)(17), 34-13-70(a) (2004)); Delaware (Del. Code Ann., Tit. 24, §§ 3101(7), 3106(a) (2003)); Idaho (Idaho Code §§ 54-1102(11), 54-1102(13), 54-1102(17), 54-1103(2) (2004)); Louisiana (La. Rev. Stat. Ann. §§ 37:831(35)-(38), 37:848(C) (West 2004 & Supp.)); Maine (Me. Rev. Stat. Ann., Tit. 32, §§ 1400(5), 1501 (West 2004)); South Carolina (S.C. Code Ann. §§ 40-19-20(12), 40-19-20(18), 40-19-30 (2003)); Vermont (Vt. Stat. Ann., Tit. 26, §§ 1211(2), 1211(4), 1251 (2003)); Virginia (Va. Code Ann. §§ 54.1-2800, 54.1-2805 (2004)); and perhaps Minnesota (Minn. Stat. §§ 149A.02(20)-(21), 149A.50(1), 149A.70(6) (2004)) (ambiguous statute). Laws allowing only funeral directors to sell caskets have been struck down by courts in Tennessee, Mississippi, and Georgia. See discussion in Part I, *infra*.

Oklahoma funeral directors routinely mark up the price of their caskets four, five, even six hundred percent above wholesale cost. Appellants' 10th Circuit Appendix ("10th Cir. App.") 919. Five of the seven Respondents are themselves funeral directors, and even though their own expert testified that mark-ups above three hundred percent are unfair to consumers, *id*. at 530, they have taken no steps to curb this practice. To the contrary, three of the Respondents mark up the price of at least one casket in their own funeral homes more than three hundred percent above wholesale cost. *Id*. at 531-32, 926.

After a thorough investigation of the industry, the Federal Trade Commission in 1982 adopted its so-called "Funeral Rule." Designed to stimulate competition and increase consumer choice, the Rule's main components are mandatory price disclosure, unbundling of goods and services, and prohibition of certain common misrepresentations, such as telling customers the law requires embalming when it does not.

Those disclosure and unbundling requirements, together with exorbitant casket prices, prompted people to start looking for new sources for caskets besides funeral homes. In response, many funeral directors began charging "casket handling fees" to customers who obtained their caskets elsewhere. In 1988, the FTC informed the industry that it was considering banning casket handling fees. Finding that the fees were "imposed . . . by a significant proportion of providers wherever third-party casket sellers exist" in order to stifle competition, the FTC outlawed

them in 1994.[2] As a result, "the whole casket retail movement exploded." 10th Cir. App. 287.

Just one year after the FTC advised the industry that it was considering eliminating casket-handling fees, Oklahoma amended its Funeral Services Licensing Act ("FSLA") in 1989 to give licensed funeral directors the exclusive right to sell caskets within the State. *See* Pet. App. 49; Okla. Stat., Tit. 59, §§ 396.2(2)(d), 396.2(10), 396.3(A) & 396.6(A). The FSLA also provides that caskets may only be sold from a licensed funeral establishment, i.e., a traditional funeral home complete with preparation, selection, and viewing rooms, a physical inventory of caskets, and a full-time embalmer on staff. Okla. Stat., Tit. 59, § 396.12; Okla. Admin. Code § 235:10-3-2.

Notwithstanding the suggestive timing of those amendments, Respondents seek to portray Oklahoma's casket sales monopoly as potentially serving a genuinely public purpose unrelated to the suppression of competition: consumer protection. Regarding that purported justification for Oklahoma's casket sales monopoly (which the Tenth Circuit did not accept), the record shows the following.

1. A casket is simply a metal or wooden box designed to hold human remains during funeral services and for burial. Pet. App. 41. Very little specialized knowledge is required to sell caskets, and any information a salesperson

[2] Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. 1592, 1604 (Jan. 11, 1994) (codified at 16 C.F.R. § 453.4(b)(1)(ii)); s*ee generally Pa. Funeral Dirs. Ass'n v. FTC*, 41 F.3d 81, 84-85 (3rd Cir. 1994) (describing history of casket handling fees and upholding FTC ban).

needs can be acquired on the job. Most consumers select caskets based on price and style. *Id*. at 47.

2. Obtaining an Oklahoma funeral director's license is an arduous and expensive process requiring two years of college coursework, graduation from an accredited program of mortuary science, two exams, and a one-year apprenticeship in a funeral home, during which the apprentice must embalm at least 25 human bodies. *Id.* at 63. Less than five percent of this training – which includes such exotic subjects as the food requirements of heterotrophic bacteria, the function and use of an electric spatula, and the order of putrefaction of internal organs – is relevant to casket retailing. As a result, the district court found that people who wish to sell caskets in Oklahoma "are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets." *Id.* at 47.

3. Both the inconsistent coverage of the FSLA and the arbitrary enforcement of its provisions by the State Board of Embalmers and Funeral Directors ("State Board") undermine the plausibility of Respondents' assertion that Oklahoma's casket sales restriction is rationally related to consumer protection.

a. Although Respondents claim that some of the academic training funeral directors receive (such as psychology and grief counseling) is important for selling caskets, the State Board allows people with no training and no license to sell caskets on a pre-need basis (i.e., before the death of the person for whom the casket will be used) without any supervision from a licensed funeral director as long as they are acting as his "agent." *Id.* at 42. Thus, while the State of Oklahoma requires people who

want to sell caskets for their *own* profit to endure two years of academic training, a one-year apprenticeship, and multiple exams, people who sell caskets for the profit of *funeral directors* may do so with no training, no apprenticeship, no examinations, and no special skills of any kind.

b. Although it is well aware of them, the State Board has never studied, investigated, or attempted to regulate unlicensed casket retailers outside the state who sell caskets over the Internet or by other means to people in Oklahoma. *Id.* at 43, 61. The State Board has no plausible explanation for why it regulates casket sales to Oklahoma residents by in-state retailers, but not sales to Oklahoma residents by out-of-state retailers.[3]

c. Although the FSLA provides that "no person shall . . . engage in the sale of *funeral service merchandise* to the public," Okla. Stat., Tit. 59, § 396.6(A) (emphasis added), the State Board does not regulate the sale of any funeral merchandise besides caskets, such as markers, monuments,

[3] The Tenth Circuit stated that "the FSLA limits its enforcement to intrastate casket sales only." Pet. App. 4. That is incorrect. The FSLA contains no express jurisdictional limitation, and it specifically provides that "no *person* shall . . . engage in the sale of funeral service merchandise to the public" without a license. Okla. Stat., Tit. 59, § 396.6(A) (emphasis added). The decision not to enforce the statute against out-of-state casket retailers is simply a matter of State Board policy. *See* Pet. App. 61 ("[t]he Board has limited its enforcement of the FSLA's statutory prohibition of casket sales by unlicensed entities to in-state casket sales"). Notably, the State of Oklahoma does not hesitate to reach outside its borders to regulate commercial activities that present *genuine* consumer protection concerns. *See, e.g.*, *Aldens v. Ryan*, 571 F.2d 1159, 1161-62 (10th Cir. 1978) (rejecting Commerce Clause challenge to provision of Oklahoma Consumer Credit Code setting maximum interest rates for credit sales by out-of-state businesses).

urns, special clothing, or flowers.[4] Accordingly, anyone may sell those items to grieving, supposedly vulnerable consumers in Oklahoma with no oversight by the State Board. *See* Pet. App. 43; Okla. Stat., Tit. 59, § 396.2(10); 16 C.F.R. §§ 453.2(b)(4) & 453.1(h).

B. Proceedings Below

Petitioners filed this lawsuit under 42 U.S.C. § 1983 in 2001, challenging Oklahoma's casket sales restrictions as a violation of their right to earn an honest living free from arbitrary or unreasonable government interference. Specifically, Petitioners argued that the lack of fit between a law permitting only licensed funeral directors to sell caskets and the State's asserted consumer protection interest rendered the challenged provisions arbitrary, irrational, and therefore illegitimate under the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment.

Following a two-day bench trial, the district court issued a detailed memorandum opinion in which it recognized that Oklahoma's casket sales restrictions interfere with Petitioners' ability to earn a living, Pet. App. 55, and expressed doubt as to whether the restrictions actually advance the cause of consumer protection. *Id*. at 73-74. The court also indicated that it "might . . . conclude that

[4] Monuments and markers are specifically exempted from the FSLA, Okla. Stat., Tit. 59, § 396.2(10). The decision not to regulate the sale of urns, clothing, and flowers used in funerals is a matter of State Board policy. The casket is typically the single most expensive item in a funeral. *See, e.g*., Federal Trade Commission, *Caskets and Burial Vaults* (Nov. 1996), available at http://www.ftc.gov/bcp/conline/pubs/services/funeral.htm.

the actual motivation for enactment of the challenged provision was, in all likelihood, far less altruistic than the rationales proffered now." *Id*. at 74. The court nevertheless upheld the restrictions because it believed they "could have been thought by the legislature to promote the goal of consumer protection." *Id*. at 74-75.

The Tenth Circuit affirmed. Although it discussed the State's consumer protection argument, the court did not uphold Oklahoma's casket sales restriction on that basis. Instead, recognizing that it was "obliged to consider every *plausible* legitimate state interest that might support the FSLA" – which evidently did not include consumer protection – the court concluded that it must "consider whether protecting the intrastate funeral home industry . . . constitutes a legitimate state interest." Pet. App. 16 (emphasis added). Like the Sixth Circuit in *Craigmiles v. Giles*, the court recognized that funeral-director-only sales laws are "'very well tailored' to 'protecting licensed funeral directors from competition on caskets.'" *Id.* at 16-17 (quoting *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002)). Unlike the Sixth Circuit, however, the Tenth Circuit accepted pure economic protectionism as a legitimate state interest under the rational basis test and upheld Oklahoma's casket sales restriction on that ground alone. *Id.* at 31.

In his concurring opinion, Judge Tymkovich denied that economic protectionism is a legitimate state interest. He also observed that "[c]onsumer interests appear to be harmed rather than protected" by Oklahoma's casket sales restrictions. *Id.* at 35. Judge Tymkovich nevertheless concluded that the restrictions satisfy the rational basis test because they "further[ ], however imperfectly, an element of consumer protection." *Id.* at 34. Judge Tymkovich did not specifically explain how he would reconcile that conclusion

with the holdings of federal courts in other states that have unanimously rejected it, see discussion in Part I, *infra*, and his decision appears to have been based in part on his mistaken belief that "the history of the licensing scheme here shows that it predates the FCC's [sic] deregulation of third-party casket sales . . . and . . . was not enacted solely to protect funeral directors facing increased intrastate competition." *Id.* at 34. In fact, as demonstrated above, Oklahoma adopted its casket sales monopoly during a time when consumers were looking to third-party suppliers for caskets and funeral directors were attempting to discourage that practice by imposing so-called "casket handling fees."[5]

REASONS FOR GRANTING THE PETITION

The decision below creates a circuit conflict on a question that has generated significant litigation in the lower courts: namely, whether states may give licensed funeral directors the exclusive right to sell caskets. More fundamentally, the decision creates a split on the basic question of whether pure economic protectionism is a legitimate state interest under the rational basis test. In support of that proposition, the Tenth Circuit claims this Court has "consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest." Pet. App. 20.

[5] *See also* 10th Cir. App. 343-44 (Petitioners' expert witness describing his first encounter with advertisement by third-party casket retailer "in the late 1970s, somewhere along in that era").

The Tenth Circuit's endorsement of economic protectionism marks a radical departure from the framers' conception of just government and a repudiation of several hundred years of common law hostility to state-sponsored monopolies. It also turns James Madison's warnings about the dangers of faction completely on their head: whereas Madison considered the tendency of interest groups to subvert the legislative process to be one of the primary evils the Constitution was designed to combat, the Tenth Circuit has embraced the very essence of faction and declared it a positive good. *See* J. Madison, *The Federalist* No. 10 (Modern Library College ed.) at 57-58.

If permitted to stand, the Tenth Circuit's decision would drain rational basis review of all content and would convert the right to earn a living – which this Court has consistently recognized since its earliest days – into a mere privilege. As this Court explained over one hundred years ago, however, "the very idea that one man may be compelled to hold his life, or the means of living, . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

I. THE DECISION BELOW CREATES A DIRECT AND ACKNOWLEDGED CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN *CRAIGMILES* AND WITH DISTRICT COURTS IN OTHER CIRCUITS.

The Tenth Circuit's decision creates a direct and acknowledged conflict with the Sixth Circuit's *Craigmiles* decision, in which Judge Boggs, writing for a unanimous panel, specifically rejected the notion that a bare desire to favor state-licensed funeral directors at the expense of

would-be casket retailers constitutes a legitimate state interest under the rational basis test. *Craigmiles v. Giles*, 312 F.3d 220, 224-25 (6th Cir. 2002). The Tennessee statute at issue in *Craigmiles* and the Oklahoma law at issue in this case are, according to the Tenth Circuit, "nearly identical." Pet. App. 26. Likewise, the Tenth Circuit did not identify any material factual differences between the two cases, nor did it attempt to distinguish *Craigmiles* in any way. Instead, the Tenth Circuit squarely rejected the Sixth Circuit's holding on an identical question of constitutional law. *Id*.

Although it did not say so explicitly, the Tenth Circuit apparently agreed with the *Craigmiles* court that consumer protection is not a conceivable basis for casket sales restrictions like Oklahoma's and Tennessee's. Otherwise, it is hard to imagine why the court, having specifically acknowledged consumer protection as a legitimate state interest, would have based its ruling on a different rationale neither suggested by the parties nor considered by the district court. Perhaps the Tenth Circuit felt, like the *Craigmiles* court, that Oklahoma's consumer protection arguments "come close to striking us with the force of a five-week-old, unrefrigerated dead fish." *Craigmiles*, 312 F.3d at 225 (internal quotations and citations omitted).

That would not be surprising. Before this case, all six federal judges who had considered casket sales restrictions like Oklahoma's found they had no rational basis. *Id.* at 228-29 (holding that "[n]one of the justifications offered by the state satisfies the slight review required by rational basis review"); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664-65 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (finding no rational basis "to require someone who sells what is essentially a box" to be a licensed funeral

director); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440-41 (S.D. Miss. 2000) (State "failed to show a rational relationship" between its casket sales restriction and its purported interest in "the prompt disposition of human remains and the protection of consumers"); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. 1:98-CV-3084-MHS, slip op. at 3-4 (N.D. Ga. Feb. 9, 1999) (Pet. App. 99) (statute prohibiting unlicensed casket sales is "not rationally related to any legitimate state interest").[6]

Besides the Tenth Circuit and the district court in this case, it appears the only other court that has ever upheld a funeral-director-only caskets sales restriction is the Oklahoma court of civil appeals in *State Board v. Stone Casket Co. of Okla. City*, 976 P.2d 1074 (Okla. Civ. App. 1998), *cert. denied*, 528 U.S. 811 (1999). Thus, not only is there an irreconcilable conflict between the Sixth and Tenth Circuits on whether naked economic protectionism is a legitimate state interest, there is a growing split among lower courts, most of which have found no rational basis for allowing only licensed funeral directors to sell caskets. Of course, if the Tenth Circuit is correct that economic protectionism is a valid justification for state-sponsored casket sales monopolies, then those decisions

[6] The Tenth Circuit questions the unanimity of prior federal case law based on its understanding of *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989) as upholding a regulatory scheme "substantially similar to Oklahoma's." Pet. App. 12 n.12. Petitioners respectfully disagree; *Teague* involved licensing of pre-need salespersons who "arrange every aspect of a client's funeral," *Teague*, 870 F.2d at 125, rather than simple casket retailing. But even if the Tenth Circuit is correct, that simply broadens the circuit split and strengthens the case for granting review.

are wrong. Thus, the constitutionality of casket sales monopolies is a recurring issue on which the lower courts need guidance.

II. WHETHER PURE ECONOMIC PROTECTIONISM CAN BE A LEGITIMATE BASIS FOR STATE ACTION IS A FUNDAMENTAL QUESTION OF GREAT NATIONAL IMPORTANCE.

It is undeniable that legislation is sometimes motivated by a bare desire to help one group or harm another. As the Tenth Circuit quipped, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." Pet. App 24. Though that may be accurate, it is certainly no virtue; in our system of government, courts are supposed to resist the power of faction, not applaud it.

As demonstrated below, this Court has consistently rejected economic protectionism as a legitimate state interest no matter which constitutional provision or standard of review it applies. According to the Tenth Circuit, however, there is a unique setting – specifically, when a State seeks to benefit a particular industry by shielding it from intrastate competition – where the Constitution's general prohibition of "naked preferences"[7] is suspended and raw favoritism can be a legitimate

[7] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (hereafter "Sunstein, *Naked Preferences*") (coining the term "naked preference" to describe "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

governmental purpose. *See* Pet. App. 20 (claiming the Supreme Court has "consistently held that protecting or favoring one particular intrastate industry . . . is a legitimate state interest"). By contrast, the Sixth Circuit says this Court has "repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate state interest." *Craigmiles*, 312 F.3d at 224. Such a stark disagreement between circuit courts about such a fundamental question of constitutional law cries out for resolution.

A. The Court Has Consistently Rejected Laws Motivated by Pure Favoritism or Prejudice Under a Variety of Constitutional Provisions.

Starting with one of the foundational decisions of American constitutional law, this Court has repeatedly confronted government action motivated by nothing more than favoritism or prejudice. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (striking down New York's grant to a private party of a 30-year monopoly on the passenger ferry trade between New Jersey and Manhattan). Cases involving such "naked preferences" have come in many guises, from debtor-creditor conflicts to protectionist trade barriers among states. The discussion below shows that no matter what guise they assume, and no matter what standard of review it applies, the Court has consistently held that a bare desire to favor or disfavor a particular individual or group is not a legitimate government interest.

Article IV Privileges and Immunities. The function of the Privileges and Immunities Clause is to "bar discrimination against citizens of other States where there

is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (invalidating unequal licensing fees for resident and nonresident shrimpers). Without exception, the Court has rejected economic protectionism as a legitimate basis for state action and has instead required states to demonstrate that any unequal treatment of residents and nonresidents is justified by some genuinely public purpose. Not coincidentally, a substantial proportion of those cases involve people exercising their right to earn a living – a right this Court has deemed "fundamental" in the Privileges and Immunities context. *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 280 n.9, 285 (1985) (striking down state residency requirement for Bar admission and rejecting economic protectionism as legitimate governmental interest); *see also Hicklin v. Orbeck*, 437 U.S. 518 (1978) (striking down "Alaska Hire" law requiring preferential hiring of residents over nonresidents); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (rejecting unequal licensing fee for resident and nonresident commercial fishermen in Alaska); *Ward v. Maryland*, 79 U.S. (1 Wall.) 418 (1870) (forbidding unequal tax rates for residents and nonresidents doing business in Maryland).

