

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 STUMPF,
and SCOTT SMITH,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

LESTER, LOVING & DAVIES, PC
ANDREW W. LESTER
1701 South Kelly Ave.
Edmond, OK 73013
(405) 844-9900

PEPPERDINE UNIVERSITY
SCHOOL OF LAW
DOUGLAS W. KMIEC
Caruso Chair & Professor
of Constitutional Law
24255 Pacific Coast Highway
Malibu, CA 90263
(310) 506-4255

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLARK M. NEILY III*
CLINT BOLICK
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

Counsel for Petitioners

**Counsel of Record*

TABLE OF AUTHORITIES

Page

CASES

Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d
434 (S.D. Miss. 2000)..... 4

Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002)..... 2

FCC v. Beach Communications, Inc., 508 U.S. 307
(1993) 3

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)..... 5

REPLY BRIEF FOR PETITIONERS

Like the Tenth Circuit, Respondents claim this Court has endorsed raw favoritism as a proper basis for state action under the rational basis test. Therefore, unless the Court intercedes, it will be the law in the six states of the Tenth Circuit – and the official policy of the State of Oklahoma – that a bare desire to advance the economic interests of some citizens at the expense of others constitutes a “legitimate state interest.” As explained in the petition, that notion directly contradicts a prior decision of the Sixth Circuit, disregards this Court’s consistent rejection of pure favoritism in other constitutional settings, and stands the framers’ concerns about the evils of faction directly on their head. The petition should be granted to establish unequivocally that this Court’s precedents do not authorize the government to invade the constitutional rights of some citizens solely to enrich others.

1. The fundamental reason for granting the petition remains unchallenged by anything in the Respondents’ opposition. The Tenth Circuit found the casket sales provisions of Oklahoma’s FSLA “very well tailored” to protecting licensed funeral directors from competition, and it held that such naked economic protectionism was a legitimate state interest. Pet. App. 26. Respondents have embraced that conclusion in their opposition, arguing that “numerous decisions from this Court have upheld enactments which amount to economic favoritism in the realm of purely intra-state commerce.” BIO 6. As explained in the petition, however, that notion is antithetical to the very concept of just government. The Tenth Circuit’s and now the State of Oklahoma’s assertion that a tolerance for raw favoritism in the regulation of constitutionally protected rights may be derived from this Court’s precedents

should be firmly and unambiguously rejected before it gains any further currency.

2. Contrary to the Respondents' suggestion, Petitioners have not "misread" the Tenth Circuit's holding, nor have Petitioners contrived a circuit split where none actually exists. BIO 3-6. The Tenth Circuit could not have been more clear in stating its holding: "Because we hold that intrastate economic protectionism . . . is a legitimate state interest and that the FSLA is rationally related to this legitimate end, we AFFIRM." Pet. App. 31. Respondents even acknowledge that "the Tenth Circuit's holding was that the FSLA was rationally related to the legitimate state interest of 'intra-state economic protectionism.'" BIO 3. Notwithstanding the clarity of that holding and their recognition of it, Respondents devote considerable attention to Judge Tymkovich's concurrence and the decision of the district court (BIO 5, 7-8) as if those opinions establish or inform the law of this case, which they do not. Whatever else may be said of the holding below, it is now binding precedent in the Tenth Circuit, and it establishes a radically expansive principle of constitutional law that parties and courts throughout the country may cite as persuasive authority.

Respondents' assertion that this case does not present a genuine circuit split is equally unpersuasive. BIO 1, 4-6. Respondents claim the decision below does not conflict with the Sixth Circuit's *Craigmiles* decision because the fact record in the two cases was "markedly different." *Id.* 5. But the only difference they point to is a single example of the FSLA being used to discipline a licensed Oklahoma funeral director for failing to provide his customer with a statement of goods and services, 10th Cir. App. 1566-71, while Tennessee submitted no comparable evidence in *Craigmiles*. That is a remarkably slender reed upon which to claim the holdings of the two cases do not conflict, *see*

BIO 5 (arguing that “[t]he two courts simply arrived at different results based on differing records”), and indeed the Tenth Circuit said nothing about the respective fact records in explaining its decision to “part company” with the Sixth Circuit regarding the constitutionality of a “nearly identical” statute. Pet. App. 26-27.¹

