No. 04-716

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

BRIEF OF THE FUNERAL CONSUMERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Tenth Circuit, in direct conflict with the Sixth Circuit, upheld a state law requiring a funeral director's license in order to sell caskets, based on the court's conclusion that protection of state-licensed funeral directors from competition constitutes a legitimate state interest.

The question presented in this case is:

Whether states may give licensed funeral directors the exclusive right to sell caskets for the sole purpose of protecting such funeral directors from competition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

REGULATIONS

OTHER AUTHORITIES

BRIEF OF THE FUNERAL CONSUMERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Funeral Consumers Alliance ("FCA") is a non-profit organization dedicated to protecting a consumer's right to choose a meaningful, dignified, and affordable funeral. FCA serves as the umbrella group for nearly 120 local affiliates, with more than 400,000 members across the United States. In support of its mission to protect funeral consumer rights, FCA seeks to enforce constitutional limits on the use of arbitrary and irrelevant credentialing requirements on casket retailers by states desiring to shield state-licensed funeral directors from competition. FCA also serves as a consumer advocate for reforms on the national level and lends support for changes where needed on the state or local level; provides educational materials on funeral choices to increase public awareness of funeral options; monitors trends and practices in the funeral industry nationally and exposes abuses; serves as a credible source of information for media covering issues relating to dying and death; seeks to create partnerships of interest with national organizations sharing similar concerns; provides leadership support for local memorial and funeral planning organizations; refers individual inquiries to appropriate organizations supplying local services; and provides a conduit for exchanging information between these organizations.

FCA's local affiliates are nonsectarian, nonprofit, educational organizations. These organizations originally formed in the late 1930s (known then as Memorial Societies) in re-

[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, FCA states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than FCA or its counsel made a monetary contribution to the preparation or submission of this brief.

sponse to two influences: the depression and the increasing costs of funerals due to the use of embalming and more elaborate manufactured caskets. There are now more than 150 nonprofit funeral-planning groups—in most states of the U.S. and in the provinces of Canada. Funeral Consumers Alliance comprises approximately 120 of such groups in the U.S. Many affiliates, with the help of their volunteers, do a price survey of area mortuaries. Some have been able to negotiate a discount at participating funeral homes, similar to a cooperative buyers' club.

The question presented in this case is an issue of great importance to FCA members: whether pure economic protectionism is a legitimate state interest under the rational basis test such that states may give licensed funeral directors the exclusive right to sell caskets for the sole purpose of shielding such funeral directors from competition. Because Oklahoma and at least eight other states permit only state-licensed funeral directors to sell caskets to the public, and because funeral directors routinely mark up the price of their caskets 200 to 500 percent above the wholesale cost, FCA has a strong interest in ensuring that the constitutional prohibition against such laws with no legitimate state interest is enforced.

STATEMENT

Petitioners Kim Powers, Dennis Bridges, and Memorial Concepts Online, Inc., sellers of caskets over the internet, filed suit against Respondents, who are members of the Oklahoma State Board of Embalmers and Funeral Directors (the "Board"), challenging Oklahoma's law requiring a state funeral director's license and "funeral establishment" license in order to sell caskets within the state. The Oklahoma Funeral Services Licensing Act, Okla. Stat. tit. 59, § 395.1 *et seq.* ("FSLA"), prohibits the sale of funeral-service merchandise, including caskets, unless the seller is a licensed funeral director operating out of a state-licensed funeral establishment. *Id*. at § 396.3a; 396.6(A). As applied, this requirement pertains only to intrastate sales of "time-of-need" cas-

kets in Oklahoma. *See* Pet. App. 5. Petitioners argued that the lack of fit between the licensing requirement in order to sell caskets and the State's asserted consumer protection interest rendered the law arbitrary, irrational, and therefore invalid under the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment to the Federal Constitution. *See id.* at 2, 38; U.S. CONST. amend. XIV.