Commerce Clause. The Court has construed the Commerce Clause as containing a "dormant" aspect that forbids legislation designed to promote the economic interests of those within a State at the expense of outsiders. Again, the cases are uniform in rejecting mere favoritism as a legitimate basis for treating one group more favorably than another. *See, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (rejecting Hawaii's effort to promote domestic liquor industry by exempting certain

locally produced liquors from state excise tax); *Hunt v. Wa. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (striking down regulation forbidding display of non-USDA grades on apples sold in North Carolina that discriminated against state-graded apples from Washington); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (rejecting Oklahoma law prohibiting transportation of minnows across state lines for sale in other states); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (rejecting New Jersey law forbidding importation of garbage from other states); *Welton v. Missouri*, 91 U.S. 275 (1876) (striking down law requiring license for "peddlers" who sell merchandise produced outside the State, but not for people who sell merchandise produced within the State).[8]

Contracts Clause. The impetus for the Contracts Clause was a desire to prevent the government from responding to raw political pressure to abrogate contractual obligations by those who made agreements that turned out to be disadvantageous.[9] Although it has granted the States increasing leeway in this area, the Court has nevertheless consistently prohibited measures designed to benefit discrete interest groups rather than the public at large. *See, e.g.*, *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983) ("[t]he

[8] Preferential treatment of local commerce is an issue in the three wine-shipping cases consolidated for argument before the Court this term, *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *cert. granted sub nom. Granholm v. Heald*, 124 S. Ct. 2389 (2004); *Mich. Beer & Wine Wholesalers Ass'n v. Heald*, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (2004); and *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004).

[9] *See, e.g.*, Richard A. Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. Chi. L. Rev. 703, 706, 717 (1984).

requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests"); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978) (noting that one element of the Court's Contracts Clause inquiry is whether "the state law was enacted to protect a basic societal interest, not a favored group"); *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) ("[t]hough the obligations of contracts must yield to a proper exercise of the police power, . . . it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive") (footnotes omitted).

Fourteenth Amendment Privileges or Immunities. There is general agreement among commentators that the purpose of the Fourteenth Amendment's Privileges or Immunities Clause was to constitutionalize the Civil Rights Act of 1866, *see, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1389 (1992), which guaranteed the rights of all citizens to make and enforce contracts, hold and convey property, and enjoy the "full and equal benefit of all laws and proceedings. . . ." Civil Rights Act, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (2000)). And while the scope of the Privileges or Immunities Clause was severely circumscribed in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court has made clear that in cases where it does apply, the Clause prohibits the government from acting out of mere favoritism. *See Saenz v. Roe,* 526 U.S. 489, 505-07 (1999) (holding California welfare program could not favor citizens who had resided in the State more than twelve months over citizens who had not).

Equal Protection. The framers recognized that faction – the propensity of self-interested groups and individuals to manipulate the power of government for their own ends – is inherent in human nature, and they had little faith in the legislature's ability to resist its influence. J. Madison, *The Federalist* No. 10 (Modern Library College ed.) at 56-57. They believed courts would play an important role in preventing the "injury of the private rights of particular classes of citizens, by unjust and partial laws." A. Hamilton, *The Federalist* No. 78 (Modern Library College ed.) at 508.

Even under its most lenient standard of review, the Court has repeatedly invalidated laws that served only to discriminate in favor of or against a particular individual or group. *See Romer v. Evans*, 517 U.S. 620, 631-34 (1996) (state constitutional amendment forbidding anti-discrimination laws for homosexuals lacked rational basis); *Quinn v. Millsap*, 491 U.S. 95, 106-09 (1989) (no rational basis for permitting only landowners to sit on planning board); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985) (no rational basis for city zoning ordinance requiring special use permit for group homes for mentally retarded); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-23 (1985) (no rational basis for New Mexico income tax exemption favoring long-time resident veterans over newly arrived veterans); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881-83 (1985) (no rational basis for higher tax burden on companies incorporated out of state); *Williams v. Vermont*, 472 U.S. 14, 22-27 (1985) (no rational basis for granting car-tax credit to state residents but denying credit to nonresidents); *Zobel v. Williams*, 457 U.S. 55, 60-64 (1982) (no rational basis for tying amount of benefits to length of residency);

Dep't of Agric. v. Moreno, 413 U.S. 528, 533-38 (1973) (no rational basis for provision of Food Stamp Act that denied benefits to households containing one or more unrelated persons); *James v. Strange*, 407 U.S. 128, 140-42 (1972) (denial of debtor protections to indigent defendants lacks rationality); *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972) (striking excessive double-bond requirement for tenants filing appeals in forcible-entry-and-detainer suits); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational basis for permitting only property-owners to serve on county board of education).

Due Process. The Due Process Clause requires the government to have a justification reflecting something more than simple disfavor of a particular group when it interferes with constitutionally protected liberty interests. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (striking down Texas sodomy statute and framing the issue as whether a democratic majority may use the power of the State to enforce its moral condemnation of homosexuality); *cf. Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 243-47 (1957) (no legitimate reason for excluding former Communist Party member from practice of law).

The foregoing cases make clear that while the Court often gives the government significant leeway, pure favoritism or prejudice unaccompanied by a plausible and truly *public* purpose are forbidden. And while members of the Court have certainly disagreed in particular cases about whether the government was in fact acting from "naked preference," the Court has been remarkably consistent in rejecting that motive when it has been clearly established as the only plausible purpose for a given regulation. *See, e.g.*, Sunstein, *Naked Preferences* at 1732 (concluding that "the prohibition of naked preferences serves as

the most promising candidate for a unitary theory of the Constitution").

B. The Tenth Circuit's Endorsement of Favoritism as a Legitimate State Interest Reflects a Basic Misconception of the Rational Basis Test.

It is certainly true, as the Tenth Circuit contends, that this Court has upheld legislation that might actually have been enacted for protectionist, rather than public-spirited, purposes. *See* Pet. App. 21-23 (citing cases). But that does not mean, as the Tenth Circuit mistakenly concludes, that the Court affirmatively *endorsed* protectionism in any of those cases. To the contrary, as Judge Tymkovich points out in his concurring opinion, the Court has always "insisted that the legislation advance some public good." *Id.* at 32. Thus, in every one of the cases cited by the Tenth Circuit as support for its assertion that this Court has approved pure economic protectionism, the Court identified some plausible, genuinely public purpose for the challenged legislation. *Compare id*. at 21-23 *with id*. at 32-33 (discussing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); and *Nordlinger v. Hahn*, 505 U.S. 1 (1992)).

While this Court may be willing to *tolerate* possible instances of favoritism as a necessary cost of giving proper deference to coordinate branches of government in cases where a genuine public interest might arguably be served, that is a far cry from *endorsing* pure favoritism as a legitimate governmental purpose, as the Tenth Circuit mistakenly claims the Court has done. Lower courts have appropriately recognized that point by rejecting pure

favoritism as a basis for state action in rational basis cases. *See, e.g.*, *Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (reconciling this Court's holding in *Metropolitan Life Insurance Co. v. Ward*, *supra*, with its decision in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985), by requiring states "to articulate some reason for [challenged] statutes beyond the fact that they favored those they favored"); *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983) (finding scheme that distributed welfare benefits unequally to state residents did not satisfy rational basis test and rejecting premise that "a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest"). Finally, it is no small irony that in upholding Oklahoma's casket sales restriction on economic protectionism grounds, the Tenth Circuit approved a rationale that the Oklahoma Supreme Court itself has specifically rejected. *City of Guthrie v. Pike & Long*, 243 P.2d 697, 701 (Okla. 1952) (striking down "arbitrary and discriminatory" licensing requirement for merchants of distress goods that was enacted "solely for the benefit of their competitors").

C. Accepting Economic Protectionism as a Legitimate State Interest Would Transform the Right to Earn a Living into a Mere Privilege in Defiance of History, Common Law, and Original Understanding.

From its earliest days, this Court has recognized a constitutional right of occupational freedom. And while the level of protection it receives has changed over the years (and also depends on the specific constitutional context in which it arises), the basic premise that every American enjoys the right to earn a living has been a constant

fixture of the Court's precedents.[10] But the Tenth Circuit's endorsement of raw favoritism renders the rational basis test self-validating and thus transforms the right to earn a living into a mere privilege to be exercised at the whim of legislators unencumbered by any obligation even to appear to be serving the public interest. That notion is antithetical to the treatment of state-sponsored monopolies at common law, to the framers' understanding of the government they created, and to our Nation's history.

The creation of government-sanctioned occupational monopolies in England and their subsequent demise has

[10] *E.g.*, *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) ("[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition"); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment's conception of "liberty" includes the right "to engage in any of the common occupations of life"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) ("nothing is more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them") (internal quotations and citations omitted); *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 238-39 (1957) ("[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment"); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life") (citing *Meyer v. Nebraska*, *supra*); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (quoting *Dent* and *Schware*, *supra*, for proposition that citizens have a right to follow any lawful calling subject to licensing requirements that are rationally related to their fitness or capacity to practice the profession); *Connecticut v. Gabbert*, 526 U.S. 286, 291-92 (1999) ("this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation").

been thoroughly documented by commentators. *See, e.g.*, Adam Mosoff, *Rethinking the Development of Patents*: *An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1255-81 (2001). As Justice Field observed in his *Slaughter-House* dissent, "[t]he common law of England . . . condemned all monopolies in any known trade or manufacture." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 104 (1873) (Field, J., dissenting). Following the Revolution, the framers carried that understanding with them into their creation of the new Republic. Justice Field continues:

> And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others.

Id. at 105. The concept of state-sanctioned monopolies was so repugnant to the founding generation that four states – Massachusetts, New York, New Hampshire, and North Carolina – included prohibitions against monopolies in their proposed bills of rights when ratifying the Constitution. *See* 1 *The Debate on the Constitution* 944 (Bernard Bailyn ed., 1993); 2 *id*. 542, 551, 571. Indeed, Oklahoma's own Bill of Rights declares that "monopolies are contrary to the genius of a free government, and shall never be allowed." Okla. Const. art. II, § 32.

Against that historical and legal backdrop, the Tenth Circuit's endorsement of naked economic protectionism as a legitimate basis for occupational licensing laws takes on a particularly disturbing complexion. In asking the Court to overturn that dangerous precedent, this petition seeks

to clarify and vindicate principles that are deeply rooted in the Nation's history, in settled jurisprudence, and in common law.

III. OKLAHOMA'S CASKET SALES RESTRICTIONS ARE NOT *RATIONALLY* RELATED TO CONSUMER PROTECTION AND THEREFORE CANNOT BE UPHELD ON THAT GROUND.

Respondents may seek to avoid the grave constitutional concerns outlined above by suggesting that the decision below may be affirmed on the consumer protection rationale approved by the district court and by Judge Tymkovich in his concurring opinion. But that argument contains a fundamental flaw that the Respondents have never addressed, and it is no accident that courts in other states have unanimously rejected consumer protection as a possible justification for casket sales monopolies like Oklahoma's.

In the proceedings below, Respondents argued that any connection, no matter how tenuous, between Oklahoma's casket sales restriction and consumer protection is enough to satisfy the rational basis test. According to that logic, the legislature could give, say, redheads, or heart surgeons, or left-handed people the exclusive right to sell caskets on the premise that, despite the patently arbitrary nature of those classifications, the additional layer of regulatory oversight provided by the State Board might benefit consumers. But the rational basis test does not permit the government to act arbitrarily. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("[t]he touchstone of due process is protection of the individual against arbitrary action of government"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 441 (1982) (Blackmun, J., plurality op.) (Court must "determine whether the disparate treatment accorded to the affected classes is arbitrary"). Instead, the

Court must be able "to ascertain some relation between the classification and the purpose it serve[s]." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

Judges who have considered casket sales monopolies in Oklahoma and elsewhere have found raw favoritism to be their only plausible justification.[11] Oklahoma's decision

[11] Pet. App. 26 (not accepting State's consumer protection rationale and noting instead that Oklahoma's casket sales restrictions are " 'very well tailored' to protecting the intrastate funeral-home industry"); *Craigmiles*, 312 F.3d at 225 ("[t]he weakness of Tennessee's proffered explanations" for its casket sales monopoly indicates that it is "nothing more than an attempt to prevent economic competition"); *Craigmiles*, 110 F. Supp. 2d at 665 ("[t]here is no reason to require someone who sells what is essentially a box to undergo the time and expense of training and testing that has nothing to do with the State's asserted goals of consumer protection and health and safety"); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000) ("[t]his Court ultimately finds that the requirement that only licensees be allowed to sell caskets not only fails to advance the interest of Mississippi in consumer protection, it actually diminishes it"); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. 1:98-CV-3084-MHS, slip op. at 3-4 (N.D. Ga. Feb. 9, 1999) (Pet. App. 99) (funeral-director-only casket sales restriction is "not rationally related to any legitimate state interest"). Even Judge Tymkovich and the district court judge made clear in their opinions that they found the State's consumer protection rationale implausible. *See* Pet. App. 34-35 ("The record makes it clear that limitations on the free market of casket sales have outlived whatever usefulness they may have had. Consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions.") (Tymkovich, J., concurring); Pet. App. 73-74 ("[T]he court might well conclude that . . . consumers would be better served by a little less protection and a little more access to open competition. The court might also conclude that the actual motivation for enactment of the challenged legislation was, in all likelihood, far less altruistic than the [consumer protection] rationale[ ] proffered now."). *Cf. Pa. Funeral Dirs. Ass'n v. FTC*, 41 F.3d 81, 90 (3rd Cir. 1994) ("forcing consumers to purchase a casket from a funeral home, or at least pay the funeral home the mark-up on a casket, . . . constitutes *substantial consumer injury*") (emphasis added).

to subject casket retailers to the exact same training, testing, and credentialing requirements as funeral directors was arbitrary at best, blatantly protectionist at worst. Either way, it certainly was not a rational – in the sense of genuine and non-arbitrary – attempt to determine what training people actually need to sell caskets or to protect consumers from being exploited by the people who sell them.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted,

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KIM POWERS; DENNIS BRIDGES; MEMORIAL CONCEPTS ONLINE, INC., Plaintiffs-Appellants, v. JOE HARRIS, in his official capacity as President of the Oklahoma State Board of Embalmers and Funeral Directors; STEPHEN HUSTON, CHARLES BROWN, TERRY CLARK, CHRIS CRADDOCK, KEITH STUMPFF, and SCOTT SMITH, each in their official capacity as a Member of the Oklahoma State Board of Embalmers and Funeral Directors, Defendants-Appellees. THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE; PACIFIC LEGAL FOUNDATION, Amici Curiae.

No. 03-6014.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

379 F.3d 1208; 2004 U.S. App. LEXIS 17926

Aug. 23, 2004, Filed

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JUDGES: Before TACHA, Chief Circuit Judge, McKAY, and TYMKOVICH, Circuit Judges.

OPINION: TACHA, Chief Circuit Judge.

Hornbook constitutional law provides that if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it. *See Fitzgerald v. Racing Assoc. of Cent. Iowa,* 539 U.S. 103, 109, 156 L. Ed. 2d 97, 123 S. Ct. 2156 (2003) (holding that the Equal Protection Clause does not prohibit Iowa's differential tax rate favoring the intrastate racetrack over the intrastate riverboat gambling industry); *Ferguson v. Skrupa,* 372 U.S. 726, 732-33, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963) ("If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it."). Plaintiff-Appellants Kim Powers, Dennis Bridges, and Memorial Concepts Online, Inc. (collectively "Plaintiffs"), who wish to sell caskets over the Internet without obtaining the licenses required by Oklahoma law, challenge the soundness of this venerable rule. Seeking declaratory relief, Plaintiffs sued Defendant-Appellees, who are members of the Oklahoma State Board of Embalmers and Funeral Directors ("the Board"), the relevant licensing authority. After a full bench trial, the District Court ruled for the Board. On appeal, Plaintiffs contend that Oklahoma's licensing scheme violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment to the Federal Constitution. We take jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

The Oklahoma Funeral Services Licensing Act, Okla. Stat. tit. 59, § 395.1 *et seq.* ("FSLA"), and Board rules promulgated pursuant to the FSLA provide the regulatory scheme for the funeral industry in Oklahoma. Pursuant to the FSLA, any person engaged in the sale of funeral-service merchandise,[1] including caskets, must be a licensed funeral director [2] operating out of a funeral establishment.[3] *Id.* at § 396.3a; *see also id.* at § 396.6(A) (prohibiting sale of funeral merchandise without a license).[4]

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[1] The FSLA defines funeral-service merchandise as "those products . . . normally provided by funeral establishments and required to be listed on the General Price List of the Federal Trade Commission, . . . including, but not limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts, niches or outer enclosures. . . . " Okla. Stat. tit. 59, § 396.2(10).

[2] The FSLA defines a funeral director as "a person who: sells funeral service merchandise to the public. . . . " Okla. Stat. tit. 59, § 396.2(2)(d).

[3] A funeral establishment is defined as "a place of business used . . . in the profession of . . . funeral directing. . . . " Okla. Stat. tit. 59, § 396.2(3).

[4] As the District Court noted:

> By including all products normally provided by funeral establishments and required to be listed on the General Price List of the FTC (a list which includes caskets) within the definition of 'funeral service merchandise,' and by including anyone who sells such 'funeral service merchandise' within the definition of 'funeral director,' and by including the place of business of anyone who participates in 'funeral directing' within the definition of a 'funeral establishment,' the FSLA effectively requires that both a funeral director's license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets. *Powers*

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Oklahoma does not, however, apply this licensing requirement to those who sell other funeral-related merchandise (e.g., urns, grave markers, monuments, clothing, and flowers). Furthermore, because the Board distinguishes between time-of-need and pre-need sales,[5] this licensing requirement does not apply to all casket sales.[6] Specifically, although a person must be fully licensed to make time-of-need sales,[7] a salesperson may lawfully sell caskets pre-paid without a license so long as that person is acting as an agent of a licensed funeral director.

Finally, while the Board may issue orders to enforce the FSLA, *see id.* at § 396.2a, the FSLA limits its enforcement to intrastate casket sales only, Dist. Ct. Op. at 3 (finding of fact). As such, an unlicensed Oklahoman may sell a time-of-need casket to a customer outside of Oklahoma – indeed, Plaintiffs have sold caskets to consumers

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v. Harris, 2002 U.S. Dist. LEXIS 26939, CIV-01-445-F, 2002 WL 32026155 at 11 (W.D. Okla. Dec. 12, 2002) [hereinafter Dist. Ct. Op.]

[5] Time-of-need sales are those that are neither pre-death nor pre-paid (i.e., purchased and paid for at the time of the sale with delivery of the casket to occur at a future date). Pre-need sales, conversely, are those sales that are either pre-death or pre-paid.

[6] The Oklahoma Insurance Code and the Insurance Commissioner regulate the sale of caskets on a pre-paid basis. *See generally* Okla. Stat. tit. 36, § 6121 *et seq*.; Okla. Admin. Code § 365: 25-9-1 *et seq*. As such, the Board requires funeral directors who make funeral arrangements on a pre-need basis to comply with the Insurance Code and with the Insurance Commissioner's regulations. *Id.* at § 235:10-7-2(6). The pre-paid sale of non-casket cemetery merchandise is governed by the Oklahoma Cemetery Merchandise Trust Act and by the State Banking Commissioner. Okla. Stat. tit. 8, § 301 *et seq*.

