No. 04-716

In The

# Supreme Court of the United States

KIM POWERS, DENNIS BRIDGES, and OKLAHOMA STATE ELECTION BOARD,

*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**

## RESPONDENTS' BRIEF IN OPPOSITION

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## REASONS FOR DENYING THE PETITION

### I. The Court Should Not Grant Certiorari Based On A Party's Incorrect Assertion That The Court Of Appeals Committed Error.

This Court has repeatedly stressed that its certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. As " . . . the Rules of this Court make plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n. 5 (1981) (Stevens, J. concurring). Further, as Justice Frankfurter has stated: "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.'" *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting), quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). While the Tenth Circuit in the case below did uphold Oklahoma's Funeral Services Licensing Act (the "FSLA"), that opinion is not, as Petitioners suggest, in error or in direct conflict with the holdings of any other court of competent jurisdiction because the Tenth Circuit, of necessity, reached a decision based on the particular facts and circumstances set forth in the Trial Court. The Tenth Circuit explicitly did not reject Respondents' argument that consumer protection was a legitimate state interest which was rationally furthered by the FSLA; rather, the Tenth Circuit merely engaged in the proper consideration of "**every** plausible legitimate state interest" which might underlie the legislative decision made by the FSLA. Pet. App. 16 (emphasis added). In so doing, the Tenth Circuit rejected the tortured, nominal and improper "rational basis" analysis relied upon by the Sixth Circuit

and properly applied the test to the legislation at issue. *Id* at 26.

### A. The "Consumer Protection" Interest Is Legitimate And Was Not Rejected By The Tenth Circuit.

Petitioners misread the Tenth Circuit's opinion as a blanket rejection of the "consumer protection" argument proffered by Respondents at both the trial and appellate levels and, similarly, overstate the actual holding rendered by the Tenth Circuit. First, as noted, the Trial Court expressly, and correctly, did (1) recognize consumer protection as a legitimate state interest and (2) recognize it as one which was furthered by the FSLA. Pet. App. 72. In so doing, the Trial Court recognized that Oklahoma's FSLA did have bona fide grounding in fact as a measure designed for consumer protection inasmuch as Respondents presented uncontroverted evidence that they had made past "use of [the FSLA] . . . to investigate and fine licensees for consumer abuses." *Id* at 69. As expressly noted, this was a fact in sharp distinction from the record before the Sixth Circuit in assessing Tennessee's similar statutory scheme, and was considered by the Trial Court in rendering its decision. *Id.*[1] The Tenth Circuit did not, as Petitioners contend, reject that line of reasoning. *See*, Pet. App. at 16 (" . . . we are obliged to consider every plausible legitimate state interest that might support the FSLA – **not just the consumer-protection interest forwarded**

[1] Judge Friot, at the Trial Court, specifically noted that Tennessee had not cited to any specific instance of imposed discipline under its statutory paradigm. *Id.* The Tenth Circuit acknowledged that finding. Pet. App. at 34 (Tymkovich, J. concurring).

**by the parties**.") and at 34 (" . . . 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.") (Tymkovich, J. concurring). As such, Petitioners' attempts to attack the Tenth Circuit opinion as rejecting consumer protection are overstated and mistaken.

### B. Petitioners Have Misread And Overstated The Tenth Circuit's Holding.

Secondly, Petitioners have grossly overstated the holding of the Tenth Circuit and its implications. The Tenth Circuit did not hold that "States may impose arbitrary and irrelevant credentialing requirements on casket retailers for the sole purpose of protecting state-licensed funeral directors from competition," as Petitioners so cynically phrase the question presented on certiorari. Rather, the Tenth Circuit's holding was that the FSLA was rationally related to the legitimate state interest of "intra-state economic protectionism", an interest which the court identified on review. Pet. App. 25-26. In so rendering, the Tenth Circuit most certainly did not envision merely "rubber-stamp" affirmation of legislation which shows "bare preference of one economic actor while furthering no public interest", to which Judge Tymkovich alluded in his concurring opinion. Rather, the opinion expressly noted it was affirming a "legislative scheme which protects the intra-state funeral home industry, **absent a violation of a specific constitutional provision or a valid federal statute**" as satisfying rational basis review. *Id* at 16 (emphasis added). This is not untethered protectionism that the Tenth Circuit recognized but something more reasonable and legitimate.

The holding of the Court in this vein is consistent with both the holdings of this Court, *see, Fitzgerald v. Racing Assoc. of Cent. Iowa*, 539 U.S. 103 (2003); *Nordlinger v. Hahn,* 505 U.S. 1 (1992); *New Orleans v. Dukes,* 427 U.S. 297 (1976); *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955); *Nebbia v. New York,* 291 U.S. 502 (1934), as well as Tenth Circuit precedent. *See, Schafer v. Aspen Skiing Corp.,* 742 F.2d 580 (10th Cir. 1984). Simply put, the Tenth Circuit's holding, in not usurping the Oklahoma legislature's proper role and creating a "libertarian paradise" by judicial writ, was not in error, and this Court should deny certiorari.