Following a two-day bench trial, the district court upheld the constitutionality of the statute. *See* Pet. App. 75. The court explained that "this court is not persuaded that the provisions in question advance the cause of consumer protection" (*id.* at 73), and noted that the actual motivation for enactment of the challenged legislation may have been "far less altruistic than the rationales proffered now." *Id.* at 74. Nonetheless, the court upheld the licensing provisions because they "could have been thought by the legislature to promote the goal of consumer protection." *Id.* at 75.

The Tenth Circuit affirmed, but on a different basis. The court discussed the parties' differing views regarding whether the FSLA's licensure requirement is rationally related to the state's proffered consumer protection interest. *Id.* at 11-13. Without expressly deciding that issue, the court below upheld the statute based on its conclusion 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." *Id.* at 31. *See also id.* at 16 (stating that "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.").

The court below expressly acknowledged that its decision created a circuit split with the Sixth Circuit: "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 substan-

tive due process." *Id.* at 26 (citing *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002)).

Judge Tymkovich concurred in the judgment, but rejected the majority's "unconstrained view of economic protectionism as a 'legitimate state interest.'" *Id.* at 32. Although Judge Tymkovich observed that "[c]onsumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales," (*id.* at 35), he concluded, in conflict with the Sixth Circuit in *Craigmiles*, that the restrictions satisfy the rational basis test because they "further[], however imperfectly, an element of consumer protection." *Id.* at 34.

SUMMARY OF ARGUMENT

The Tenth Circuit and the Sixth Circuit are in square conflict on an issue of enormous national significance: whether states may grant licensed funeral directors the exclusive right to sell caskets for the sole purpose of protecting such funeral directors from competition. More fundamentally, the issue is whether pure economic protectionism is a legitimate state interest under the rational basis test.

The Tenth Circuit below and the Sixth Circuit in *Craigmiles* considered constitutional challenges to state laws that required individuals wishing to sell caskets to obtain a state funeral director's license. *See* Pet. App. 3-5; *Craigmiles*, 312 F.3d at 222. Although both courts purported to review those statutes under the rational basis test, they reached diametrically conflicting results. Thus, the Tenth Circuit upheld the Oklahoma licensure requirement, determining that, "absent a violation of a specific constitutional provision or other federal law [which the court did not find], intrastate economic protectionism constitutes a legitimate state interest." Pet App. at 24. The Sixth Circuit reached the opposite conclusion, holding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles*, 312 F.3d at 224. The Sixth Circuit struck down the Tennessee casket sales licensing law because "[t]his measure to privilege certain businessmen over others

at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review." *Id.* at 229.

The decision below thus directly conflicts with the Sixth Circuit's holding in *Craigmiles*, requiring resolution of the conflict by this Court. In addition, the decision below conflicts with numerous decisions of this Court, and raises an issue of substantial and recurring importance to consumers of funeral services and caskets. In particular, the issue affects buyers of the approximately 1.8 million caskets sold in the U.S. each year, in what is for many individuals one of the three most expensive purchases they will ever make. As such, this Court's review of the question presented is warranted.

ARGUMENT

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE SIXTH CIRCUIT'S DECISION IN *CRAIGMILES*

The Tenth Circuit in this case held that "if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it." Pet. App. 2. The court reached this holding based on its conclusion that, "absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest." *Id.* at 24. Because the court below determined that the FSLA does not violate any federal statutory or constitutional provision, and that the FSLA is "'very well tailored' to protecting the intrastate funeral-home industry," the court upheld the FSLA's constitutionality. *Id.* at 26 (internal citation omitted). *See also id.* at 31 ("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.").

The court below expressly acknowledged that its decision created a square conflict with the Sixth Circuit's deci-

sion in *Craigmiles*. As the court below explained: "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." *Id.* at 26.

In *Craigmiles*, the Sixth Circuit addressed a challenge to a provision of the Tennessee Funeral Directors and Embalmers Act that, like the FSLA in Oklahoma, prohibited "anyone from selling caskets without being licensed by the state as a 'funeral director.'" *Craigmiles*, 312 F.3d at 222. The Sixth Circuit reached the opposite conclusion from the Tenth Circuit regarding economic protectionism: "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224. Having concluded that pure economic protectionism is not a legitimate state interest, the Sixth Circuit went on to reject the government's claim that the statute promoted both public safety and consumer protection. *See id.* at 226. "Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which [the] licensure provision is very well tailored. . . . None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment." *Id.* at 228-29.