[7] The FSLA and Board rules also require that a person be a licensed funeral director operating out of a funeral establishment to sell pre-death, but not pre-paid, caskets.

located outside of Oklahoma – and an unlicensed salesperson who is not located in Oklahoma may sell a time-of-need casket to a customer in Oklahoma. The requirement that a salesperson possess both a funeral director's license and operate out of a licensed funeral establishment applies, therefore, only to the intrastate sale of time-of-need caskets in Oklahoma.

Obtaining these licenses is no small feat. According to the Board's rules, an applicant for a funeral director's license must complete both sixty credit hours of specified undergraduate training[8] and a one-year apprenticeship during which the applicant must embalm twenty-five bodies. An applicant also must pass both a subject-matter and an Oklahoma law exam. *See generally* Okla. Admin. Code §§ 235:10-1-2, 10-3-1. Furthermore, to be licensed as a funeral establishment in Oklahoma, a business must have a fixed physical location, a preparation room that meets the requirements for embalming bodies, a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains. *See generally id.* at §§ 235:10-1-2, 10-3-2. In reflecting on these legislative and administrative regulations, the District Court concluded that "they evince an intent to forego laissez faire treatment of those sales and services when provided in this State. Limiting the sale of caskets to sellers licensed by the Board is, undeniably, a major component of that statutory scheme." Dist. Ct. Op. at 13.

[8] The required mortuary science curriculum includes: embalming, restorative art, microbiology, pathology, chemistry, arranging funerals, psychology, grief management, funeral merchandise, and the funeral and burial practices of various religions.

Memorial Concepts Online, Inc. is an Oklahoma corporation created, operated, and owned by Ms. Powers and Mr. Bridges to sell funeral merchandise over the Internet.[9] It offers no other death- or funeral-related services, plays no role in the disposition of human remains, and is not licensed in Oklahoma as a funeral establishment. Although Ms. Powers, who lives in Ponca City, Oklahoma, has many years of experience selling caskets on a pre-need basis as the agent of a licensed Oklahoma funeral director, she is not licensed by the Board as either a funeral director or as an embalmer. Likewise, although Mr. Bridges has been a licensed funeral director in Tennessee for over twenty years, he is not licensed in Oklahoma. As a part of their current enterprise, Plaintiffs wish to sell in-state, time-of-need caskets to Oklahomans over the Internet.[10] They have foregone

[9] Because this is an Internet company, it maintains no physical storefront presence in the State of Oklahoma. Only the server is located there. The parties have assumed, as do we for purposes of this appeal, that the server's location constitutes the Internet company's place of business. Hence, we need not address the imponderables of "where" an Internet company is located for purposes of state regulation.

[10] Plaintiffs contend that they could offer a valuable service to Oklahoma customers because, whereas "caskets commonly represent upwards of 25 per cent (and [in] some cases more) of the total cost of funeral-related goods and services," Dist. Ct. Op. at 3, they can sell these products at a substantial discount. We note that there is significant debate regarding whether increased competition in the casket-sales market will decrease overall funeral costs. Although the FTC prohibits funeral directors from charging a direct "casket-handling fee" to recoup revenue lost from the sale of the casket, *see* 16 C.F.R. § 453.4(b)(1)(ii), many funeral directors simply raise the overall price of non-declinable fees for all customers – thus increasing everyone's overall funeral costs. *See, e.g., Pennsylvania Funeral Dir. Assoc., Inc. v. FTC,* 41 F.3d 81, 84-85 (3d Cir. 1994) (noting that, although some hope exists that increased competition in the casket market will eventually lower overall funeral prices, it will assuredly cause "many funeral

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these sales because they "have a reasonable and genuine fear that if they were to sell caskets to Oklahoma consumers, they might be prosecuted for violation of the FSLA and Board rules." Dist. Ct. Op. at 3.

Importantly, Plaintiffs have no desire to obtain the appropriate Oklahoma licenses because they view their requirements as irrelevant to the operation of an intrastate, Internet, retail, casket business. On this point, the District Court specifically found that

> very little specialized knowledge is required to sell caskets. Most consumers select caskets based on price and style. Any information a generally educated person needs to know about caskets in order to sell them can be acquired on the job. Less than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets. As a result of the substantial misfit between the education and training required for licensure and the education and training required to sell caskets in Oklahoma, people who only wish to sell caskets, if they wish to make in-state sales, are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets. Dist. Ct. Op. at 5.

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service providers . . . [to] raise the amount of their non-declinable professional service fees in order to ensure that they recoup overhead costs."); Dist. Ct. Op. at 6 ("In some cases, however, when competition increases, funeral homes have raised their prices for the other services they provide in order to compensate for profits lost due to lower casket prices.").

Thus, Plaintiffs brought this declaratory judgment action, asserting that the FSLA violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.[11] After a thorough bench trial, the District Court, in its well-reasoned order and memorandum, found for the Board on all counts. Plaintiffs filed a timely notice of appeal.

II. STANDARD OF REVIEW

"We review challenges to the constitutionality of a statute de novo." *United States v. Plotts,* 347 F.3d 873, 877 (10th Cir. 2003) (quotations omitted). We review the District Court's factual findings for clear error. Fed. R. Civ. P. 52(a).

III. PRIVILEGES AND IMMUNITIES CLAUSE

Plaintiffs contend that the FSLA violates the Privileges and Immunities Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States[.]"). Citing *Saenz v. Roe,* 526 U.S. 489, 143 L. Ed. 2d 689, 119 S. Ct. 1518 (1999), they contend that "the right to earn an honest living . . . [is found] in the Privileges and Immunities

[11] At trial, Plaintiffs also contended that the FSLA violated the "dormant" Commerce Clause. Given the District Court's factual findings, *see supra* at 4-5, this doctrine is inapplicable. Moreover, Plaintiffs do not reassert this claim on appeal. As such, it is waived. *See State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n.7 (10th Cir. 1994).

Clause." Aplt. Brief at 62. Despite Plaintiffs' protestations, *Saenz* does not mark a sea change in long-standing constitutional jurisprudence. As such, we agree with the District Court's disposition of this claim: "There is no merit to this ground for challenge. Revival of the Privileges and Immunities Clause may be an interesting and useful topic for scholarly debate but this memorandum is not the place for that discussion." Dist. Ct. Op. at 8 (citations omitted). To the extent that Plaintiffs argue that we should overrule the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1872), it is enough to remind Plaintiffs that "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan,* 522 U.S. 3, 20, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997); *but see Saenz,* 526 U.S. at 521 (Thomas, J., dissenting) (urging the Court to reconsider its privileges-and-immunities jurisprudence).

IV. DUE PROCESS AND EQUAL PROTECTION CLAUSES

Plaintiffs next contend that the FSLA violates two rights under the Fourteenth Amendment. First, they claim, as a matter of substantive due process, that the FSLA violates "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose [.]" *Dent v. West Virginia,* 129 U.S. 114, 121, 32 L. Ed. 623 9 S. Ct. 231 (1889) (upholding West Virginia's physician licensing scheme against a substantive due process challenge). Second, they contend, as a matter of equal protection, that the FSLA is unconstitutional because the Board is "arbitrarily treating similarly-situated people differently, and . . . arbitrarily treating differently-situated people the same." Aplt. Brief at 24. As a state economic regulation that does not affect a

fundamental right and categorizes people on the basis of a non-suspect classification, we determine whether the FSLA passes constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review. *See Fitzgerald,* 539 U.S. at 107 (equal protection); *General Motors Corp. v. Romein,* 503 U.S. 181, 191, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992) (substantive due process).

A. Equal Protection Versus Substantive Due Process

Because their substantive analyses converge, often the differences between equal protection and substantive due process are not fully appreciated. The Equal Protection and Due Process clauses protect distinctly different interests. On the one hand, the "substantive component" of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg,* 521 U.S. 702, 720, 138 L. Ed. 2d 772, 117 S. Ct. 2258, 117 S. Ct. 2302 (1997), even when the challenged regulation affects all persons equally. In contrast, "the essence of the equal protection requirement is that the state treat all those similarly situated similarly," *Bartell v. Aurora Pub. Schs.,* 263 F.3d 1143, 1149 (10th Cir. 2001) (quotations omitted), with its "central purpose [being] the prevention of official conduct discriminating on the basis of race [or other suspect classifications,]" *Washington v. Davis,* 426 U.S. 229, 239, 48 L. Ed. 2d 597, 96 S. Ct. 2040, (1976). As such, equal protection only applies when the state treats two groups, or individuals, differently.

Here, Plaintiffs have cast their challenge to the FSLA as both a substantive due process and an equal protection

claim. Although Plaintiffs forward both contentions, their challenge is most properly presented as an equal protection claim, as evidenced by the fact that they almost exclusively cite to equal protection cases (even to support their substantive due process argument) and that the Court itself has most often analyzed regulatory challenges under the equal protection rubric. In any event, because a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims.

B. Parties' Arguments

To satisfy the rational basis test, "the [FSLA] need only be rationally related to a legitimate government purpose." *Save Palisade FruitLands v. Todd,* 279 F.3d 1204, 1210 (10th Cir.2002). The Board argues that protecting casket purchasers, a particularly vulnerable group, constitutes a legitimate state interest. Plaintiffs concede this point, and we agree as well. *See Turner Broad. Sys. v. FCC,* 520 U.S. 180, 189-90, 137 L. Ed. 2d 369, 117 S. Ct. 1174 (1997) (finding consumer protection a legitimate federal governmental interest in a First Amendment challenge). Thus, as framed by the parties, the relevant question is whether the FSLA's licensure scheme is rationally related to the state's proffered consumer protection interest.

Plaintiffs contend that it is not. They argue that the regulatory scheme is irrational because "less than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets[.]" Dist. Ct. Op. at 5; *see also Cornwell v. Hamilton,* 80 F. Supp. 2d 1101, 1111

(S.D. Cal. 1999) (holding California's cosmetology licensing requirements in violation of the Fourteenth Amendment's Due Process and Equal Protection clauses because "just over six percent of the curriculum is relevant . . . . [to] a would-be African hair braider"). Indeed, Plaintiffs claim that "every single federal court . . . that has considered casket sales restrictions like Oklahoma's has found they lack any rational basis."[12] Aplt. Brief at 23.

The Board concedes that its licensure requirements do not perfectly match its asserted consumer-protection goal. Instead, they contest the degree of fit needed to pass rational-basis review. In the Board's view, "[a] statutory classification fails rational-basis review only when it rests on grounds *wholly* irrelevant to the achievement of the State's objective." *Heller v. Doe by Doe,* 509 U.S. 312, 324, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (quotations omitted) (emphasis added). The Board further contends that:

> these restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory

[12] Plaintiffs cite the following cases: *Craigmiles v. Giles,* 312 F.3d 220 (6th Cir. 2002) (holding Tennessee's casket selling licensure requirements, which are nearly identical to Oklahoma's, in violation of the Fourteenth Amendment's Due Process and Equal Protection clauses); *Craigmiles v. Giles,* 110 F. Supp. 2d 658 (E.D.Tenn.2000) (same); *Casket Royale, Inc. v. Mississippi,* 124 F. Supp. 2d 434 (S.D. Miss. 2000) (same in relation to Mississippi's casket statute). Plaintiffs' statement pushes the bounds of credulity, however, given *Guardian Plans, Inc. v. Teague,* 870 F.2d 123 (4th Cir. 1989). In *Teague,* upon which the Board relies heavily, the Fourth Circuit rejected an equal protection and substantive due process challenge to Virginia's funeral regulatory scheme, one substantially similar to Oklahoma's.

> requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. . . . This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally. *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315-16, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993) (internal citations and quotations omitted).

The Board urges that its licensing protocol is not "wholly irrelevant" because "[e]very witness who testified on the subject agreed that consumers purchasing time-of-need caskets may be especially vulnerable to overreaching sales tactics because of grief and other emotions which arise as the result of the death of the person for whom the consumer is purchasing a casket." Dist. Ct. Op. at 5. The Board further notes that "[e]ven [Plaintiffs'] own expert, Lisa Carlson, admitted that Oklahoma's FSLA functions to protect consumers and that removing those provisions would effectively reduce consumer protection for people buying caskets in . . . Oklahoma." Aple. Brief at 22.

C. Equal Protection and Judicial Review of Economic Legislation

In *United States v. Carolene Products Co.,* 304 U.S. 144, 154, 82 L.Ed. 1234, 58 S. Ct. 778 (1938), the Court held, pursuant to rational basis review, that when legislative judgment is called into question on equal protection grounds and the issue is debatable, the decision of the

legislature must be upheld if "any state of facts either known or which could reasonably be assumed affords support for it." Second-guessing by a court is not allowed. *Id.; see also Beach Communications,* 508 U.S. at 313 ("Equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *New Orleans v. Dukes,* 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513, (1976) (per curiam) ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . ").

Further, rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question. *Mourning v. Family Publ'n Serv., Inc.,* 411 U.S. 356, 378, 36 L. Ed. 2d 318, 93 S. Ct. 1652 (1973). In fact, we will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 50, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966), *abrogated on other grounds by Healy v. Beer Inst., Inc.,* 491 U.S. 324, 342, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989), or because the statute's classifications lack razor-sharp precision, *Dandridge v. Williams,* 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970). Nor can we overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice. *Vance v. Bradley,* 440 U.S. 93, 110-11, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979).

Finally, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually

motivated the legislature." *Beach Communications,* 508 U.S. at 315 (citations and quotations omitted). "Those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]'" *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973)); *see also McDonald v. Board of Election Comm'rs,* 394 U.S. 802, 809, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."). As such, we are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further. In fact, "this Court is *obligated* to seek out other conceivable reasons for validating [a state statute.]" *Starlight Sugar, Inc. v. Soto,* 253 F.3d 137, 146 (1st Cir. 2001) (emphasis added). Indeed, that the purpose the court relies on to uphold a state statute "was not the reason provided by [the state] is irrelevant to an equal protection inquiry." *Id.* (citing *Beach Communications,* 508 U.S. at 315).[13]

[13] *See also City of Dallas v. Stanglin,* 490 U.S. 19, 26, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989); *Beatie v. City of New York,* 123 F.3d 707, 711-12 (2d Cir. 1997) ("Supreme Court jurisprudence now informs us that when reviewing challenged social legislation, a court must look for 'plausible reasons' for legislative action, whether or not such reasons underlay the legislature's action.") (citing *United States R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980)); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.,* 21 F.3d 237, 240 (8th Cir. 1994) ("We are not bound by explanations of the [policy's] rationality that may be offered by litigants or other courts.") (quoting *Kadrmas v. Dickinson Pub. Schs.,* 487 U.S. 450, 463, 101

(Continued on following page)

These admonitions are more than legal catch phrases dutifully recited each time we confront an equal protection challenge to state regulation – they make sense. First, in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to "try again." Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns. *See generally Geier v. American Honda Motor, Inc.,* 529 U.S. 861, 894, 146 L. Ed. 2d 914, 120 S. Ct. 1913 (2000).

Thus, we are obliged to consider every plausible legitimate state interest that might support the FSLA – not just the consumer-protection interest forwarded by the parties. Hence, we consider whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest. If it does, there can be little doubt that the FSLA's regulatory scheme is rationally related to that goal. *See Craigmiles v. Giles,* 312 F.3d

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L. Ed. 2d 399, 108 S.Ct. 2481 (1988)); *Burke Mountain Acad., Inc. v. U.S.,* 715 F.2d 779, 783 (2d Cir. 1983) ("It is our job to try to divine what Congress left unstated [and] we resort to our own talents and those of counsel to discern the rationality of the classification in question.") (internal quotations omitted).

220, 228 (6th Cir. 2002) (stating that Tennessee's version of the FSLA is "very well tailored" to "protecting licensed funeral directors from competition on caskets").

D. Intrastate Economic Protectionism

Implicit in Plaintiffs' argument is the contention that intrastate economic protectionism, even without violating a specific constitutional provision or a valid federal statute, is an illegitimate state interest. *See* Aplt. Brief at 53 n.8. Indeed, Plaintiffs describe Oklahoma's licensure scheme as "a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of business people – namely, Oklahoma funeral directors." *Id.* at 26. Amici are not so coy. In their view, Oklahoma's licensure scheme "is simply . . . protectionist legislation[,]" Brief of Amicus Curiae Claremont Institute at 26, and "under the Constitution, . . . economic protectionism is not a legitimate state interest[,]" Brief of Amicus Curiae Pacific Legal Foundation at 2.

By our count, only three courts have held, in the absence of a violation of a specific constitutional provision or a valid federal statute, that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles,* 312 F.3d at 224;[14] *see also Cornwell,* 80 F. Supp. 2d at 1117 (implying,

[14] Citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 412, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983); *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 537-38, 93 L. Ed. 865, 69 S. Ct. 657 (1949).

without citation, that establishing a cartel for cosmetology services is not a legitimate state interest); *Santos v. City of Houston,* 852 F. Supp. 601, 608 (S.D. Tex. 1994) (holding that "economic protectionism in its most glaring form . . . [is] not legitimate.").[15] Because the four Supreme Court cases collectively cited by *Craigmiles* and *Santos* do not stand for the proposition that intrastate economic protectionism, absent a violation of a specific constitutional provision or federal statute, is an illegitimate state interest, we cannot agree.

In fact, it is only by selective quotation that such a reading of these Supreme Court cases appears plausible. For example, in *H.P. Hood & Sons, Inc., v. DuMond,* 336 U.S. 525, 93 L.Ed. 865, 69 S. Ct. 657 (1949), the Court considered whether "the State of New York [had the power] to deny additional facilities to acquire and ship milk in *interstate* commerce where the grounds of denial are that such limitation upon *interstate* business will protect and advance local economic interests." *Id.* at 526, (emphasis added). The Court struck the legislation. The *Craigmiles* court cites to the following passage from *H.P. Hood & Sons,* which is clearly limited to the regulation of *interstate* commerce, to support its conclusion that *intrastate* economic protectionism is an illegitimate state interest:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the

[15] Citing *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 470, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).

> states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527, 79 L. Ed. 1032, 55 S. Ct. 497, 'What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In *Buck v. Kuykendall,* 267 U.S. 307, 69 L. Ed. 623, 45 S. Ct. 324, the Court struck down a state act because, in the language of Mr. Justice Brandeis, 'Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.' The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the state, was there declared 'not sound.' It is no better here. This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled. *H.P. Hood & Sons,* 336 U.S. at 537-38 (citations omitted).

When read in context, *H.P. Hood & Sons*'s admonition is plainly directed at state regulation that shelters its economy from the larger national economy, i.e., violations of the "dormant" Commerce Clause.

The other cases relied upon in *Craigmiles* and *Santos* are similarly distinguishable. *See Energy Reserves Group,*

Inc. v. Kansas Power & Light Co., 459 U.S. 400, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983) (addressing a Contracts Clause-specific issue); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981) (addressing the "dormant" Commerce Clause); *City of Philadelphia v. New Jersey,* 437 U.S. 617, 618, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978) (addressing whether "[a] New Jersey law prohibit[ing] the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the State. . . . violates the Commerce Clause of the United States Constitution."). As such, these passages do not support the contention espoused in *Craigmiles* and *Santos* that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, represents an illegitimate state interest. Our country's constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection. *See Metropolitan Life Ins. Co. v. W.G. Ward,* 470 U.S. 869, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985) (noting that the Commerce Clause and the Equal Protection Clause "perform different functions in the analysis of the permissible scope of a state's power – one protects interstate commerce, and the other protects persons from unconstitutional discrimination by states").