### C. Petitioners Oversimplify The "Split of Authority" Analysis In Support Of Their Petition.

Petitioners' pleas to the contrary notwithstanding, Respondents submit that there is not "direct conflict" between the Tenth Circuit's holding below and any other appellate court. Petitioners work hard to cast the Tenth Circuit's holding as creating a clear "direct conflict" among the federal circuits, but the analysis used is mechanical and ill-fitting. Admittedly, the Sixth Circuit did affirm a lower court's decision to strike down Tennessee's statutory scheme which was "almost identical" to Oklahoma's FSLA, but that was not because of a disagreement as to the applicable law. It was simply the result of a different result reached on a different record under the same "rational basis" test. By definition, rational basis review does not lend itself to formulaic application and will necessarily turn on a case-specific basis when analyzing challenged enactments. The Sixth Circuit decision in

*Craigmiles*, as contrasted with the Tenth Circuit's decision below, is simply a finding that the Tennessee statutory scheme did not satisfy rational basis review on the record there presented.

The record before the Trial Court here and that before the Sixth Circuit were markedly different. Judge Friot of Oklahoma's Western District court assessed the FSLA in light of a consumer protection rationale which was bolstered by an undisputed record of actual use by Respondents of the FSLA to address consumer abuses. Pet. App. at 69. That kind of record was not before the Sixth Circuit, *id*, and may well have informed that court's decision in rejecting Tennessee's consumer protection argument.

In essence, both the Tenth and the Sixth Circuits applied the proper review – *i.e.,* rational basis – and committed no plain error of law. The two courts simply arrived at different results based on differing records – a result completely foreseeable under a proper, organic rational basis review.

Moreover, as noted by the Tenth Circuit, Petitioners are simply wrong to the extent they urge that every court to address legislation akin to the FSLA has struck it down save and except the Tenth Circuit. Respondents pointed out that Fourth Circuit has also upheld similar legislation challenged in Virginia in *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989). The Tenth Circuit clearly noted that Petitioners' attempts to cast the Trial Court as a lone voice on this point "push[] the bounds of credulity" in light of the Fourth Circuit's disposition. Pet. App. at 12, n. 12. Petitioners continue here to try to distinguish and diminish the implications of the Fourth Circuit's holding, all to no avail. As such, what appears is that, to the extent

there is any "split of authority", it actually militates against Petitioners, as the Sixth Circuit has assumed the minority position.

## II. Petitioners Have Not Articulated A Compelling Reason To Justify Discretionary Review By This Court Because Petitioners Misunderstand The Effect Of This Court's Prior Holdings Regarding "Intra-State Economic Protectionism."

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction in the case at bar inasmuch as Petitioners have rendered a gross oversimplification of the economic favoritism analysis from both the Tenth Circuit's holding and other case law governing legislation regulating purely "intra-state" commerce.

Contrary to what Petitioners would have the Court believe, intra-state economic protectionism is a legitimate state interest which has been recognized by courts, including this one, absent some violation of a specific constitutional provision or a valid federal statute. This is what the Tenth Circuit held, Pet. App. at 17-18, despite Petitioners' efforts to cast it in some different light.

As noted above, numerous decisions from this Court have upheld enactments which amount to economic favoritism in the realm of purely intra-state commerce where no other fundamental right or interest is implicated. *See, Fitzgerald, supra; Nordlinger, supra; Dukes, supra; Ferguson v. Skrupa, supra; Williamson, supra;* and

*Nebbia, supra.* While this type of legislation, and the cases upholding it, does not resound well with Petitioners, it is certainly not *per se* unconstitutional.

A more measured approach must, at times, be taken when reviewing such legislation. Courts must be careful not to affirm the kind of dangerous enactments that admit of only "bare preference of one economic actor while furthering no public interest." This is the kind of reasoning alluded to by Judge Tymkovich in his concurring opinion below. However, what is evident from the record below, as Judge Tymkovich demonstrated so well, is that Oklahoma's FSLA is not the kind of "bare preference . . . furthering no public interest"; rather, Oklahoma's FSLA is a statute that admits of some economic preference but only in the further name of consumer protection and regulation and oversight of certain licensed professions. Pet. App. at 32-35. As such, where Oklahoma's FSLA does more than simply protect an alleged privileged "cartel", it satisfies rational basis review on both the front of being legislation of intra-state economic protectionism which does not offend other constitutional or federal right and the front of consumer protection. This Court should deny certiorari.

## III. The Tenth Circuit Court Of Appeals Did Not Err In Deciding This Case.

What becomes obvious from reading both the Tenth Circuit's and the Trial Court's opinions is that neither court unreservedly endorsed the FSLA. However, as this Court has stated, federal courts do not sit as a "super-legislature to weigh the wisdom of legislation." *Ferguson, supra,* 372 U.S. at 731. What both the Trial Court and the Tenth Circuit showed was commendable restraint in

resisting any improper urge to substitute their own judgment for that of Oklahoma's legislature. *See, Mutual Loan Co. v. Martell,* 222 U.S. 225 (1911).