Accordingly, there is an irreconcilable conflict between the Sixth and Tenth Circuits on an important issue of constitutional interpretation. This Court's review is therefore essential to resolve that conflict in the law.[2]

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[2] The decision below also conflicts with numerous decisions of this Court. Because *Amicus* FCA agrees with the analysis contained in the Petition for Certiorari regarding the conflict between the decision below and this Court's precedents, *Amicus* does not repeat that analysis here. *See* Supreme Court Rule 37.1. *See also Craigmiles*, 312 F.3d at 224 ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.") (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624

II. THE QUESTION PRESENTED IN THE PETITION IS OF RECURRING AND SUBSTANTIAL IMPORTANCE

The question whether states may impose arbitrary licensing requirements on those who wish to sell caskets for the sole purpose of protecting state-licensed funeral directors from competition is exceedingly important. There are currently 200 casket retailers nationwide. But at least nine states including Oklahoma have enacted protectionist legislation that permits only state-licensed funeral directors to sell caskets to the public. States with such laws in force occur within the jurisdiction of nine different Courts of Appeals: the First Circuit (Maine), the Second Circuit (Vermont), the Third Circuit (Delaware), the Fourth Circuit (Virginia), the Fifth Circuit (Louisiana), the Eighth Circuit (Minnesota), the Ninth Circuit (Idaho), the Tenth Circuit (Oklahoma), and the Eleventh Circuit (Alabama).[3] In addition, the Sixth Circuit

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[Footnote continued from previous page]

(1978); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)); Pet. App. at 32-33 (Tymkovich, J., concurring) ("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.") (citing *Williamson v. Lee Optical, 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); *Nordlinger v. Hahn*, 505 U.S. 1 (1992)).

[3] *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)); 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).

has struck down a Tennessee casket sales licensing law in *Craigmiles*. 312 F.3d at 229. And district courts in Mississippi and Georgia have rejected protectionist casket sales laws in those states as well. *See Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440-441 (S.D. Miss. 2000); *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). The question presented is thus a recurring one, which will continue to occupy—and divide—the lower courts in the absence of guidance from this Court. This Court's review is thus essential to resolve the Circuit conflict between the Sixth and Tenth Circuits, and to provide guidance to the courts in other jurisdictions where such laws exist.

The question presented is also one of enormous importance to consumers of funeral services and caskets. The purchase of a funeral is the third largest single expenditure that many consumers will ever have to make, after a home and a car. *See* 47 Fed. Reg. 42,260, 42,260 (1982). Today, there are approximately 2.4 million deaths per year, supporting a $3.7 billion market for all funeral goods sold. Approximately 75 percent of those who die are buried in a casket. Thus, there are presently approximately 1.8 million caskets sold in the United States each year.

"For years, caskets have been the major profit-maker for an undertaker, and mark-up on caskets was often 500-700% or more." LISA CARLSON, CARING FOR THE DEAD: YOUR FINAL ACT OF LOVE 272 (1998). *See also Craigmiles*, 312 F.3d at 224 (noting that "the district court found that funeral home operators generally mark up the price of caskets 250 to 600 percent, whereas casket retailers sell caskets at much smaller margins."). Indeed, the average cost of a funeral in the U.S. is currently $6,500, several times the cost in Great Britain, France, and Australia in recent years, some of which is attributable to the cost of the casket.

The funeral industry has a long history of being hostile to competition, using public safety as a pretext for anti-

competitive laws. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 398-400 (1973) (discussing history of funeral industry licensing "to protect an area of exclusive business competence," in which "the real motivation, or part of it, was economic."). *See also id.* ("Trade groups were anxious to control competition . . . ."). As chronicled in Jessica Mitford's bestselling book, THE AMERICAN WAY OF DEATH, members of the funeral industry have engaged in sharp practices designed to cause consumers to spend more on caskets and funerals—a practice that some Oklahoma funeral homes continue to employ. Pet. App. 44.

The district court explained some of those sharp practices that have occurred in Oklahoma:

> 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.