In contrast, the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest. *See Fitzgerald,* 539 U.S. at 109 (holding that the hypothetical goal of fostering intrastate riverboat gambling provided a rational

basis to support legislation taxing riverboat slot machine revenues at a more favorable rate than those from racetrack slot machines); *Ferguson,* 372 U.S. at 730-31 ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.") (quotations omitted); *Dukes,* 427 U.S. at 304 n.5 ("These principles . . . govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties.").

The Court's application of this principle is found in numerous state subsidization and licensing equal protection cases. For example, in *Fitzgerald,* the Court held that an Iowa statute taxing slot machine revenues on riverboats at 20%, while taxing those at racetracks at 36%, did not violate the Equal Protection Clause because, even though they harmed the racetracks, "the different tax rates" may have furthered the state's legitimate interest in "helping the riverboat industry." 539 U.S. at 110. More specifically, the *Fitzgerald* Court held:

> Once one realizes that not every provision in a law must share a single objective, one has no difficulty finding the necessary rational support for the 20 percent/36 percent [tax] differential here at issue. That difference, harmful to the racetracks, is helpful to the riverboats, which, as respondents concede, were also facing financial

> peril. These two characterizations are but opposite sides of the same coin. Each reflects a rational way for a legislator to view the matter. *Id.* at 109 (citations omitted).

Indeed, even Plaintiffs concede that "the [*Fitzgerald*] Court found [helping the riverboat industry] to be [a] legitimate governmental objective [.]" Aplt. Reply Brief at 6.

In *Nordlinger v. Hahn,* 505 U.S. 1, 18, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992), the Court held that California's property taxation scheme, which favored long-time property holders over new purchasers, did not violate the Equal Protection Clause. In discussing the many possible reasons for the taxation scheme, the Court held that "the State . . . legitimately can decide to . . . [favor] established, 'mom-and-pop' businesses . . . [over] newer chain operations." *Id.* at 12.

In *Dukes,* the Court rejected an Equal Protection Clause challenge to a New Orleans ordinance that prohibited selling foodstuffs from pushcarts in the French Quarter, even though it exempted area vendors who had continuously operated that business for eight or more years. 427 U.S. at 298. This ordinance had the effect of allowing only two vendors to continue operation in the French Quarter. *Id.* at 300. Although the court of appeals struck the legislation as furthering an illegitimate state purpose because the ordinance created "a protected monopoly for the favored class member[,]" *id.* (quotations omitted), the Court rejected this reasoning, *id.* at 303. Instead, it found that the ordinance furthered a legitimate state purpose, because the presence of "vendors in the [French Quarter], the heart of the city's tourist industry, might . . . have a deleterious effect on the economy of the

city." *Id.* at 304-05. As the Court noted, "the legitimacy of that objective [, i.e., benefitting the tourist industry,] is obvious." *Id.* at 304.

Finally, in the watershed Equal Protection Clause case of *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 99 L.Ed. 563, 75 S. Ct. 461 (1955), the Court held that a state may set as a legitimate goal "freeing a profession, to as great an extent as possible, from all taints of commercialism." 348 U.S. at 491. Indeed, *Williamson* so closely mirrors the facts of this case that, but for the Siren's song that has recently induced other courts to strike state economic legislation similar to the FSLA, merely a citation to *Williamson* would have sufficed to dispose of this case.[16]

Similarly, the Tenth Circuit has held that state legislation granting special benefits to an intrastate industry, absent a specific federal constitutional or statutory violation, does not run afoul of the Equal Protection Clause. For example, in *Schafer v. Aspen Skiing Corp.,* 742 F.2d 580, 583 (10th Cir. 1984), an injured party pursued an equal protection challenge to Colorado's special three-year statute of limitations that applied only to suits against the ski industry. In rejecting the challenge, we noted that "the ski industry makes a substantial contribution, directly or indirectly, to the Colorado economy" and

[16] The Court has not limited this deferential jurisprudence to equal protection cases. In the substantive due process arena, the Court has stated "the Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned." *Nebbia v. New York,* 291 U.S. 502, 527-28, 78 L.Ed. 940, 54 S.Ct. 505 (1934). Indeed, the Court stated that even the establishment of a monopoly is a legitimate state interest. *Id.* at 529.

that the "state has a legitimate interest in its well-being and economic viability." *Id.* at 584. Although the plaintiff in *Schafer* was an injured consumer and not a competitor, the underlying principle holds true: favoring one intra-state industry over another is a legitimate state interest. In short, given the overwhelming supporting authority, and the dearth of credible arguments to the contrary, we hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.

We also note, in passing, that while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.[17]

[17] Examples from states in this circuit abound. *See, e.g.,* John Greiner, *Henry to Back Tire Plant Bill,* The Oklahoman, May 26, 2004, at 1B (discussing the Oklahoma Quality Investment Act, which provides Oklahoma City's Bridgestone/Firestone tire manufacturing plant with $5 million in state financial assistance); Brice Wallace, *State Hopes to Lure Jobs,* Deseret Morning News, May 22, 2004, at D12 (noting that the Utah Board of Business and Economic Development extended financial incentives to lure new jobs to the Qwest Bilingual and National Vinyl Products facilities already located in the state); Gargi Chakrabarty, *Kodak Picks Weld; Windsor Plant Wins Competition for New Investment, 60 Jobs,* Rocky Mtn. News, Mar. 23, 2004, at 1B (noting cash incentives, state job training funds, and property tax reductions given to Eastman Kodak Co. to encourage expansion in Windsor, Colorado); Andrew Webb, *Hydrogen Plan Lands Funds,* Albuquerque J., Mar. 5, 2004, at B6 (discussing New Mexico's Advanced Technologies Economic Development Act, which aims to use economic incentives to attract hydrogen research businesses to the state); Morgan Chilson, *Boeing Sees Future in 7E7,* Topeka Cap.-J., Sept. 7, 2003 (discussing a Kansas bill that allows the state to issue $500 million in bonds to help Boeing Wichita acquire a role in manufacturing the 7E7 jetliner); Jeff Gosmano, *Wyoming Pipeline Group Seeks to Jump Start Pipeline Building Process,* Natural Gas Week, Aug. 29, 2003 (noting the legislation adopted by Wyoming giving the state the

(Continued on following page)

While this case does not directly challenge the ability of states to provide business-specific economic incentives, adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences. *See Vieth v. Jubelirer*, 158 L. Ed. 2d 546, ___ U.S. ___, 124 S. Ct. 1769, 1776-77 (2004) ("Judicial action must be governed by standard, by rule. Laws promulgated by [legislatures] can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."). Thus, besides the threat to all licensed professions such as doctors, teachers, accountants, plumbers, electricians, and lawyers, *see, e.g.,* Oklahoma Statutes, title 59 (listing over fifty licensed professions), every piece of legislation in six states aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger. While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the Oklahoma electorate for its institution, not us.

E. Oklahoma's Regulatory Scheme

Because we find that intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest, we have little difficulty determining that the FSLA satisfies

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power to issue $1 billion in bonds to revive gas pipeline development). Additionally, state and local governments often craft measures to protect current businesses from additional competition. *See, e.g.,* Annys Shin & Michael Barbaro, *Council Bill Targets Wal-Mart,* WASH. POST, June 15, 2004, at E01(commenting on a proposed zoning restriction on "big box" stores that is crafted narrowly to apply almost exclusively to Wal-Mart Supercenters).

rational-basis review. As discussed above, *see supra* note 11, the Board enforces the FSLA in such a manner as to avoid any conflict with the "dormant" Commerce Clause. Moreover, we find no other federal statutory or constitutional provision that the FSLA violates. In particular, we note that, despite the FTC's protestations before the trial court that the FSLA does not "advance the ends of the FTC's Funeral Rule,"[18] the FSLA does not transgress any of the Rule's express provisions. *See* 16 C.F.R. §§ 453.1-453.9. Hence, the FSLA need only be rationally related to the legitimate state interest of intrastate industry protection. There can be no serious dispute that the FSLA is "very well tailored" to protecting the intrastate funeral-home industry. *Craigmiles,* 312 F.3d at 228. As such, "our inquiry is at an end." *United States R. Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980).

F. *Craigmiles v. Giles*

In so holding, we part company with the Sixth Circuit's *Craigmiles* decision, which struck a nearly identical Tennessee statute as violating the Equal Protection Clause and substantive due process. Our disagreement can be reduced to three points.[19] First, as noted by the District Court, *Craigmiles's* analysis focused heavily on the court's perception of the actual motives of the Tennessee legislature. *Craigmiles,* 312 F.3d at 227 ("The state could argue

[18] Brief of Amici Curiae Federal Trade Commission at 1, *Powers v. Harris,* 2002 U.S. Dist. LEXIS 26939, CIV-01-445-F (W.D. Okla 2002). The FTC did not appear as amicus on appeal, but it did submit an amicus brief below. The parties did not include this brief in the record on appeal. *But see* http://www.ftc.gov/os/2002/09/okamicus.pdf (last visited on July 6, 2004).

[19] We also reject *Casket Royale, Inc.,* 124 F. Supp. 2d 434 (S.D. Miss. 2000), *Santos,* 852 F. Supp. 601 (S.D. Tex. 1994), and *Brown v. Barry,* 710 F. Supp. 352 (D.D.C. 1989) for these same reasons.

that the Act as a whole . . . actually provides some legitimate protection for consumers from casket retailers. The history of the legislation, however, reveals a different story. . . . "). The Supreme Court has foreclosed such an inquiry. *Beach Communications,* 508 U.S. at 315 ("Because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). Second, the *Craigmiles* court held that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles,* 312 F.3d at 224. As discussed above, we find this conclusion unsupportable. *See Fitzgerald,* 539 U.S. at 109-110 (holding, after the decision in *Craigmiles,* that the objective of favoring one intrastate industry over another provides a rational basis to support legislation). Third, in focusing on the actual motivation of the state legislature and the state's proffered justifications for the law, the *Craigmiles* court relied heavily on *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). We find this emphasis misplaced.

A few additional words are in order regarding our last point of disagreement. In essence, Plaintiffs in this case "ask this court to engage in what they assert to be an exacting rational-basis standard set forth by the Supreme Court in *Cleburne*[.]" *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 n.6 (10th Cir. 1991). Pursuant to their reading of *Cleburne*,[20] "a court would be shrinking from its most basic duty if it abstained from

[20] Plaintiffs push hard for a similar reading of *Romer v. Evans,* 517 U.S. 620, 134 L.Ed.2d 855, 116 S.Ct. 1620 (1996). For purposes of this appeal, our treatment of *Cleburne* applies equally to *Romer.*

both an analysis of the legislation's *articulated* objective *and* the method that the legislature employed to achieve that objective." *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C. 1989); *see also Craigmiles*, 312 F.3d at 227. This reading of *Cleburne*, however, constitutes a marked departure from "traditional" rational-basis review's prohibition on looking at the legislature's actual motives, *see Beach Communications*, 508 U.S. at 315 and our obligation to forward every conceivable legitimate state interest on behalf of the challenged statute, *see, e.g., Starlight Sugar*, 253 F.3d at 146.

Despite the hue and cry from all sides,[21] no majority of the Court has stated that the rational-basis review found in *Cleburne* and *Romer v. Evans,* 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), differs from the traditional variety applied above. *But see Lawrence v.*

[21] Debate over whether the Court has developed a higher-order rational-basis review began not long after *Cleburne. See, e.g.,* Erwin Chemerinsky, *Constitutional Law: Principles and Policies,* 536 (1997) ("The claim is that in some cases where the Court says it is using rational basis review, it is actually employing a test with more 'bite' than the customarily very deferential rational basis review. . . . The claim is that there is not a singular rational basis test but one that varies between complete deference and substantial rigor."); Robert C. Farrell, *Legislative Purpose & Equal Protection's Rationality Review,* 37 Vill. L. Rev. 1, 65 (1992) (suggesting that there are two levels of rational basis review used by the Court in an unpredictable manner); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name,* 62 Ind. L.J. 779 (1987) (claiming that the Court's use of heightened rational basis review creates confusion in lower courts and legislatures by failing to delineate when differing types of rational basis review apply). Indeed, at least one commentator has argued that the Court employs at least six versions of rational-basis review. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause & Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model & Modern Supreme Court Practice,* 4 U. Pa. J. Const. L. 225, 231 (2002).

Texas, 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472, ___, 539 U.S. 558, 123 S. Ct. 2472, 2485, 156 L. Ed. 2d 508 (2003) (O'Connor, J., concurring in part) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). Perhaps, as Justice O'Connor suggests, *Cleburne* and *Romer* represent the embryonic stages of a new category of equal protection review. *See Cleburne,* 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part) (labeling *Cleburne*'s rational-basis review "'second-order' rational-basis review"). But "even if we were to read *Cleburne* to require that laws discriminating against historically unpopular groups meet an exacting rational-basis standard," which we do not, "we do not believe the class in which [Plaintiffs] assert they are a member merits such scrutiny." *Jacobs, Visconsi & Jacobs, Co.,* 927 F.2d at 1119 n.6.

On the other hand, *Romer* and *Cleburne* may not signal the birth of a new category of equal protection review. Perhaps, after considering all other conceivable purposes, the *Romer* and *Cleburne* Courts found that "a bare . . . desire to harm a politically unpopular group," *Department of Agriculture v. Moreno,* 413 U.S. 528, 534, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973), constituted the only conceivable state interest in those cases, *see Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1581 n.24 (10th Cir. 1995) (forwarding this interpretation of *Cleburne*). Under this reading, *Cleburne* would also not apply here because we have conceived of a legitimate state interest other than a "bare desire to harm" non-licensed, time-of-need, retail, casket salespersons.

Finally, perhaps *Cleburne* and *Romer* are merely exceptions to traditional rational basis review fashioned by the Court to correct perceived inequities unique to those cases. If so, the Court has "failed to articulate [when this exception applies, thus] providing no principled foundation for determining when more searching inquiry is to be invoked." *Cleburne,* 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part). Regardless, the Court itself has never applied *Cleburne*-style rational-basis review to economic issues. *See, e.g., Fitzgerald,* 123 S. Ct. at 2159-60; *Beach Communications,* 508 U.S. at 315; *Nordlinger,* 505 U.S. at 11-13. Following the Court's lead, neither will we. Thus, we need not decide how *Cleburne* alters, if at all, traditional rational-basis review because, even under a modified rational basis test, the outcome here would be unchanged.

V. CONCLUSION

We do not doubt that the FSLA "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the [FSLA's] requirements." *Williamson,* 348 U.S. at 487. Under our system of government, Plaintiffs "'must resort to the polls, not to the courts'" for protection against the FSLA's perceived abuses. *Id.* at 488 (quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1876)).

As Winston Churchill eloquently stated: "Democracy is the worst form of government except for all those other forms that have been tried." Winston Churchill, Speech at the House of Commons (Nov. 11, 1947). Perhaps the facts here prove this maxim. A bill to amend the FSLA to favor

persons in the Plaintiffs' situation has been introduced in the Oklahoma House three times, only to languish in committee. *See* H.R. 1460 (Okla. 2003); H.R. 1057 (Okla. 2001); H.R. 1083 (Okla. 1999). While these failures may lead Plaintiffs to believe that the legislature is ignoring their voices of reason, the Constitution simply does not guarantee political success.

Because we hold that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the FSLA is rationally related to this legitimate end, we AFFIRM.

CONCUR: TYMKOVICH, J., concurring.

I join the majority opinion except for Parts IV D and E, and concur in the judgment. I write separately because I believe the majority overstates the application of "intrastate economic protectionism" as a legitimate state interest furthered by Oklahoma's funeral licensing scheme.

The majority opinion usefully sets forth an overview of the rational basis test. Under the traditional test, judicial review is limited to determining whether the challenged state classification is rationally related to a legitimate state interest. As the majority explains, and I agree, courts should not (1) second-guess the "wisdom, fairness, or logic" of legislative choices; (2) insist on "razor-sharp" legislative classifications; or (3) inquire into legislative motivations. I also agree that the burden rests with the challenger to a legislative classification "to negative every conceivable basis" supporting the law. Courts should credit "every

plausible legitimate state interest" as a part of their judicial review under this deferential standard.

Where I part company with the majority is its unconstrained view of economic protectionism as a "legitimate state interest." The majority is correct that courts have upheld regulatory schemes that favor some economic interests over others. Many state classifications subsidize or promote particular industries or discrete economic actors. And it is significant here that Oklahoma's licensing scheme only covered intrastate sales of caskets. But all of the cases rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest.

The Supreme Court has consistently grounded the "legitimacy" of state interests in terms of a public interest. The Court has searched, and rooted out, even in the rational basis context, "invidious" state interests in evaluating legislative classifications. Thus, for example, in the paradigmatic case of *Williamson v. Lee Optical, Inc.,* 348 U.S. 483, 99 L.Ed. 563, 75 S. Ct. 461 (1955), the Supreme Court invoked consumer safety and health interests over a claim of pure economic parochialism. Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good. *Id.* at 487-88 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. . . . The prohibition of the Equal Protection Clause goes no further than [ ] invidious discrimination."). Similarly, the Court in *Fitzgerald v. Racing Ass'n of Central Iowa,* 539 U.S. 103, 156 L. Ed. 2d 97, 123 S. Ct. 2156 (2003) invoked economic development and protecting the reliance interests of

river-boat owners, in *City of New Orleans v. Dukes,* 427 U.S. 297, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) invoked historical preservation and economic prosperity, and in *Nordlinger v. Hahn,* 505 U.S. 1, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992) invoked neighborhood preservation, continuity, stability, and protecting the reliance interests of property owners. None of these cases overturned the principle that the Equal Protection Clause prohibits invidious state interests; to the contrary, they ratified the principle.

While relying on these time-tested authorities, the majority goes well beyond them to confer legitimacy to a broad concept not argued by the Board – unvarnished economic protectionism. Contrary to the majority, however, whenever courts have upheld legislation that might otherwise appear protectionist, as shown above, courts have always found that they could also rationally advance a *non-protectionist* public good. The majority, in contrast to these precedents, effectively imports a standard that could even credit legislative classifications that advance no general state interest.

The end result of the majority's reasoning is an almost per se rule upholding intrastate protectionist legislation. I, for one, can imagine a different set of facts where the legislative classification is so lopsided in favor of personal interests at the expense of the public good, or so far removed from plausibly advancing a public interest that a rationale of "protectionism" would fail. Even those cases such as *Fitzgerald* that give some weight to economic protectionism, are careful to find a mix of state interests that advance the general welfare. No case holds that the bare preference of one economic actor while furthering no

greater public interest advances a "legitimate state interest."[1]

We need not go so far in this case for two reasons. First of all, the record below and the district court's findings of fact support a conclusion that the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection. The district court found that the Board had in fact brought enforcement actions under the Act to combat consumer abuse by funeral directors. The licensing scheme thus provides a legal club to attack sharp practices by a major segment of casket retailers. Secondly, the history of the licensing scheme here shows that it predates the FCC's deregulation of third-party casket sales or internet competition, and, at least in the first instance, was not enacted solely to protect funeral directors facing increased intrastate competition. I would therefore conclude that the district court did not err in crediting the consumer protection rationale advanced by the Board.