3. Respondents also seek to blunt the significance of the Tenth Circuit’s ruling by claiming that even though the FSLA “admits of some economic preference” for funeral directors, it nevertheless advances a degree of consumer protection as well. BIO 7. The problem is that under this argument *any* occupational licensing scheme – no matter how arbitrary or blatantly discriminatory – conceivably advances a degree of consumer protection by simple virtue of its existence. Thus, regardless of how the legislature determines eligibility to work in a particular occupation – whether by reasonable training and testing requirements, by random chance, or by pure political influence – the end result is a regime that enables the state to regulate the conduct of licensees and thus, at least theoretically, protect consumers. Courts have specifically rejected that kind of self-validating reasoning in other rational basis cases, *see, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners 5-7, and it is similarly unpersuasive here.

4. In light of Respondents’ efforts to downplay its significance, it seems important to emphasize what the

¹ Respondents’ argument on this point is further undercut by the fact that courts applying rational basis review are free to speculate about the possible existence of facts that might support the challenged legislation. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Thus, it is irrelevant that Oklahoma chose to submit evidence of its own enforcement activities while Tennessee did not because the *possibility* of such enforcement is equally plausible under both statutes and could certainly be hypothesized by a reviewing court.

Tenth Circuit’s “economic protection” rationale is not. It is not a recognition of the idea that the government may sometimes seek to protect the overall health of an industry by curbing certain forms of competition. There is absolutely no reason to believe that the vitality of the funeral industry depends on regulatory protection from third-party casket retailers, and, to the contrary, the amicus brief submitted by the Federal Trade Commission in the district court makes plain that what the industry actually needs is more competition from outsiders, not less. *See* 10th Cir. Supp. App. 1804-27, 1825 (explaining that “[a] principal intention and effect of the [FTC’s] Funeral Rule is to permit consumers to purchase caskets and other funeral merchandise from third parties who are not funeral directors”).²

Moreover, while Respondents struggle mightily to characterize the Tenth Circuit’s economic protectionism analysis as standing for something other than raw favoritism, *see* BIO 6-7, the fact of the matter is that the court unreservedly embraced the practice of “dishing out special economic benefits to certain in-state industries.” Pet. App. 24. And while that may be an accepted practice when it comes to providing financial incentives or tax breaks, *see* Pet. App. 24-25 & n.17, that does not mean the government may advance the same rationale for regulations that interfere with citizens’ exercise of constitutionally protected rights, including the right to earn a living selling “what amounts to . . . a glorified box.” *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 438 (S.D. Miss. 2000).

² The Tenth Circuit states that the amicus brief submitted to the district court by the FTC in support of the Petitioners was not included in the record on appeal. Pet. App. 26 n.18. In fact, the Tenth Circuit’s docket sheet shows that the Petitioners’ Supplemental Appendix containing the FTC’s amicus brief was filed by order of the court dated June 24, 2003.

5. The Court observed in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) that it has not “elaborated on the standards for determining what constitutes a ‘legitimate state interest.’” This case provides an excellent vehicle for establishing a modest but critical outer limit on permissible government conduct, as well as a chance to emphasize that no matter how deferential the Court’s standard of review, legislators may never use their power to advance the purely private interests of certain constituents by limiting the constitutional rights of others. The Tenth Circuit’s and Oklahoma’s contrary interpretation of this Court’s precedents should not be allowed to stand.

◆

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

LESTER, LOVING & DAVIES, PC
 ANDREW W. LESTER
 1701 South Kelly Ave.
 Edmond, OK 73013
 (405) 844-9900

PEPPERDINE UNIVERSITY
 SCHOOL OF LAW
 DOUGLAS W. KMIEC
 Caruso Chair & Professor
 of Constitutional Law
 24255 Pacific Coast Highway
 Malibu, CA 90263
 (310) 506-4255

INSTITUTE FOR JUSTICE
 WILLIAM H. MELLOR
 CLARK M. NEILY III*
 CLINT BOLICK
 1717 Pennsylvania Ave., NW
 Suite 200
 Washington, DC 20006
 (202) 955-1300

**Counsel of Record*