The Trial Court held that the FSLA was rationally related to a legitimate state interest which was furthered by the FSLA. Pet. App. at 72. In so holding, the Trial Court recognized Oklahoma's use of the FSLA to address consumer abuses, *id* at 69, that all witnesses, including Petitioners', testified that the FSLA furthered consumer protection, *id* at 46, and that there was a fit, however slim, between the educational and licensing requirements of the FSLA and selling caskets at "time of need." *Id* at 47. The Tenth Circuit also upheld the FSLA on appeal. The decision there, however, did not amount to a rejection of the Trial Court's reasoning (*see* discussion, *supra*) but became a decision of the Tenth Circuit based on its own reasoning, over and above that of the Trial Court, and analysis of intra-state economic protectionism as a legitimate state interest rationally related to the FSLA. Pet. App. at 31.

If there has been any erroneous application of the rational basis test, it has been that used by the Sixth Circuit and in Mississippi. Petitioners rely upon the Sixth Circuit decision in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), as well as the lower court decisions in *Craigmiles v. Giles*, 110 F.Supp.2d 658 (E.D.Tenn. 2000) and *Casket Royale, Inc. v. Mississippi,* 124 F.Supp.2d 434 (S.D.Miss. 2000), in support of their arguments. It is those courts, though, which have made merely an "empty gesture" and paid only "lip service" to the historical and proper rational basis test. Pet. App. at 66 & 71. The Trial Court performed a fine job of pointing out the deficiencies in and "less than disciplined approach" those courts took in applying the rational basis test, Pet. App. at 65-72, a

task which the Tenth Circuit reiterated admirably. Pet. App. at 26-30.

In sum, it is the Tenth Circuit which properly has applied rational basis review to the FSLA, and this Court should deny Petitioners' appeal to grant certiorari.

## IV. The Tenth Circuit Was Correct In Rejecting Petitioners' Claims Arising Under The Privileges And Immunities Clause.

Here, Petitioners again try to make a claim that the FSLA violates their rights under the Privileges and Immunities Clause. However, the Tenth Circuit rejected that position, Pet. App. at 8-9, like the Trial Court before it. *Id* at 51. On this point, both courts were right, and Petitioners' position is simply wrong. They have no claim arising under the Privileges and Immunities Clause, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Craigmiles*, *supra*, 312 F.3d at 229; *Craigmiles, supra,* 110 F.Supp.2d at 665, and this Court's opinion in *Saenz v. Roe*, 526 U.S. 489 (1999) most certainly was not an invitation to revisit that issue. The Tenth Circuit was correct on this point, and this Court should deny certiorari.

## V. Petitioners Have Waived Any Claims Allegedly Arising Under Either The Commerce Clause Or The Contracts Clause.

In their Petition, Petitioners have attempted to revive their claims that the FSLA violates their rights arising under either the Commerce Clause and/or the Contracts Clause of the United States Constitution. However, Petitioners do not appear to have made a specific challenge to the FSLA under the Contracts Clause, inasmuch as the

Trial Court did not acknowledge one in its disposition. Pet. App. at 38 (" . . . [Petitioners] assert that [the FSLA] violate[s] 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."). In any event, as regards the claim under the Commerce Clause, the Trial Court denied that claim because it found no "case or controversy" arising thereunder. Pet. App. at 50. On appeal to the Tenth Circuit, however, Petitioners only raised claims of error as to their challenges arising under the Equal Protection Clause, the Due Process Clause and the Privileges and Immunities Clause; they did not appeal the Trial Court's disposition of the Commerce Clause claims. *Id* at 8. Specifically, the Tenth Circuit recognized that the Commerce Clause claims were waived on appeal because they were not reasserted in the appellate pleadings. *Id*, n. 11.

Where a party does not preserve an issue from the trial court on appeal, an appellate court does not commit error in not considering same on appeal. *See, State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n. 7 (10th Cir. 1994). Moreover, when that is the case, this Court has previously refused to entertain such claims on appeal, *see, Oneida County, N.Y. v. Oneida Indian Nation of New York,* 470 U.S. 226, 244-45 (1985), and this Court should do likewise.

## CONCLUSION

The decision below does not conflict with a decision of this Court or any Court of Appeals on a point of pure law or alleged legal error. While different courts have reached different conclusions as to the constitutionality of similar pieces of legislation, all courts have applied the proper legal review. They have simply reached different results from different records. Moreover, the result reached below, that Oklahoma's FSLA is rationally related to legitimate state interests, was proper. Because Petitioners offer no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because there is no direct conflict between Circuit Courts of Appeals and their decisions, and because the Court of Appeals correctly applied existing law to the case, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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