The licensing scheme at issue here leaves much to be desired. The record makes it clear that limitations on the

[1] Three cases suggest that bare economic protectionism does not meet the legitimacy requirement: *Smith v. Cahoon,* 283 U.S. 553, 75 L.Ed. 1264, 51 S.Ct. 582 (1931) (holding that a bonding requirement favoring agricultural interests over other industries is not legitimate); *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 84 L.Ed.2d 751, 105 S.Ct. 1676 (1985) (holding that a desire to improve the local economy by fostering in-state insurance companies at the expense of out-of-state companies is not legitimate); *Allegheny Pittsburgh Coal Co. v. County Comm'n,* 488 U.S. 336, 102 L.Ed.2d 688, 109 S.Ct. 633 (1989) (holding that a county tax assessment system discriminating against recent sales and protecting certain property owners is "wholly irrational").

free market of casket sales have outlived whatever usefulness they may have had. Consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales. Oklahoma's general consumer protection laws appear to be a more than adequate vehicle to allow consumer redress of abusive marketing practices. But the majority is surely right that the battle over this issue must be fought in the Oklahoma legislature, the ultimate arbiter of state regulatory policy.

I therefore conclude that the legislative scheme here meets the rational basis test and join in the judgment of the majority.

**KIM POWERS, et al., Plaintiffs, vs.
JOE HARRIS, et al., Defendants.**

Case No. CIV-01-445-F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

2002 U.S. Dist. LEXIS 26939

**December 12, 2002, Decided
December 12, 2002, Filed**

COUNSEL: For Plaintiffs, Kim Powers, Dennis Bridges and Memorial Concepts Online, Inc., represented by: Andrew W. Lester, Lester Loving & Davies, Edmond, OK. Clark M. Neily, III, Institute for Justice, Washington, DC. R. Scott Thompson, Lester Loving & Davies, Edmond, OK. Robert Freedman, Institute for Justice, Washington, DC. William H. Mellor, Institute for Justice, Washington, DC.

For Defendants, Joe Harris, in his official capacity as President of the Oklahoma State Board of Embalmers and Funeral Directors, and Charles Brown, Terry Clark, Chris Craddock, Keith Stumpff and Scott Smith, each in their official capacity as a Member of the Oklahoma State Board of Embalmers and Funeral Directors, represented by: Joseph L. McCormick, IV Attorney General's Ofc – Lincoln-OKC, General Counsel – Litigation Division, Oklahoma City, OK. Linda L. Samuel-Jaha, Attorney General's Ofc – Lincoln-OKC, General Counsel – Litigation Division, Oklahoma City, OK. Stefan K. Doughty, Attorney General's Ofc – Lincoln-OKC, General Counsel – Litigation Division, Oklahoma City, OK.

For Amicus, Federal Trade Commission, represented by: Maureen K. Ohlhausen, Federal Trade Commission,

Washington, DC. Myra Howard, Federal Trade Commission, Washington, DC.

JUDGE: STEPHEN P. FRIOT, UNITED STATES DISTRICT JUDGE.

OPINION:

MEMORANDUM OPINION

To provide context for the analysis which follows, the court begins with a summary of the issues presented by this action (Part I). That summary is followed by findings of fact (Part II); conclusions of law regarding: jurisdiction, disposition of certain of plaintiffs' challenges, and the law which applies to determine plaintiffs' remaining challenges (Part III); discussion and determination of these remaining challenges, including additional fact-findings and conclusions of law pertinent to the central legal issues, which are the validity of plaintiff's due process and equal protection challenges (Part IV); and the court's rulings (Part V, Conclusion).

Part I:

Summary

This action challenges the constitutionality of some provisions of Oklahoma's funeral services laws. Plaintiffs, who sell caskets over the internet, challenge those laws because, as interpreted and applied by the defendants who are members of the Oklahoma State Board of Embalmers and Funeral Directors (the Board), those laws prohibit plaintiffs from selling caskets within the State of Oklahoma.

This action was tried to the court on November 18 and 19, 2002. The court has had the benefit of outstanding advocacy on behalf of the plaintiffs, the defendants and the amici. With the benefit of that outstanding advocacy, augmented by its own research and careful consideration, the court now reaches its conclusions.

Plaintiffs challenge Oklahoma's funeral service laws (the Oklahoma Funeral Services Licensing Act, 59 O.S. § 395.1 *et seq.,* the "FSLA," or the "Act," and Board rules promulgated pursuant to the FSLA) on several federal constitutional grounds. Specifically, plaintiffs assert that Oklahoma's funeral services laws violate four clauses of the United States Constitution: the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause of Article I, Section 8.

The court applies the rational basis test to determine the validity of plaintiffs' due process and equal protection challenges. The parties agree that this is the applicable test and the court concurs. This test is described with more precision in Part III of this memorandum, but roughly stated here, it essentially requires the court to uphold the constitutionality of the FSLA's restrictions on casket sales if there is any legitimate public purpose which the Oklahoma legislature could have reasonably conceived to be served by those restrictions.

In their effort to validate the laws challenged under this test, defendants assert that the legitimate public purpose which the legislature could have reasonably conceived to be served by Oklahoma's restrictions on casket sales is consumer protection. Defendants assert

that Oklahoma consumers are both conceivably and in fact served by restrictions which require Oklahoma casket sellers to hold certain licenses issued by the Board. In this regard, defendants assert that consumers purchasing caskets are vulnerable to over-reaching sales tactics and that Oklahoma's licensing scheme gives the Board investigative and disciplinary tools, not available with respect to most ordinary consumer purchases, which may be used to protect consumers from improper sales practices. Those tools include the ability to impose fines and to revoke or suspend licenses.

In response, plaintiffs assert that the lack of fit between the knowledge and skills required to sell caskets, and the knowledge and skills required to become licensed to sell caskets in Oklahoma, is so severe as to render Oklahoma's licensing requirements irrational and arbitrary, causing Oklahoma's laws to fail the rational basis test for constitutional validity. Plaintiffs assert that because Oklahoma's restrictions deprive plaintiffs of their ability to sell caskets and do not meet the constitutional test for validity, Oklahoma's funeral services laws violate plaintiffs' federal due process and equal protection rights.

On this basis, and for other reasons asserted under the Privileges and Immunities Clause and under the Commerce Clause, plaintiffs seek a judgment declaring the challenged funeral services laws unconstitutional and unenforceable to the extent that those laws prohibit plaintiffs from selling caskets to Oklahomans without the currently required licenses. Plaintiffs also seek an order enjoining the Board from enforcing the challenged laws in any manner inconsistent with such a declaration. Plaintiffs do not seek money damages.

Much of the evidence which has been presented is undisputed, it being more often the case that the inferences to be drawn from the evidence are in dispute rather than the underlying facts themselves. Nevertheless, the court has previously declined to decide this action at the summary judgment stage, preferring that a full evidentiary record be developed for the benefit of this court, the parties, and for any reviewing court. For similar reasons, and because this case was not tried to a jury, the court has afforded the parties a good deal of leeway with respect to the evidence admitted at trial. Although broadly relevant to the general discussion as framed by the parties, the court considers much of the record evidence to be, in the strict legal sense of the word, immaterial. In the formal fact-findings stated below, the court has, again for the benefit of the parties, made some findings which are more relevant to legislative policy-making than to the narrow legal issues presented for determination. In support of its decision, however, the court has resisted the temptation to rely on any findings which are not strictly relevant to material legal issues as those issues are explained in Part IV of this memorandum.

Part II:

Findings of Fact

Plaintiff Kim Powers is a resident of Ponca City, Oklahoma. She is not licensed by the Board as either a funeral director or as an embalmer.

Plaintiff Dennis Bridges is a resident of Knoxville, Tennessee. He is a licensed funeral director in Tennessee. He is not licensed by the Board as either a funeral director or as an embalmer.

Plaintiff Memorial Concepts Online, Inc. is an Oklahoma corporation created, operated and owned by Kim Powers and Dennis Bridges to sell funeral merchandise over the internet. Memorial Concepts is not licensed by the Board as a funeral establishment.

At this time, none of the plaintiffs hold any of the three licenses (funeral director, embalmer, or funeral establishment) that are currently issued by the Board.

Defendants are Joe Harris, Stephen Huston, Charles Brown, Terry Clark, Chris Craddock, Keith Stumpff, and Scott Smith, all of whom are sued in their official capacities as members, and in some cases as officers, of the Board.

Plaintiffs currently sell funeral merchandise, including caskets, over the internet. Plaintiffs sell caskets only for immediate payment and delivery. Apart from offering funeral merchandise for sale, plaintiffs offer no other death- or funeral-related services. Plaintiffs have no role in the disposition of human remains.

A casket is a burial box designed to hold and transport human remains prior to and during funeral services, and for burial. Caskets have not been shown to play a role in protecting public health, safety, or sanitation, nor have they been shown to aid in protection of the environment. Caskets commonly represent upwards of 25 per cent (and is some cases more) of the total cost of funeral-related goods and services.

As a part of their current business enterprise, plaintiffs wish to sell time-of-need[1] caskets to Oklahoma consumers. Plaintiffs are prohibited from making such sales because, applying and enforcing the FSLA, the Board currently requires casket sellers who wish to sell caskets in Oklahoma to Oklahomans for delivery in Oklahoma (referred to in this memorandum as in-state sales) to hold a funeral establishment license as well as a funeral director's license. The Board issues both of these licenses.[2]

Previously, while working for a funeral home chain and acting as the agent of a licensed funeral director, Ms. Powers sold caskets to Oklahoma consumers on a pre-need basis. In that capacity, Ms. Powers was not closely supervised by a licensed funeral director and she routinely sold caskets to Oklahoma consumers including grieving consumers who were arranging funerals for family members when death was imminent. The Board allowed then, and continues to allow now, such pre-need sale of caskets by untrained, unlicensed pre-need counselors acting as agents of funeral homes. Such sales are commonplace in Oklahoma.

Mr. Bridges has extensive experience in the funeral industry. He has been a licensed funeral director in Tennessee for over twenty years. In that capacity, he has

[1] For purposes of this memorandum, time-of-need sales are distinguished from pre-need sales as follows. Time-of-need sales are those which are neither pre-death (whether or not death is imminent), nor pre-paid (purchased and paid for at the time of the sale with delivery of the casket to occur at a future date).

[2] The Board also issues an embalmer's license. An embalmer's license is often, but not necessarily, issued in combination with a funeral director's license. The Board does not require a person who only wishes to sell caskets to have an embalmer's license.

arranged thousands of funerals and has sold thousands of caskets.

Plaintiffs have a reasonable and genuine fear that if they were to sell caskets to Oklahoma consumers, they might be prosecuted for violation of the FSLA and Board rules. For fear of prosecution, plaintiffs have foregone in-state casket sales.

Plaintiffs have sold a number of caskets over the internet to purchasers located outside of Oklahoma. The Board does not regulate, investigate, or restrict the sale of caskets or other funeral merchandise by plaintiffs, or by others, to consumers located outside the State of Oklahoma. The Board has not indicated any interest in regulating those out-of-state sales.

Likewise, the Board does not regulate, investigate, or restrict the sale of caskets or other funeral merchandise by persons or businesses located outside the State to consumers located inside the State. The Board has shown no interest in regulating those sales to Oklahomans.

Although urns, clothing, and flowers are sometimes sold as death- or funeral-related goods or services, the Board does not require individuals or businesses which sell urns, clothing, or flowers, and which do not otherwise participate in the sale of death- or funeral-related goods or services, to be licensed by the Board.

The Board has received consumer complaints regarding the sale of death- and funeral-related goods and services. At times, these complaints have involved charges of serious consumer abuses, including but not limited to complaints against funeral establishments concerning the

sale of pre-need funeral services, and complaints against cemeteries.

The court makes no determination as to the prevalence of such tactics, but it finds that in at least some instances, Oklahoma funeral homes have employed sharp practices in their dealings with consumers purchasing caskets. For example, Oklahoma funeral homes have attempted to increase the amount of money a consumer spends on a casket by showing higher-priced caskets more favorably in a showroom by strategic use of lighting, by placement of high-end caskets on rugs or beside sentimental sculpture, and by displaying less expensive caskets in unattractive colors alongside expensive caskets displayed in attractive colors. In at least one case, an Oklahoma funeral home priced a low-end casket at $695, which had a probable wholesale cost of between $150 and $120. In that case, that particular casket was the least expensive casket offered by that funeral home but it was not on display except by picture. Also on that occasion, the funeral home did not provide a casket price list to its prospective customer before the customer entered the casket showroom.

In at least one instance, as a result of a complaint by an Oklahoma consumer, the Board has investigated and disciplined licensees for improper conduct with respect to the sale of funeral merchandise. Carl Cunningham, a licensed funeral director in Oklahoma, and Cunningham Funeral Home, a licensed funeral home establishment in Oklahoma, were the respondents in that proceeding before the Board. After notice and an administrative hearing, the Board issued an administrative order finding that the respondents had failed to provide a statement of goods and services to the family of the deceased on the day funeral arrangements were made, in violation of Oklahoma

Administrative Code (OAC) 235: 10-7-2(5). As a result of that administrative order, the Board fined respondent Carl Cunningham $1,000 individually, and fined respondent Cunningham Funeral Home an additional $1,000.

According to the testimony of Peggy Paddyaker, an investigative analyst for the Consumer Protection Unit of the Oklahoma Attorney General's office, it is the practice of the Consumer Protection Unit to initiate civil litigation against a person or business as a result of a consumer complaint only when the Attorney General's office concludes that there is a pattern of improper conduct sufficient to call for action on behalf of the State. The Consumer Protection Unit fields consumer complaints by sending a letter to the business concerning which it has received a complaint. It takes weeks to months for the Unit to establish contact with a business and sometimes no contact is established. The Consumer Protection Unit attempts conciliation but it does not compel a person or business to participate in conciliation efforts. The Consumer Protection Unit refers consumer complaints which are received against licensed persons or businesses to the state licensing board with jurisdiction over such persons or businesses, if such a board exists.

Lisa Carlson, executive director of Funeral Consumers Alliance (and an articulate consumer advocate with impressive credentials), testified that her nationwide organization receives numerous consumer complaints regarding death- and funeral-related goods and services. Consumer complaints concern both time-of-need sales and pre-need sales, and are commonly made against funeral homes as well as against cemeteries.

Family members generally make funeral purchases and other funeral and burial arrangements for the deceased. Every witness who testified on the subject agreed that consumers purchasing caskets need legal protection to help prevent and remedy over-reaching sales tactics. Every witness who testified on the subject agreed that consumers purchasing time-of-need caskets may be especially vulnerable to overreaching sales tactics because of grief and other emotions which arise as the result of the death of the person for whom the consumer is purchasing a casket.

There are a number of facility, equipment, and inventory requirements which the Board imposes on persons or entities seeking to qualify for a funeral establishment license from the Board. (Board rules are described in more detail in Part III.)

Because of these facility, equipment, inventory, and other requirements which the FSLA and Board's rules and practices impose, Oklahoma's requirement that a casket seller hold a funeral establishment license effectively precludes the in-state sale of caskets using the internet model in which transactions occur by computer or by telephone. For the same reasons, these requirements effectively preclude plaintiffs from obtaining a funeral establishment license and, therefore, effectively preclude plaintiffs from selling caskets to in-state purchasers.

Obtaining a funeral director's license in Oklahoma requires a substantial investment of time and money. There are comprehensive educational, training, and other requirements established by the Board in order to qualify for this license. For example, those requirements include an approved curriculum of mortuary science and a one-year

apprenticeship during which an apprentice must embalm 25 bodies. (Board rules are described in more detail in Part III.)

On the other hand, very little specialized knowledge is required to sell caskets. Most consumers select caskets based on price and style. Any information a generally educated person needs to know about caskets in order to sell them can be acquired on the job. Less than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets. As a result of the substantial mis-fit between the education and training required for licensure and the education and training required to sell caskets in Oklahoma, people who only wish to sell caskets, if they wish to make in-state sales, are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets.

Because of the educational and training requirements which the FSLA and the Board's rules and practices impose, Oklahoma's requirements to qualify for a funeral director's license effectively preclude plaintiffs from obtaining a funeral director's license, and therefore, effectively preclude plaintiffs from selling caskets to in-state purchasers as a part of plaintiffs' current business enterprise.

More variety in casket prices and in casket styles is available to consumers as a result of the relatively recent development of the internet market. Internet casket sales and retail casket store sales began to proliferate in or after 1994, the year in which the Federal Trade Commission (the FTC) prohibited funeral homes from imposing a

casket handling fee on customers who purchased caskets from independent sources such as the internet, retail casket stores, or funeral homes which did not render other goods or services to a customer. (Such sources are referred to collectively in this memorandum as independent sellers.)

Coordination with independent sellers to ensure that the proper casket arrives at a funeral home in a timely fashion is a matter of routine in the funeral industry and does not present any unique problems for funeral directors or for customers. Funeral homes routinely accept and accommodate caskets purchased from independent sources.

As long as independent sellers stay in the market, casket sales from independent sources such as plaintiffs place downward pressure on casket prices as a result of increased competition. This downward pressure may result, and in other states has at times resulted, in lower casket prices. Allowing casket sales from such independent sources, however, may or may not result in lower costs for the typical package of funeral-related goods and services. In some states where open price competition is occurring, the overall price of funerals appears to be going down or escalating at a decreased rate. In some cases, however, when competition increases, funeral homes have raised their prices for the other services they provide in order to compensate for profits lost due to lower casket prices. Funeral homes make most of their profit from charges for services rather than from profits from the sale of funeral merchandise. Merchants who only sell funeral merchandise obviously make all of their profits from the sale of that merchandise.

Even with Oklahoma's present licensing restrictions in place, there are a number of sources from which Oklahoma consumers may purchase caskets, so that the potential for considerable casket price and style competition now exists in this State. Currently, Oklahoma consumers may purchase caskets from any internet sellers located outside of this State. Oklahoma consumers may also compare casket prices offered by various funeral homes and may purchase a casket from a funeral home which does not provide any other goods or services to that consumer. At this time, there is a retail casket store in Oklahoma City which has qualified to sell caskets by obtaining the necessary licensure.

Alternatively, Oklahoma consumers may elect cremation and thus have remains disposed of in a manner which does not require a casket. Consumers may also elect (at least theoretically, although the court realizes this would not typically be an attractive alternative) burial without a casket, as no casket is required for burial in this State.

In 1989, the year the specific statutory provisions challenged in this action were enacted as amendments to the FSLA, there was no internet market for the sale of caskets and there were no retail casket stores. Since 1989, two house bills presenting statutory amendments for the legislature's consideration have been introduced in the state legislature. Those bills are HB 1083, introduced during the First Session of the 47th Legislature in 1999; and HB1057, introduced during the First Session of the 48th Legislature in 2001. Among other changes to the FSLA, each of these bills provided that persons or businesses which sell funeral merchandise to the public but which do not provide any other services related to the transportation or preparation of human remains or the

supervision of funerals, would not be subject to the FSLA. One of these bills did not advance beyond the committee stage. The other was defeated by the house sitting as a body. During the years in which these bills were pending before the legislature, the internet existed, and retail casket stores existed in other states if not in Oklahoma. During the years both of these bills were pending, members of the Oklahoma legislature certainly could have been made aware of all of the policy arguments advanced by any of the parties in this action or suggested by any of the evidence heard by the court.