Id.

In 1982, the Federal Trade Commission enacted the Funeral Industry Practices Rule ("Funeral Rule") to "lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice." 47 Fed. Reg. 42,260, 42,260 (1982). Prior to issuance of the Funeral Rule,

the FTC found that "a significant number of funeral providers" engaged in "acts and practices [that] are unfair or deceptive," such as "requir[ing] that consumers purchase 'prepackaged' funerals, which may include goods and services which the consumers would not otherwise purchase." *Id.* Accordingly, the Funeral Rule required, among other things, that funeral providers disclose written price information for funeral goods and services on an itemized basis. In addition, in order "[t]o ensure that funeral consumers have the ability to select only the goods and services they want to purchase," the Rule required funeral providers to unbundle the goods and services they offer for sale and offer them on an itemized basis. *Id.* at 42,261.

As a result of those disclosure and unbundling requirements, combined with the large mark-ups on casket prices, consumers began to seek more competitive sources for caskets. "As word leaked out about actual casket costs, some entrepreneurs saw an opportunity to cut the price and still make a 'fair' profit, knowing that consumers were growing resentful." CARLSON, CARING FOR THE DEAD: YOUR FINAL ACT OF LOVE 272 (1998). *See also* 59 Fed. Reg. 1592, 1593 (1994). The funeral industry responded, in turn, by charging "casket handling fees" as separate non-declinable fees charged to consumers who purchased caskets from non-funeral home sources. *See id.*

The FTC stepped in again, determining that "these [casket handling] fees serve to frustrate the Rule's basic 'unbundling' requirement by penalizing consumers who decline caskets sold by the funeral home and instead purchase them from third party sellers. The emergence of third-party casket sellers, and consequently, those fees, have developed in the market since the Rule's promulgation." *Id.* Accordingly, the FTC amended the Funeral Rule to ban such anti-competitive fees (*id.*), and as a result, the casket retail movement began to grow rapidly. *See* CARLSON, CARING FOR THE DEAD: YOUR FINAL ACT OF LOVE 272 (1998).

Today, the existence of state licensure laws to sell caskets in Oklahoma and elsewhere is frustrating the FTC's goal of promoting competition. Indeed, in the court below, the Federal Trade Commission filed an *amicus curiae* brief "because defendant's characterization of the Funeral Rule conflicts with the actual purpose of the Rule and has the unfortunate effect of turning the Rule against its objective of enhanced competition and consumer welfare." Mem. of Law of *Amicus Curiae* The Federal Trade Commission, at 1 (Sept. 5, 2002). The FTC explained:

> Rather than promote competition, the FSLA prohibits it. Rather than protect consumers by exposing funeral directors to meaningful competition, the FSLA protects funeral directors from facing any competition from third-party casket sellers. Rather than promote consumer choice, the FSLA forces consumers to purchase caskets from funeral directors. Whatever ends the FSLA can be said to be advancing, it is not advancing the ends of the FTC's Funeral Rule.

Id.

As noted above, there are currently some 200 casket retailers nationwide. Except in the states with protectionist laws requiring a funeral director's license to sell caskets, the FTC's Funeral Rule is promoting competition and having its desired effect. In states where competition is allowed to exist, the retail casket market is exploding, and "consumers are now saving thousands of dollars on overnight delivery of attractive, well-made, quality caskets that are available from sources all around the country." CARLSON, CARING FOR THE DEAD: YOUR FINAL ACT OF LOVE 272 (1998).

The question whether the Tenth Circuit erred in holding—in conflict with the Sixth Circuit and with this Court's precedents—that states may restrict such competition based on pure economic protectionism is thus an issue of exceptional importance. The issue affects many of the buyers of some 1.8 million caskets each year, in what is for many indi-

viduals one of the three most expensive purchases they will ever make. Because this Court's review is essential to resolve the conflict between the decision below and the Sixth Circuit, as well as the conflict between the decision below and this Court's precedents, and because the question presented is a recurring and exceedingly important issue confronting the lower courts and affecting casket consumers, the Petition for Certiorari in this case should be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted.

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