

FILED

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U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY DEPUTY

Defendants.

Case No. CIV-01-445-F

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).

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 in 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-need¹ 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

¹For 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).

²The 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.

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 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 over-reaching 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. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872); Craigmiles v. Giles, 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, 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

³It 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.

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 Court. Craigmiles v. Giles, 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 (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 (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 (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 (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 (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 (1937) quoting Nebbia v. People of New York, 291 U.S. 502, 537-38 (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. Craigsmiles v. Giles, 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 (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 (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 (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 (1992).⁴

⁴Because 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 Craigsmiles v. Giles, 2002 WL 31728831 at unofficial page 4), are of little precedential value. Romer v. Evans, 517 U.S. 620, 631-34 (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 (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*

(continued...)

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. “[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 “[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 (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 (1980), quoting Flemming v. Nestor, 363 U.S. 603 (1960). As

⁴(...continued)

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 (1997), where the Court, confronted with a challenge to 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 (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.

Justice O'Connor observed for the Court in Gregory v. Ashcroft, 501 U.S. 452 (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. Williams, 397 U.S. 471, 485 quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (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 (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 (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 (1978) quoting McGowan v. Maryland, 366 U.S. 420, 425 (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. 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

The first Oklahoma funeral services laws were enacted by the Legislative Assembly of the Territory of Oklahoma. 1905 Okla. Terr. Sess. Laws, Chapter XXXVI, Art. 1, §§ 1-18. 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 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.

⁶See Schmidinger v. City of Chicago, 226 U.S. 578, 587 - 89 (1913); Craigsmiles 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 Craigsmiles 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 Craigsmiles--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, Craigsmiles v. Giles, 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 Craigsmiles, and the Casket Royale opinion, are discussed at greater length in Part III.

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 basis⁷ 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 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

⁷If 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.

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. Craig miles v. Giles, 2002 WL 31728831 (6th Cir.) affirming Craig miles 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 Craig miles v. Giles.

In Craigiles 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." Craigiles v. Giles, 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 (1980), quoting Flemming v. Nestor, 363 U.S. 603 (1960).

It is at this point in the analysis, however, that this court takes issue with the Sixth Circuit's approach. Given Craigiles 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" Craigiles v. Giles, 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 Craigiles v. Giles, 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 Craigiles 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 (1905), has been

“overruled in part,” Craigsmiles, 110 F. Supp. 2d at 662, the district court Craigsmiles 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 (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.” Craigsmiles, 110 F. Supp. 2d 658 at 662.⁸ Statements in the district court Craigsmiles 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 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 (1993).

There is one more point to be made with regard to both of the Craigsmiles 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 Craigsmiles 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

⁸The 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.” Craigsmiles v. Giles, 2002 WL 31728831, unofficial p.7.

statutory authority over its licensees to investigate and fine licensees for consumer abuses, the district court in Craigsmiles v. Giles found that Tennessee “pointed to no instance where any funeral director has been disciplined in connection with the sale of funeral merchandise.” Craigsmiles, 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 Craigsmiles, 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 Craigsmiles court,⁹ Casket Royale rejected Mississippi’s argument that “[r]estricting sales to licensees promotes consumer protection by . . . providing legal accountability.” *Id.* 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. *Id.* 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.*

⁹Portions of Craigsmiles’ text are incorporated almost unchanged in Casket Royale and Casket Royale was decided only two months after the district court decision in Craigsmiles.

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. 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 (1979), quoting Rast v. Ven Deman & Lewis Co., 240 U.S. 342, 357 (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 (1973) as quoted in Heller v. Doe, 509 U.S. 312, 320 (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

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