Part III:

Conclusions Regarding Applicable Law

There is a sufficient case or controversy to establish jurisdiction with respect to plaintiffs' challenges based on due process, equal protection, and privileges and immunities grounds. United States Constitution, Art. III, § 2.

Because there is not evidence of any past, current, or planned action by the Board to enforce the challenged statutes or rules with respect to any out-of-state or interstate sales, even though the challenged statutes are not, by their terms, so limited in their application, the court concludes that there is not a case or controversy sufficient to provide jurisdiction to determine plaintiffs' challenge brought under the Commerce Clause. United States Constitution, Art. III, § 2.

Should it later be determined that the court has jurisdiction to decide the interstate commerce issue, in the exercise of its discretion to either render a declaratory judgment or decline to do so, 28 U.S.C. § 2201, the court concludes that it would be judicially imprudent to decide

that issue. The court bases this determination upon its conclusion that fact issues raised by such a challenge differ from fact issues raised by plaintiffs' other arguments, and also upon its conclusion that the lack of any serious dispute between plaintiffs and defendants with respect to interstate sales undercuts the parties' motivation to fully litigate that issue.

Except with respect to the interstate commerce issue just described, the court has jurisdiction to determine the remaining issues presented by this action under 28 U.S.C. §§ 1331 and 1343, and plaintiffs have standing to litigate those issues. United States Constitution, Art. III, § 2.

Because it can be addressed briefly, the court takes up plaintiffs' privileges and immunities challenge here as a preliminary matter. There is no merit to this ground for challenge. *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1872); *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial p. 7 (6th Cir.). Revival of the Privileges and Immunities Clause may be an interesting and useful topic for scholarly debate but this memorandum is not the place for that discussion.

Having disposed of plaintiffs' more peripheral grounds for challenging Oklahoma's funeral services laws and having concluded that jurisdiction exists to determine plaintiffs' remaining grounds for challenge, the court turns to the key issue for determination, that is, the validity of plaintiffs' substantive due process and equal protection challenges.

There is no controlling legal precedent with respect to this issue. Although it would not be controlling in any event, the court notes that the Oklahoma Court of Civil

Appeals has previously addressed the constitutionality of the FSLA. In *State ex rel. Board of Embalmers and Funeral Directors v. Stone Casket Co. of Oklahoma City,* 1999 OK CIV APP 19, 976 P.2d 1074, 1076 (Okla. Civ. App. 1999), the court of appeals held that the FSLA does not violate federal equal protection. That holding was based on the State's argument that the FSLA's restrictions on casket sales served a legitimate public purpose by protecting public health, public safety, and the environment. In this action, the State has expressly withdrawn those arguments from the court's consideration, preferring to urge only consumer protection as the public purpose which justifies the FSLA's restrictions. For these reasons, *Stone Casket* provides no suggestion as to the proper resolution of the issues before this court.[3]

Recognizing that this action presents a case of first impression, the parties agree on the test which the court should apply to determine it; they only disagree concerning the result they would have the court reach by applying that test. As the challenged statute does not involve any fundamental rights or any suspect classifications such as gender or illegitimacy, in order to survive plaintiffs' due process and equal protection challenges, the FSLA need only survive rational basis review as that review has been articulated by the United States Supreme

[3] It is doubtful, but perhaps arguable, that even where grounds which might justify statutory restrictions have been withdrawn from the court's consideration, those grounds could still be used by a court to find a statute constitutional under the rational basis test. *See* authorities cited in Part III. Because of the conclusions reached by the court in this memorandum, it is not necessary for the court to address this narrow question, and so it does not do so, preferring to limit its discussion to the single public purpose expressly proffered by the State.

Court. *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial pp. 2-3 (6th Cir.) (articulating the "slight constitutional scrutiny" allowed under the rational basis test, *id.* at unofficial p. 1, and holding that Tennessee's funeral services laws failed to pass even that level of review).

The applicable rational basis test is set out in *Heller v. Doe,* 509 U.S. 312, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993) (applying the rational basis test to uphold Kentucky laws distinguishing between the mentally ill and the mentally retarded where those laws were challenged on the basis of equal protection, and substantive and procedural due process). *See also, Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955) (upholding Oklahoma statute against due process challenge where "it might be thought that the particular legislative measure was a rational way to correct" an evil, *id.* at 488; upholding the statute against an equal protection challenge because "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . [o]r so the legislature may think," *id.* at 489; and concluding that, "We cannot say that the regulation has no rational relation to [the] objective and therefore is beyond constitutional bounds," *id.* at 491); *Ferguson v. Skrupa,* 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963) (not mentioning the rational basis test *per se* except in Justice Harlan's concurrence, but citing *Lee Optical, Ferguson v. Skrupa,* 372 U.S. at 732, n.15, by way of upholding a Kansas statute challenged on due process and equal protection grounds where the challenged statute made it a misdemeanor to engage in the business of debt adjusting except as incident to the practice of law; the Court stated that "the Kansas legislature was free to

decide for itself that legislation was needed to deal with the business of debt adjusting," *id.* at 731).

In the context of due process challenges, the following characterizations of the rational basis test apply.

The court does not sit as a "superlegislature to weigh the wisdom of legislation." *Ferguson v. Skrupa,* 372 U.S. at 731 quoting *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423, 96 L. Ed. 469, 72 S. Ct. 405 (1952). Courts do not use the due process clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Ferguson v. Skrupa,* 372 U.S. at 731-32. A state statute "may be wise or unwise. But relief, if any be needed, lies not with [the courts] but with the body constituted to pass laws for the [state]." *Id.* The existence of facts supporting the legislative judgment is to be presumed. *United States v. Carolene Products Co.,* 304 U.S. 144, 152, 82 L. Ed. 1234, 58 S. Ct. 778 (1938). As long as legislative responses are not arbitrary or capricious, judges should refrain from reviewing the wisdom of those laws. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 398, 81 L. Ed. 703, 57 S. Ct. 578, 8 Ohio Op. 89 (1937) quoting *Nebbia v. People of New York,* 291 U.S. 502, 537-38, 78 L. Ed. 940, 54 S. Ct. 505 (1934).

In the realm of economic legislation, the Due Process Clause, of its own force, imposes no affirmative obligations on the states, and prohibits very little. As Leo Nebbia discovered to his sorrow, it condemns neither competition nor monopolies nor lower prices nor higher prices. *Nebbia* at 529-532. The legislature may determine, without interference from the Due Process Clause, that protection

of the consumer lies in creation of a cartel-like scheme for protection of an industry. *Id.* at 538-39.

In the context of equal protection challenges, the following characterizations of the rational basis test apply.

Although the licensing requirements of the FSLA have interfered with plaintiffs' current business enterprise, those requirements and the classifications they establish do not affect any right now considered fundamental which would require more significant justification than a rational basis in law. *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial p. 3 (6th Cir.). The framework for the court's analysis thus becomes "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin,* 490 U.S. 19, 26, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989).

In cases like this one, rational basis review in equal protection analysis "is not a license for the courts to judge the wisdom, fairness or logic of legislative choices." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993). Nor does the test authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (*per curiam*). "For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity." *See, e.g., FCC v. Beach Communications,* 508 U.S. at 314-315. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between

the disparity of treatment and some legitimate governmental purpose." *See, e.g., Nordlinger v. Hahn,* 505 U.S. 1, 11, 120 L. Ed. 2d 1, 112 S. Ct. 2326 (1992).[4]

A legislature which creates such classifications need not "actually articulate at any time the purpose or rationale supporting its classification." *Id.* at 15. Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications,* 508 U.S. at 313. "A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller Doe,* 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications,* 508 U.S. at 315.[5] A statute is presumed constitutional and

[4] Because there are no allegations of prejudice against discrete and insular groups or other unpopular factions, the somewhat exceptional equal protection cases relied on by plaintiffs in their Trial Brief at pp. 7-8, (also relied on by the Sixth Circuit in *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831 at unofficial page 4), are of little precedential value. *Romer v. Evans,* 517 U.S. 620, 631-34, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996), for example, used the rational basis test to strike down an amendment to the Colorado state constitution forbidding special legal protections for homosexuals. *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 447-50, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), held there was no rational basis for a city zoning ordinance requiring a special use permit for group homes for the mentally retarded. *See* Memorandum of Law Amici Curiae of Professor Harry F. Tepker and Oklahoma Funeral Directors Association (docket entry no. 107) at pp. 17-18, quoting Saphire, Richard B., "Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.," 88 Ky. L. J. 591 (2000).

[5] *Cf. City of Boerne v. Flores,* 521 U.S. 507, 529, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997), where the Court, confronted with a challenge to

(Continued on following page)

"[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the record. *Heller v. Doe,* 509 U.S. at 320-21. "Under rational basis review, it is 'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.'" *Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980), quoting *Flemming v. Nestor,* 363 U.S. 603, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). As Justice O'Connor observed for the Court in *Gregory v. Ashcroft,* 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991), it makes no difference that the assumptions apparently underlying the challenged legislation are "probably not true" or even "not true at all." *Id.* at 474.

In applying rational basis scrutiny, courts are compelled to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v.*

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the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.,* under § 5 of the Fourteenth Amendment, explicitly weighed the adequacy of the factual record before Congress, and *United States v. Lopez,* 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), where the Court, weighing the constitutionality of federal legislation criminalizing gun possession in a school zone as an exercise of Congressional power under the Commerce Clause, noted pointedly that Congressional findings supportive of the Commerce Clause rationale for the legislation were lacking, thus leaving the Court with no basis for finding a sustainable legislative judgment where no such basis "was visible to the naked eye." *Id.* at 562-63.

Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 quoting *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 55 L. Ed. 369, 31 S. Ct. 337 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69-70, 57 L. Ed. 730, 33 S. Ct. 441 (1913). Moreover, the Fourteenth Amendment "does not compel [state] legislatures to prohibit all like evils, or none. A Legislature may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Products Co.,* 304 U.S. 144, 151, 82 L. Ed. 1234, 58 S. Ct. 778 (1938) (discussing application of Fourteenth Amendment principles to Fifth Amendment equal protection challenge). A statutory classification fails rational-basis review only when it "'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 71, 58 L. Ed. 2d 292, 99 S. Ct. 383 (1978) quoting *McGowan v. Maryland,* 366 U.S. 420, 425, 6 L. Ed. 2d 393, 81 S. Ct. 1101, 17 Ohio Op. 2d 151 (1961).

The court concludes this litany of authorities with the observation, original to the *Heller v. Doe* decision from which most of the litany is taken, that despite the exceedingly light standard for constitutional review provided for, "[T]he standard of rationality must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe,* 509 U.S. 312 at 321, 125 L. Ed. 2d 257. In other words, the rational basis test is not a test so easy to pass that it is impossible for state legislation to fail it.

The legitimate public purpose which defendants proffer in support of Oklahoma's legislation under the

rational basis test is consumer protection. Consumer protection is a legitimate public purpose.[6]

1905 Okla. Terr. Sess. Laws, Chapter XXXVI, Art. 1, §§ 1-18. The first Oklahoma funeral services laws were enacted by the Legislative Assembly of the Territory of Oklahoma. Those laws established the Territorial Board of Embalming of Oklahoma Territory, and required licensing by that Territorial Board for any person engaged in the practice of embalming bodies within the Territory. Territorial law

[6] *See Schmidinger v. City of Chicago,* 226 U.S. 578, 587-89, 57 L. Ed. 364, 33 S. Ct. 182 (1913); *Craigmiles v. Giles,* 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) (concluding that "protecting the vulnerable funeral consumer and insuring competency in the funeral services profession" are "clearly legitimate governmental interests," but finding that the Tennessee statute was not rationally related to such an interest; the cases cited by the district court in *Craigmiles* in support of this conclusion are described by that court as dealing with health and safety or consumer protection issues, however, not necessarily "competency"; considering the district court's finding in that case that no health or safety considerations are raised by casket sales, this court questions whether "competency" in the sale of such an innocuous product is a legitimate concern of the legislature). On appeal, the Sixth Circuit makes short shrift of Tennessee's argument in *Craigmiles* – essentially an enhanced consumer service argument – that the course of study required for licensure is justified because it trains funeral directors in the best ways to treat persons who have suffered loss. The Sixth Circuit does not, however, state that enhanced customer service is not a legitimate public purpose. In fact, the opinion seems to presume otherwise. *See, Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial pp. 4, 6. *See also, Casket Royale v. Mississippi, Inc.,* 124 F. Supp. 2d 434, 439-440 (S.D. Miss. 2000) (the court presumes without stating that consumer protection is a legitimate public purpose; the Mississippi court distinguishes enhanced customer service, including product knowledge, as an interest separate from consumer protection and finds that enhanced customer service is not a legitimate governmental interest). The district court and the circuit court opinions in *Craigmiles,* and the *Casket Royale* opinion, are discussed at greater length in Part III.

required no licensure for any person engaged only in furnishing burial receptacles so long as that person was not also performing embalming. 1905 Okla. Terr. Sess. Laws, Chapter XXXVI, Article 1, §§ 5, 9.

The current statutory provisions challenged in this action include the following sections of the FSLA, listed in the order they appear in the Act.

> As used in the Funeral Services Licensing Act: "Funeral director" means a person who: sells funeral service merchandise to the public. . . . 59 O.S. § 396.2.2.d.
>
> "Funeral establishment" means a place of business used . . . in the profession of . . . funeral directing. . . . 59 O.S. § 396.2.3.
>
> "Funeral service merchandise . . . " means those products . . . normally provided by funeral establishments and required to be listed on the General Price List of the Federal Trade Commission, 15 U.S.C. § 57a(a), including, but not limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts, niches or outer enclosures. . . . 59 O.S. § 396.2.10.
>
> The following persons, professions and businesses shall be required to be licensed pursuant to the Funeral Services Licensing Act: Any person engaged or who may engage in . . . the sale of any funeral service merchandise. 59 O.S. § 396.3a.
>
> No person shall . . . engage in the sale of any funeral service merchandise to the public . . . unless such person has obtained the license specified by the rules promulgated pursuant to

> the Funeral Services Licensing Act and has otherwise complied with the provisions of the Funeral Services Licensing Act. 59 O.S. § 396.6A.

By including all products normally provided by funeral establishments and required to be listed on the General Price List of the FTC (a list which includes caskets) within the definition of "funeral service merchandise," and by including anyone who sells such "funeral service merchandise" within the definition of "funeral director," and by including the place of business of anyone who participates in "funeral directing" within the definition of a "funeral establishment," the FSLA effectively requires that both a funeral director's license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets.

The FSLA provides the Board with authority to prescribe and promulgate rules necessary to effectuate the provisions of the FSLA, and to make orders it deems necessary or expedient to the performance of its duties. 59 O.S. § 396.2a. As previously found in Part II of this memorandum, the Board has limited its enforcement of the FSLA's statutory prohibition of casket sales by unlicensed entities to in-state casket sales. The effect of the FSLA's statutory provisions, when combined with this Board practice, is that the FSLA, as interpreted and enforced by the Board, requires both a funeral director's license and a funeral establishment license before a person or entity may lawfully sell caskets in-state.

The FSLA also provides the Board with the authority to investigate, fine, suspend a license, revoke a license, or otherwise discipline licensees. Additionally, the FSLA provides the Board with the authority to request prosecution by the district attorney or by the Attorney General

against any person for any violation of the FSLA. 59 O.S. § 396.2a. Other than the FSLA, no other state laws provide consumers or the Board with the authority to impose fines against, or to suspend or revoke any licenses of, Board licensees. The FSLA does not provide a private cause of action to an individual consumer, for damages or otherwise, as a result of any alleged consumer abuse. The challenged statutes do not provide the Board with jurisdiction to award damages directly to Oklahoma consumers.

The mission of the Board "is to act in the public interest, for . . . public protection" and for other purposes of the funeral services profession and the public. OAC Chapter 10, Funeral Services Licensing, 235: 10-1-1. Consistent with this mission statement, the Board has promulgated rules establishing requirements which apply to a person or entity seeking a funeral director's license or a funeral establishment license.

According to those Board rules, in order to be licensed as a funeral establishment in Oklahoma, a business must have a fixed physical location and must be inspected by a representative of the Board. The business must also have a preparation room which will accommodate an embalming table and the room must be properly ventilated and contain sufficient supplies and equipment necessary to prepare human remains. The business must also have a selection room for the purpose of providing the public a selection of funeral service merchandise and it must have a inventory of not less than five caskets and have adequate areas for public viewing of human remains. The Board has also established other requirements. *See generally* OAC 235: 10-1-2, 10-3-2.

Other Board rules provide that an applicant for a funeral director's license must complete 60 credit hours of undergraduate training, an approved curriculum of mortuary science, and a one-year apprenticeship during which the applicant must embalm 25 bodies. The required mortuary science curriculum includes subjects such as embalming, restorative art, microbiology, pathology, chemistry, arranging funerals, psychology, grief management, funeral merchandise, and the funeral and burial practices of various religions. To become a licensed funeral director in Oklahoma, an applicant must also pass either a national or state subject-matter exam as well as an Oklahoma law exam. There are additional educational and training requirements which have been established by the Board. *See generally* OAC 235: 10-1-2, 10-3-1.

Other Oklahoma statutory or administrative provisions pertain to the purchase of death- and funeral-related goods and services. The sale of caskets on a pre-need and pre-paid basis[7] is regulated by the Oklahoma Insurance Code and by the Insurance Commissioner. *See generally* 36 O.S. § 6121 *et seq.* and OAC § 365: 25-9-1 *et seq*. Although the Board's definition of the practice of funeral directing does not include pre-need sales, the Board requires funeral directors who would make funeral arrangements on a pre-need basis to comply with the Insurance Code and with the Insurance Commissioner's regulations. OAC § 235: 10-7-2(6). The pre-paid sale of cemetery merchandise, as defined by the Oklahoma legislature, does not include caskets and is governed by the Oklahoma Cemetery

[7] If a casket is sold pre-death but not pre-paid, under the FSLA and the Board rules, that transaction is the province of the licensed funeral establishment and funeral director.

Merchandise Trust Act and by the State Banking Commissioner. 8 O.S. § 301 *et seq.* (definitions at § 302).

Given these interrelated statutory provisions codified in various titles of the Oklahoma Statutes, the court concludes that although Oklahoma's statutory and regulatory provisions governing sales of death- and funeral-related goods and services were not enacted as a unitary measure and do not amount to a seamless regulatory web, they evince an intent to forego laissez faire treatment of those sales and services when provided in this State. Limiting the sale of caskets to sellers licensed by the Board is, undeniably, a major component of that statutory scheme.

In addition to the Oklahoma statutes cited above which specifically pertain to death- and funeral-related issues, Oklahoma consumers are also given certain protections by the Oklahoma Consumer Protection Act, 15 O.S. § 751 *et seq.,* and by the Oklahoma Deceptive Trade Practices Act, 78 O.S. § 51 *et seq.* Both of these acts provide Oklahoma consumers with a private cause of action to pursue damages for individual harm resulting from conduct such as fraudulent or deceptive sales practices. Other statutory and common law of the State of Oklahoma, such as negligence law and contract law, also protects consumers and provides for private causes of action. In appropriate circumstances, these laws would be available to Oklahoma consumers to support actions against licensed funeral homes and funeral directors, or to support actions against independent casket sellers.

Part IV:

Discussion of Due Process and Equal Protection Challenges

With these facts and conclusions of law in mind, the court turns to a discussion of the ultimate questions of fact and law presented by this action. The issue before the court is whether the provisions of the FSLA and in the Board's associated rules and practices, which require plaintiffs to hold a funeral establishment license and a funeral director's license before selling caskets in-state, violate either federal substantive due process or equal protection guarantees because those restrictions are not rationally related, as that test is defined by the controlling legal authorities, to a legitimate public purpose of the State of Oklahoma.

Three federal decisions address the constitutionality of other states' laws which are very similar to the challenged Oklahoma laws. Six days ago, the Sixth Circuit affirmed a decision of the Eastern District of Tennessee which held that Tennessee's funeral services laws violated due process and equal protection. *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831 (6th Cir.) affirming *Craigmiles v. Giles,* 110 F. Supp. 2d 658 (E.D. Tenn. 2000). The district court for the Southern District of Mississippi has reached the same conclusion with respect to Mississippi's funeral services laws. *Casket Royale v. Mississippi,* 124 F. Supp. 2d 434 (S.D. Miss. 2000). Because of the similarity of the issues presented in these decisions to the issues presented here, the court discusses each of these three decisions beginning with the Sixth Circuit's decision in *Craigmiles v. Giles.*

In *Craigmiles v. Giles,* the Sixth Circuit states that as required by the rational basis test, it subjects Tennessee's funeral services laws to only "slight constitutional scrutiny." *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial p. 1. The Sixth Circuit's recitation of the Supreme Court authorities which the Sixth Circuit says it applies includes many of the same authorities cited and quoted in the conclusions of law portion of this memorandum. For example, the Sixth Circuit notes the well-established rule that in applying the rational basis test, it is irrelevant what reasoning "in fact" underlies a legislative enactment. *Id.* at unofficial p. 3, citing *Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980), quoting *Flemming v. Nestor,* 363 U.S. 603, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960).

It is at this point in the analysis, however, that this court takes issue with the Sixth Circuit's approach. Given *Craigmiles v. Giles'* stated rationale for its holding, it appears that the Sixth Circuit's quotation of the above-stated rule from *Railroad Retirement Bd. v. Fritz* is an empty gesture. For example, while the Sixth Circuit concedes that "The state could argue that the Act as a whole applied to the plaintiffs actually provides some legitimate protection for consumers from casket retailers," the court bases its ruling on the fact that "[t]he history of the legislation, however, reveals a different story. . . ." *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831, unofficial p. 5. Other examples which make clear that the Sixth Circuit's principal concern was with the Tennessee legislature's actual purpose in enacting the challenged laws, rather than with any reasonably conceivable purpose those laws might serve,

include the statement that Tennessee's licensure requirements "[appear] directed at protecting licensed funeral directors from retail price competition." *Id.* at unofficial p. 5. The Sixth Circuit also states that "The weakness of Tennessee's proffered explanations indicates that the [challenged amendment] was nothing more than an attempt to prevent economic competition." *Id* . at unofficial p. 3. Finally, the Sixth Circuit concludes its decision with the statement that, "This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose. . . ." *Id.* at unofficial p. 7.

This court also disagrees with the Sixth Circuit to the extent that the appellate court engages in balancing of the various public policies which it finds to be either served or not served by the Tennessee law. For example, the Sixth Circuit reasons that, "Perhaps the best antidote for the evil of funeral goods and services bundling by funeral homes is to have third-party competitors on individual items like caskets. Licensure is a barrier to that solution." *Id.* at unofficial p. 6. The Sixth Circuit also states that, "Applying the whole [statute] in order to cover casket retailers by the FTC funeral rule is both inapposite and counterproductive." *Id.* While these statements may be accurate, and while they may even be true statements with which this court would agree if it were for this court to expound policy on behalf of the Oklahoma legislature, these concerns are not properly cited as judicial reasons for invalidating state statutes subject to only the "slight constitutional scrutiny" which the Sixth Circuit court purports to apply.

For these reasons, this court concludes that although *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS

24637, 2002 WL 31728831 (6th Cir.) sets out many of the principles of the rational basis test as those principles have been articulated by the Supreme Court, the Sixth Circuit takes a less-than-disciplined approach in that case when it comes to its own application of those principles to the Tennessee laws which have recently been before it.

Because it has now been affirmed on appeal, the court only briefly addresses the district court opinion in *Craigmiles v. Giles,* 110 F. Supp. 2d 658 (E.D. Tenn. 2000). With a case history notation that *Lochner v. New York,* 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), has been "overruled in part," *Craigmiles,* 110 F. Supp. 2d at 662, the district court *Craigmiles* opinion cites and relies on *Lochner v. New York*. *Lochner,* however, has been completely abrogated. As the Supreme Court stated in *Ferguson v. Skrupa,* 372 U.S. 726, 730, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963), "The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded." *Craigmiles,* 110 F. Supp. 2d 658 at 662.[8] Statements in the district court *Craigmiles* decision that, "the evidence clearly shows that the state licensure requirements do not benefit the consumer," *id.* at 663, and that, "There is no evidence . . . that consumers would be treated any differently by independent retailers than by funeral directors," *id.* at 664, show a willingness on the

[8] The Sixth Circuit has disassociated its affirmance of the trial court's ruling from any reliance on *Lochner,* stating that "Our decision today is not a return to *Lochner,* by which this court would elevate its economic theory over that of legislative bodies." *Craigmiles v. Giles,* 312 F.3d 220, 2002 U.S. App. LEXIS 24637, 2002 WL 31728831 unofficial p. 7.

part of that court to evaluate the effectiveness of a legislative measure as well as its economic benefits and detriments. This type of evaluation, while consistent with *Lochner,* extends far beyond any level of judicial scrutiny authorized under *Heller v. Doe,* 509 U.S. 312, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993).

There is one more point to be made with regard to both of the *Craigmiles* decisions. In addition to this court's disagreement with the district court's and the appellate court's application of the rational basis test in those decisions, it is important to observe that the *Craigmiles* courts were confronted with facts which may, in at least one respect, differ materially from the facts in the case at bar. It is a distinction which may or may not, standing alone, be sufficient to square the results in those cases with the result this court reaches today, but it is worth noting. In contrast to the uncontroverted evidence before this court as to the Oklahoma Board's past use of its statutory authority over its licensees to investigate and fine licensees for consumer abuses, the district court in *Craigmiles v. Giles* found that Tennessee "pointed to no instance where any funeral director has been disciplined in connection with the sale of funeral merchandise." *Craigmiles,* 110 F. Supp. 2d at 664. Although this court, in assessing the constitutionality of the FSLA under the rational basis test, does not place conclusive or even substantial reliance on the fact that Oklahoma's statutory scheme has borne fruit in the form of administrative enforcement, the Tennessee court's finding that the Tennessee legislation was a dead letter in terms of consumer protection raises the possibility of judicial invalidation on a basis which the evidence in this case virtually forecloses.

The court now turns to the final decision for discussion, *Casket Royale.* Just as Tennessee argued in *Craigmiles,* the State of Mississippi argued in *Casket Royale* that consumer protection, among other grounds, was one of the valid public purposes served by the funeral laws of that state. Perhaps following the lead of the *Craigmiles* court,[9] *Casket Royale* rejected Mississippi's argument that "[r]estricting sales to licensees promotes consumer protection by . . . providing legal accountability." 124 F. Supp. 2d at 439. The *Casket Royale* court disagreed with this contention because it found that under the funeral statutes, the Mississippi Board's only recourse against unscrupulous licensees was the revocation of the licensee's right to act as a funeral director or to provide funeral services. 124 F. Supp. 2d at 440. The court reasoned that because the statute did not give any direct recourse to a consumer who was a victim of such practices, the legal accountability provided for under Mississippi's licensing scheme was not rationally related to consumer protection. *Id.*

This court disagrees with the Mississippi court's conclusions regarding licensing as a consumer protection tool, and adds the following fact-findings to its own previous findings. The court finds that licensing models of regulation can afford substantial protection to consumers, whether or not those licensing laws provide direct recourse to private litigants. All sorts of state boards (and bar associations) regularly sit as bodies which investigate and discipline licensees as a result of consumer complaints.

[9] Portions of *Craigmiles'* text are incorporated almost unchanged in *Casket Royale* and *Casket Royale* was decided only two months after the district court decision in *Craigmiles.*

The ability to suspend or revoke a license to practice a trade or profession is a tool which inures to the benefit of both the profession and the public that profession serves. This finding presumes that disciplinary action imposed by licensing boards against their licensees can reasonably be thought to deter future similar inappropriate conduct by the disciplined licensee and by other licensees. The court finds that this is a logical and reasonable presumption, and that licensing boards do, in fact, serve the public's interest in this way.

Casket Royale "ultimately [found] that the requirement that only licensees be allowed to sell caskets not only fails to advance the interest of Mississippi in consumer protection, it actually diminishes it [because] . . . consumers in Mississippi are offered fewer choices when it comes to selecting a casket [and] . . . the consumer . . . is forced to pay higher prices in a far less competitive environment." *Casket Royale,* 124 F. Supp. 2d at 440. This comment misses the mark. Essentially, the statement indicates the Mississippi court's view that because the statute has the effect of limiting a consumer's style and choice options, the statute diminishes consumer protection. But style and price options have more to do with consumer service than with the type of consumer protections Mississippi argued its licensing model offered its citizens. In any event, as this court understands the rational basis test, the evaluation of a statute's potential service or even its disservice to any variety of public interests is immaterial to the question of whether the statute embodies at least one conceivably reasonable means of furthering at least one legitimate public policy goal.

In summary, while all three of the opinions which have addressed these issues give lip service to the highly

deferential standard of review embodied in the rational basis test, all three decisions improperly balance the degree to which the writing court finds the challenged statutes, in fact, constitute a service or a disservice to the public. Contrary to this approach, the rational basis test requires upholding the challenged statute as long as it has "some footing in the realities of the subject addressed by the legislation," *Heller v. Doe,* 509 U.S. at 321. Issues such as the state legislature's wisdom in enacting the statute, the statute's effectiveness, and the actual purpose which the state legislature might have had in mind at the time of the enactment, are all immaterial. As the Supreme Court has held many times, any other rule improperly restricts governance by state legislatures.

With this understanding of the rational basis test in mind, the court concludes that the current statutory and Board-made licensing restrictions in Oklahoma's funeral services laws have some footing in the realities of the subject matter which those laws address. The subject matter of the FSLA is the sale of death- and funeral-related goods and services. The realities of that business are that there have been past consumer abuses, including but not limited to what the court has referred to in this memorandum as sharp practices, as well as worse abuses. Consumer protection is a legitimate goal of Oklahoma public policy and licensure is one rational way in which the State may choose to serve that goal, despite the impact of that choice on other public policy interests such as increased competition in the marketplace.

From the variety of available consumer protection models, Oklahoma has chosen a pro-active regulatory approach for regulation of those who would sell caskets, consisting of a licensing regime administered by a statutory

board. That licensing scheme is replete with the usual trappings of occupational licensing, including a detailed specification of prerequisites to licensure and a long list of derelictions of varying degrees of seriousness (several of which have a clear consumer protection orientation) which may result in suspension or revocation of the license. OAC §§ 235: 10-3-1; 10-7-2. Oklahoma has thus chosen not to rely solely upon consumer enforcement of statutory and common law remedies for deterrence and punishment of sharp practices and for vindication of society's interest in avoiding predatory conduct. H. L. A. Hart, commenting on paternalism in the law, observed that "instances of paternalism now abound in our law, criminal and civil." Hart, *Law, Liberty and Morality,* p. 32 (Random House, Vintage, 1963). The choice of whether to be paternalistic, and, given that choice, as to how best to be paternalistic, was one for the Oklahoma legislature to make. This court's power of review is spent when it determines, as it has, that a rationale for the challenged legislation could have been reasonably conceived. "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competence of the courts to arbitrate in such contrariety." *Vance v. Bradley,* 440 U.S. 93, 112, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979), quoting *Rast v. Ven Deman & Lewis Co.,* 240 U.S. 342, 357, 60 L. Ed. 679, 36 S. Ct. 370 (1916).

The deference due the judgment of the Oklahoma legislature under the rational basis test is perhaps best illustrated, in the context of this case, by the fact that, in spite of the arguments vigorously advanced by the Board in this action, this court is not persuaded that the provisions in question advance the cause of consumer protection. Maybe they do and maybe they don't. Credible

testimony presented at trial makes it clear that there are plausible arguments both ways, but the court is not called upon to weigh the consumer protection arguments. If that were the court's task – an essentially legislative undertaking, at least where economic legislation is challenged – the court might well conclude that a consumer turning to the internet to shop for a casket at the time of a family member's death or impending death is considerably less vulnerable than the State suggests, and that consumers would be better served by a little less protection and a little more access to open competition. The court might also conclude that the actual motivation for enactment of the challenged legislation was, in all likelihood, far less altruistic than the rationales proffered now. But the court's writ does not run that far under the rational basis test. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley,* 440 U.S. at 97.

The court's task, instead, is to determine whether plaintiffs have, in the language of *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973) as quoted in *Heller v. Doe,* 509 U.S. 312, 320, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993), "negatived" the consumer protection rationales suggested by the defendants, regardless of whether the legislature actually considered those rationales and regardless of whether, as a policy matter, the court would find plaintiffs' arguments more persuasive. Where, as here, it is readily conceivable that the licensing provisions challenged by the plaintiffs could have been thought by the legislature to promote the

goal of consumer protection by which the State now attempts to justify those restrictions, it follows, perforce, that plaintiffs have not negatived the consumer protection rationale offered by the State.

For all of these reasons, the court concludes that the challenged provisions in Oklahoma's funeral services laws pass the rational basis test.

Part V:

Conclusion

After careful consideration of the evidence, the parties' submissions, the record, and the relevant arguments and authorities, the court determines as follows.

The challenged Oklahoma Funeral Services Licensing Act laws and Board rules do not unconstitutionally deprive plaintiffs of federal due process of law or of equal protection guarantees because the restrictions imposed by Oklahoma's funeral services laws are rationally related to the legitimate public purpose of consumer protection. Oklahoma's funeral services laws also do not deny any constitutionally protected privileges or immunities of citizenship. The court has no jurisdiction to determine plaintiffs' challenge to the FSLA brought under the Commerce Clause.

The declaratory and injunctive relief requested by plaintiffs is **DENIED**.

Entered this 12th day of December, 2002.

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

JUDGMENT

This action having come on for trial before the court with the undersigned presiding, and the issues having been duly tried and determined, it is hereby ordered and adjudged that judgment is hereby entered in favor of the defendants and against the plaintiffs in accordance with the court's Memorandum Decision of this date.

Entered and dated at Oklahoma City, Oklahoma, this 12th day of December, 2002.

STEPHEN P. FRIOT

UNITED STATES DISTRICT JUDGE

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OKLAHOMA STATUTES

TITLE 59. PROFESSIONS AND OCCUPATIONS

CHAPTER 9. FUNERAL SERVICES LICENSING ACT

59 Okla. St. § 396.2 (2004)

§ 396.2. Definitions

As used in the Funeral Services Licensing Act:

1. "Embalmer" means a person who disinfects or preserves dead human remains, entire or in part, by the use of chemical substances, fluids or gases in the remains, or by the introduction of same into the remains by vascular or hypodermic injection, or by direct application into organs or cavities;

2. "Funeral director" means a person who:

a. is engaged in or conducts or represents themselves as being engaged in preparing for the burial or disposal and directing and supervising the burial or disposal of dead human remains,

b. is engaged in or conducts or represents themselves as being engaged in maintaining a funeral establishment for the preparation and the disposition, or for the care of dead human remains,

c. uses, in connection with the name of the person or funeral establishment, the words "funeral director" or "undertaker" or "mortician" or any other title implying that the person is engaged as a funeral director,

d. sells funeral service merchandise to the public, or

e. is responsible for the legal and ethical operation of a crematory;

3. "Funeral establishment" means a place of business used in the care and preparation for burial, commercial embalming, or transportation of dead human remains, or any place where any person or persons shall hold forth and be engaged in the profession of undertaking or funeral directing;

4. "Apprentice" means a person who is engaged in learning the practice of embalming or the practice of funeral directing, as the case may be, under the instruction and personal supervision of a duly licensed embalmer or a duly licensed funeral director of and in the State of Oklahoma, pursuant to the provisions of the Funeral Services Licensing Act, and who is duly registered as such with said Board;

5. "Board" means the Oklahoma Funeral Board;

6. "Directing a funeral" or "funeral directing" means directing funeral services from the time of the first call until final disposition or release to a common carrier or release to next of kin of the deceased or the designee of the next of kin;

7. "First call" means the beginning of the relationship and duty of the funeral director to take charge of dead human remains and have such remains prepared by embalming, cremation, or otherwise, for burial or disposition, provided all laws pertaining to public health in this state are complied with. First call does not include calls made by ambulance, when the person dispatching the ambulance does not know whether or not dead human remains are to be picked up;

8. "Personal supervision" means the physical presence of a licensed funeral director or embalmer at the

specified time and place of the providing of acts of funeral service;

9. "Commercial embalming establishment" means a fixed place of business consisting of an equipped preparation room, and other rooms as necessary, for the specified purpose of performing preparation and shipping services of dead human remains to funeral establishments inside and outside this state;

10. "Funeral service merchandise or funeral services" means those products and services normally provided by funeral establishments and required to be listed on the General Price List of the Federal Trade Commission, 15 U.S.C., Section 57a(a), including, but not limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts, niches or outer enclosures;

11. "Outer enclosure" means a grave liner, grave box, or grave vault;

12. "Funeral director in charge" means an individual licensed as a funeral director designated by a funeral service establishment, commercial embalming establishment, or crematory who is responsible for the legal and ethical operation of the establishment and is accountable to the Board;

13. "Authorizing agent" means a person legally entitled to order the cremation or final disposition of particular human remains pursuant to Section 1151 or 1158 of Title 21 of the Oklahoma Statutes; and

14. "Cremation" means the technical process, using heat and flame, that reduces human remains to bone

fragments. The reduction takes place through heat and evaporation. Cremation shall include, but not be limited to, the processing and pulverization of the bone fragments.

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59 Okl. St. § 396.3 (2004)

§ 396.3. Qualifications and examination of funeral directors and embalmers – Approved schools

A. The Oklahoma Funeral Board shall determine the qualifications necessary to enable any person to practice as a funeral director or embalmer, and prescribe the requirements for a funeral establishment or commercial embalming establishment. The Board shall examine all applicants for licenses to practice as a funeral director or embalmer. The Board shall issue the proper licenses to applicants who successfully pass such examination and qualify pursuant to any additional requirements the Board may prescribe.

B. The minimum requirements for a license to practice funeral directing or embalming, or both, are as follows:

An applicant for a license to practice embalming shall be at least twenty (20) years of age, a legal resident of this state, a citizen or permanent resident of the United States, and of good moral character. In addition, an applicant shall have at least sixty (60) semester hours of study earned, measured in quarter or clock hours, from a regionally accredited college or university, shall be a graduate of a program of mortuary science accredited by the American Board of Funeral Service Education, and have served one (1) year as a registered apprentice. The applicant may serve as a registered apprentice prior to enrollment in an

approved school of mortuary science, or subsequent to graduation from said school.

Curriculum of study for an embalmer and/or funeral director is a program of mortuary science which shall be that prescribed by the American Board of Funeral Service Education.

C. The Board shall issue the appropriate license to any qualified applicant whose application has been approved by the Board, and who has paid the fees required by Section 396.4 of this title, has passed the required examination with a general average of not less than seventy-five percent (75%) and has demonstrated to the Board proficiency as an embalmer or funeral director.

D. The Board shall maintain for public inspection a list of all accredited schools of embalming and mortuary science.

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59 Okl. St. § 396.3a (2004)

§ 396.3a. Persons and businesses required to be licensed

The following persons, professions and businesses shall be required to be licensed pursuant to the Funeral Services Licensing Act:

1. Any person engaged or who may engage in:

a. the practice or profession of funeral directing or embalming,

b. maintaining the business of a funeral establishment or commercial embalming establishment,

c. the sale of any funeral service merchandise, or

d. providing funeral services; and

2. Any funeral establishment or commercial embalming establishment.

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59 Okl. St. § 396.6 (2004)

§ 396.6. License required – Employment of licensed embalmer – Display of license or certificate

A. No person shall operate a funeral establishment, commercial embalming establishment, or crematory, engage in the sale of any funeral service merchandise to the public, provide funeral services, carry on the business or profession of embalming or funeral directing or perform any of the functions, duties, or powers prescribed for funeral directors or embalmers pursuant to the provisions of the Funeral Services Licensing Act unless the person has obtained the license specified by rules promulgated pursuant to the Funeral Services Licensing Act and has otherwise complied with the provisions of the Funeral Services Licensing Act. The license shall be nontransferable and nonnegotiable.

B. A license shall not be issued to any person for the operation of a funeral or embalming establishment which does not employ an embalmer licensed pursuant to the provisions of Section 396.3 of this title. An individual who supervises a funeral or embalming establishment shall be licensed pursuant to the provisions of Section 396.3 of this title.

C. The holder of any license or certificate issued pursuant to the Funeral Services Licensing Act, or any rules promulgated pursuant thereto, shall have the license or certificate displayed conspicuously in the place of business of the holder.

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59 Okl. St. § 396.11 (2004)

§ 396.11. Apprenticeship – Application – Certificate – Rules

A. The term for an apprenticeship in embalming and the term for an apprenticeship in funeral directing may be served concurrently. Applications for an apprenticeship in funeral directing or embalming shall be made to the Board in writing on a form and in a manner prescribed by the Board. The Board shall issue a certificate of apprenticeship to any person applying for said certificate who submits to the Board satisfactory evidence that said person is seventeen (17) years of age or older, of good moral character, and a graduate of an accredited high school or has earned a G.E.D. credential. The application shall be accompanied by a registration fee as required by Section 396.4 of this title.

B. The Board shall prescribe and enforce such rules as necessary to qualify apprentice applicants as embalmers or funeral directors. A license to practice embalming or funeral directing shall not be issued until said applicant has complied with the rules of the Board, and said applicant has embalmed at least twenty-five dead human bodies for burial or shipment during apprenticeship.

C. The certificate of apprenticeship shall expire one (1) year from the date of issuance but may be renewed by the Board for four additional one-year periods.

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59 Okl. St. § 396.12 (2004)

§ 396.12. Funeral establishment required to be licensed – Display of license – Inspection of premises – Sanitary rules – Commercial embalming establishments

A. Any place where a person shall hold forth by word or act that the person is engaged in the profession of undertaking or funeral directing shall be deemed as a funeral establishment and shall be licensed as such pursuant to the provisions of the Funeral Services Licensing Act.

B. A funeral establishment shall not do business in a location that is not licensed as a funeral establishment, shall not advertise a service that is available from an unlicensed location, and shall advertise itself by the name that the establishment is licensed as pursuant to the Funeral Services Licensing Act.

C. Every funeral establishment, commercial embalming establishment, and crematory shall be operated by a funeral director in charge. Each establishment license shall be conspicuously displayed at the location.

D. The Oklahoma Funeral Board shall have the power to inspect the premises in which funeral directing is conducted or where embalming or cremation is practiced or where an applicant proposed to practice, and the Board is hereby empowered to prescribe and endorse rules for reasonable sanitation of such establishments, including necessary drainage, ventilation, and necessary and suitable

instruments for the business or profession of embalming and funeral directing.

E. Any place where a person shall hold forth by word or act that such person is engaged in preparing and shipping of dead human remains to funeral establishments inside and outside this state shall be deemed a commercial embalming establishment and shall be licensed as such pursuant to the provisions of the Funeral Services Licensing Act.

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59 Okl. St. § 396.24 (2004)

§ 396.24. Violations – Penalties

Any person, firm, association or corporation who violates any of the provisions of the Funeral Services Licensing Act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

OKLAHOMA ADMINISTRATIVE CODE

TITLE 235. OKLAHOMA STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS

CHAPTER 10. FUNERAL SERVICES LICENSING

SUBCHAPTER 3. QUALIFICATIONS AND REQUIREMENTS FOR LICENSURE

O.A.C. § 235:10-3-1 (2003)

§ 235:10-3-1. Qualifications for licensing individuals

To be licensed in Oklahoma as a funeral director, embalmer, or both, an individual must meet the following minimum requirements:

(1) The individual must be twenty (20) years of age.

(2) The individual must be of good moral character.

(3) The individual must not have any felony convictions.

(4) The individual must not have had any misdemeanor convictions related to funeral service.

(5) The individual must be a legal resident of Oklahoma, and a citizen of the United States, or a permanent resident of the United States.

(6) The individual shall have completed the following educational requirements:

(A) The individual is a graduate of a program of mortuary science accredited by the American Board of Funeral Service Education.

(B) The individual shall have completed a total of sixty (60) college semester hours of credit at an accredited institution of higher education.

(i) Such institution must be accredited by a regional accrediting agency and recognized by the U.S. Department of Education as a valid and legal accrediting agency.

(ii) When the institution so accredited extends credit in quarter hours, each quarter hour shall equal 2/3rds of one semester hour.

(iii) Courses applied to completing the accredited mortuary science program in excess of the minimum requirements for an accredited program by the American Board of Funeral Service Education may be applied to the (60) total semester hours of college, provided such credits are earned at a regionally accredited institution.

(7) The individual shall have successfully passed the National Board Examination of the International Conference of Funeral Service Examining Boards with a average grade of seventy five percent (75%) or better on the Arts section for applicants for a funeral director license, applicants for a embalmers license shall have earned an average of seventy five percent (75%) or better on the Science section, and applicants seeking both a funeral director and embalmers license shall have earned an overall average of seventy-five percent (75%) or better on the Arts and Science section of the National Board

examination or a written State Board examination with a grade of seventy five percent (75%) or better.

(8) The individual shall have successfully passed a written Oklahoma Law examination with a grade of seventy five percent (75%) or better. The Oklahoma Law examination shall cover the Oklahoma Funeral Services Licensing Act and Rules of the State Board of Embalmers and Funeral Directors. The Oklahoma law written examination shall not be administered until the applicant has completed all educational requirements and other examination requirements with proof of such completion on file in the Board office. Rejection of an application to take the written examination for failure to complete educational requirements, or failure to file proper proof of completion of educational requirements is not appealable to the Board.

(9) The applicant must have paid any and all fees due and payable prior to licensing.

(10) The individual must have served and completed an embalmer and/or funeral director apprenticeship(s) in the State of Oklahoma.

(11) Once all requirements set forth above have been met, the individual may apply for a license as a funeral director, embalmer, or both.

O.A.C. § 235:10-3-2 (2003)

§ 235:10-3-2. Requirements for licensing funeral service establishments

To be licensed by the Board a funeral service establishment or a commercial embalming establishment must meet the following minimum requirements:

(1) The establishment shall be operated by a sole owner, a partnership, or by a corporation chartered in the State of Oklahoma.

(2) The establishment shall have a fixed place of business with a specific street address or physical location and shall conform to local zoning ordinances as evidenced by a occupancy permit issued by the proper local governmental entity authorizing the occupancy of a funeral service establishment at that location. Only one establishment license shall be issued to a specific address. If the establishment will contain a preparation room which does not discharge into a municipal sanitary sewer it must also secure permission from the appropriate county and/or state agency for any such discharge from the embalming room prior to being eligible to receive a funeral establishment or commercial embalming establishment license from this Board.

(3) The establishment shall be inspected by a representative of the Board prior to being initially licensed and periodically as determined by the Board.

(4) Each establishment shall have available a current copy of the Oklahoma Statutes and Rules related to the practice of funeral directing and embalming available for public inspection.

(5)

(A) The establishment shall have a preparation room. Such preparation room shall meet the following minimum requirements:

(i) The walls, floor, and ceiling must be constructed, and of such materials and finished in a way that they may be cleaned and disinfected. The room must be of sufficient size and dimension to accommodate an embalming table, a sink that drains freely with hot and cold running water connections, and an instrument table, cabinet, and shelves. The embalming table must have a rust proof metal, porcelain, or fiberglass top, with edges raised at least 3/4 inches around the entire table and drain opening at the lower end.

(ii) The preparation room shall be heated and air-conditioned. The preparation room must be properly ventilated with an exhaust fan that provides at least five room air exchanges per hour. All fumes must be ventilated to the outside atmosphere. The construction must be such that odors from the preparation room cannot enter the rest of the establishment.

(iii) The room shall not have a passageway available for public use.

(iv) The room shall contain sufficient supplies and equipment for normal operation. Nothing in this subsection shall require embalming chemicals to be stored in the preparation room. The room shall have no excess equipment stored, other than equipment necessary for preparing dead human remains, and performing necessary restorative art work. There shall be storage shelves or cabinets for all supplies, instruments, and equipment.

(v) All outside openings shall be covered with screens.

(vi) Measures must be taken to prevent a view of the interior of the room through any open door or window.

(B) A funeral establishment operated in conjunction with another licensed funeral establishment, with common ownership, shall be exempt from maintaining a preparation room provided it is located within 60 miles of the main establishment and can be practically served by the main establishment.

(6) The establishment shall have a selection room. Such room shall be devoted solely to the purpose of providing the public to make a reasonable selection of funeral service merchandise. Such room shall be of adequate size and furnishings. Such selection room shall meet the following minimum requirements:

(A) The funeral provider must offer a printed or typewritten price list to people who inquire in person about the offering or prices of funeral merchandise including caskets, alternative containers and outer burial containers. The price list must be offered upon the beginning of discussion of, but in any event before showing the funeral merchandise. In lieu of a written list, other formats, such as notebooks, brochures, or charts may be used if they contain the same information as would the printed or typewritten list, and display it in a clear and conspicuous manner.

(B) Each funeral establishment shall maintain an inventory of not less than five adult caskets at the location.

(C) The selection room shall have no excess equipment stored, other than equipment necessary for the proper display of funeral service merchandise.

(D) The room shall be maintained in a clean, neat, and orderly fashion at all times.

(7) The establishment shall have adequate areas for public viewing of dead human remains and necessary offices for conducting the business affairs of the establishment. The establishment may have other rooms, offices, and other facilities, including restrooms for the staff and public lounge areas. All other rooms and facilities shall be maintained in a clean, neat, and orderly fashion at all times.

(8) The establishment shall have the necessary automotive vehicles to provide adequate service to the public. This shall not prohibit the establishment from arranging to lease, borrow, or otherwise arrange for extra vehicles when needed.

(9)

(A) Each funeral service establishment shall have at least one full-time licensed funeral director employed to be designated as the Funeral Director-in-Charge of the operation of the establishment and a sufficient number of other licensed individuals to adequately serve the public.

(B) If an individual owner, partners, or corporation officers are not licensed funeral directors, then the owner, partners, or the corporation must employ a full-time licensed funeral director to serve as Funeral Director in Charge of the establishment.

(C) No licensed funeral director may serve as the Funeral Director in Charge of more than one (1) funeral service establishment without the express written authorization of the Board. With the written order of the Board a licensed funeral director, upon good cause shown that such is in the public interest, may serve as a Funeral Director in Charge of more than one (1) funeral service establishment but in no event may any such licensed funeral director be the Funeral Director in Charge of more than three (3) such funeral service establishments. Provided all of the establishments are under the same ownership, and no establishment included in the application is more than a 60 miles radius from the most centrally located establishment contained in the application.

(10) Each establishment must either employ a licensed embalmer full-time or have an available embalmer available to embalm dead human remains within six (6) hours after the establishment has assumed custody of the body.

(11)

(A) No establishment license is transferable from one person to another, or from one location to another. In case of the sale, lease, or relocation to a new location, or a change of name of the establishment, the establishment license may remain in force by mutual consent of the buyer and seller for a period of (30) thirty days or until the next regularly scheduled Board meeting, and at such time the license shall expire. The Funeral Director in Charge must notify the Board office of change of ownership, change of address, or change of name. The purchaser, lessee, or owner must notify the Board office to request an inspection, and issuance of a new license. Upon

purchase, lease or change of address, change of name, change of funeral director in charge a new establishment license application must be submitted with fee.

(B) Upon a change of Funeral Director in Charge of any funeral service establishment, then the Board office shall be promptly notified thereof in writing. Such written notice shall be accompanied by a new application for an establishment license listing the new Funeral Director in Charge, all without any additional fee.

(C) The failure to submit a new establishment application to the Board within ten (10) days of the purchase, lease, or relocation or change of name or change of Funeral Director in Charge, may result in a penalty.

(12)

(A) The issuance of a funeral service establishment license to an individual not licensed as a funeral director does not entitle the individual to practice funeral directing.

(B) In the event the Funeral Director in Charge becomes no longer in charge of said funeral establishment then such Funeral Director in Charge has the responsibility of notifying the Board of such change within ten (10) business days. Upon such notice a new establishment license application must be submitted to the Board for approval.

(13) All establishment licenses issued expire on the thirty-first of December in the year issued.

(A) An establishment license may be renewed until the thirtieth of April in the year following expiration.

(B) A penalty of One Hundred Fifty Dollars ($150.00) shall be assessed to all establishment renewals submitted after the thirty-first of January in the year following expiration.

(14) Every funeral service establishment and commercial embalming establishment shall be at all times subject to inspection by the Board. Inspections are to be reasonable in regard to time and manner.

(15) Any establishment which has been issued an establishment license under a rule of the Board having different requirements, then such Establishment is permitted to continue to be licensed under the rules pursuant to which the establishment was initially licensed. The Establishment license of such grandfathered establishment is not transferable. At such time as a change of ownership, purchase, lease, or change of address of such grandfathered funeral establishment is made then such establishment must meet the current requirements of this subchapter.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PEACHTREE CASKETS DIRECT, INC., THOMAS ALLEN HICKS, and THELMA JACO, Plaintiffs, v. STATE BOARD OF FUNERAL SERVICE OF GEORGIA; BOBBY L. COBB, in his official capacity as President of the State Board of Funeral Service; LEWIS A. MASSEY, in his official capacity as Secretary of State of Georgia; WILLIAM G. MILLER, Jr., in his official capacity as Joint Secretary, State Examining Boards, Defendants.	)	CIVIL ACTION FILE NO. 1:98-CV-3084-MHS

FINAL ORDER AND PERMANENT INJUNCTION

(Filed Feb. 09, 1999)

The Court hereby issues this final order and permanent injunction pursuant to Fed. R. Civ. P. 65. This order is based upon the evidence and argument presented at the November 2, 1998 contested hearing on the temporary restraining order and preliminary injunction. The parties have stipulated that the Court may enter this order without further hearing and without findings of fact.

Chapter 18 of Title 43, Official Code of Georgia, O.C.G.A. §§ 43-18-1, *et seq.*, defines "[f]uneral merchandise" as "goods that may only be sold or offered for sale by a funeral director working in a funeral establishment . . . includ[ing] . . . a casket or alternative container." § 43-18-1(14). The uncontradicted record evidence in this case establishes that State of Georgia authorities charged with enforcing this statute interpret it to prohibit the sale of caskets and alternative containers for human remains by any person who is not licensed as a "[f]uneral director" and at any place other than a licensed "[f]uneral establishment." In fact, state authorities have threatened to enforce the statute against plaintiffs, who are not licensed and are engaged in the sale of caskets and alternative containers.

The Chapter provides both civil and criminal remedies against persons who engage in the unlicensed practice of funeral directing. O.C.G.A. §§ 43-18-4, -5, -6. The criminal provision, § 43-18-6, makes any violation of the "article" a "misdemeanor." The punishment for misdemeanors under Georgia law is prescribed by O.C.G.A. § 17-10-3.

The Due Process Clauses of the United States Constitution require that regulatory statutes meet a certain level of specificity. A statute is void for vagueness if it fails to give "fair warning," "provide explicit standards for those who apply them," and "impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Criminal statutes are held to a higher standard. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 1224-25 (1997) (discussing three "manifestations of the fair warning requirement" including "the canon of

strict construction of criminal statutes, or rule of lenity" which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered").

The Court concludes that, to the extent it purports to make the unlicensed sale of caskets and alternative containers for human remains unlawful, Chapter 18 of Title 43, Official Code of Georgia, O.C.G.A. §§ 43-18-1, *et seq.*, is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In its Preliminary Order in this case, the Court also addressed the issue of whether the prohibition on the unlicensed sale of caskets and alternative containers is consistent with the Equal Protection Clause of the Fourteenth Amendment. Regarding plaintiffs' likelihood of success on the merits, the Court said that it "appears that the purported prohibition on the sale of caskets and alternative containers is not rationally related to a legitimate state interest." (Order at 2). The Court now concludes that, to the extent it purports to prohibit the unlicensed sale of caskets and alternative containers, O.C.G.A. §§ 43-18-1, *et seq.*, is indeed not rationally related to any legitimate state interest and thus violates the Equal Protection Clause of the Fourteenth Amendment. The Court reaches this conclusion because, according to the evidence before the Court, neither the statute nor any rules of the State Board of Funeral Service contain standards for the design, construction, or sale of caskets or alternative containers. Moreover, it appears that the restrictions of O.C.G.A. §§ 43-18-1, *et seq.*, apply only to in-state sale. Other forms of distribution (such as delivery in Georgia of containers purchased out-of-state,

gift, and home manufacture for personal use) are not prohibited.

Defendants are therefore permanently RESTRAINED and ENJOINED from taking any action pursuant to O.C.G.A. 43-18-1, *et seq.*, to prevent or restrict plaintiffs or other persons from selling caskets or alternative containers for human remains in Georgia. Defendants may not require funeral director or funeral establishment licensing for the sale of caskets or alternative containers for human remains. This Order applies to all defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

IT IS SO ORDERED, this the 8th day of Feb, 1999.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Senior Judge
United States District
Court

Presented by:

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