UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROMAN CATHOLIC ARCHDIOCESE OF NEWARK, et al., Plaintiffs, v. CHRISTOPHER CHRISTIE, et al., Defendants.	**Civil Action** HON. MICHAEL A. SHIPP, U.S.D.J. Civil Action No. 15-5647

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, PURSUANT TO FED. R. CIV. P. 12(B)(1) AND FED. R. CIV. P. 12(B)(6)

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625
(609) 984-4863 (Phone)
ERIC.PASTERNACK@DOL.LPS.STATE.NJ.US

KEVIN R. JESPERSEN
Assistant Attorney General
Of Counsel

ERIC S. PASTERNACK
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

To protect consumers who must venture in the potentially exploitative market for funeral services and to ensure that the market for such services is competitive, New Jersey has long prohibited nonreligious cemeteries from selling monuments, such as headstones, to consumers. Upon the effective date of Assembly Bill No. 3840, New Jersey will extend this prohibition to religious cemeteries, including Plaintiff Roman Catholic Archdiocese of Newark. Because the statute advances the State's legitimate interest in protecting the welfare of its citizens through the regulation of the funeral profession, the legislative act fully comports with the requirements of substantive due process and equal protection.

In restricting religious cemeteries from selling monuments, A3840 does not substantially interfere with any contractual obligations Plaintiffs entered into before the statute's passage. The State takes the position that the statute has only prospective effect and thus leaves undisturbed whatever contracts the Archdiocese may have entered into before the effective date of the act. But even if the statute had retroactive effect, it would still be valid because the statute is a necessary and reasonable method of protecting consumers and of fostering competition. As such, A3840 does not offend the Contracts Clause.

Nor does A3840 violate the Privileges or Immunities Clause considering that the Supreme Court has confined the reach of the clause to a set of national rights

that does not include the right to pursue a particular occupation. That the A3840 regulates the sale of monuments, a particular business, does not provide a basis to invalidate the enactment under the Privileges and Immunities Clause.

Finally, to the extent that Plaintiffs may assert a claim for damages under 42 U.S.C. § 1983, it is barred by Defendants' entitlement to Eleventh Amendment immunity.

Accordingly, the entirety of Plaintiffs' Complaint should be dismissed with prejudice.

PROCEDURAL HISTORY

On July 20, 2015, Plaintiffs Roman Catholic Archdiocese of Newark, Emilio Mazza and Dennis Flynn, Sr. filed a Complaint against Governor Christopher Christie and Acting Attorney General John J. Hoffman, in their respective official capacities. (Pl. Compl., generally). The Complaint seeks an injunction permanently enjoining Defendants from enforcing Assembly Bill No. 3840, which will be codified as N.J. Stat. Ann. § 16:1-7.1, and a declaration that the statute is unconstitutional. *Id.*

STATEMENT OF FACTS

A. THE STATE'S REGULATIONS OF NON-RELIGIOUS CEMETERIES.

Since 1851, the State of New Jersey has regulated cemeteries. P.L. 1851, p. 254. In its original form, the 1851 Act provided a method for the formation of

cemetery associations "for the purpose of procuring and holding lands to be used exclusively for a cemetery or place for the burial of the dead." *Id.* The 1851 Act also vested the management of a cemetery in a board of trustees, established a method for electing such trustees, and provided that cemeteries incorporated thereunder would possess the general powers and privileges of a corporation.

In 1875, the Legislature granted cemeteries tax exempt status for the first time:

> The cemetery lands and property of any association formed pursuant to this Act, or otherwise incorporated, as well as bonds and mortgages given to secure the purchase money of such cemetery lands, shall be exempt from all public taxes, rates or assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietor. . .
>
> [Rev. 1875, p. 100.]

Then, in 1937, Legislature consolidated the various statutes regulating cemeteries into Title 8.

Following the consolidation of the statutes, the Supreme Court of New Jersey recognized that cemeteries are tax exempt and incorporated for the "purpose of procuring and holding lands to be used exclusively for a cemetery or place for the burial of the dead." *Frank v. Clover Leaf Park Cemetery Ass'n*, 148 A.2d 488, 491-92 (N.J. 1959) (citing N.J. Stat. Ann. § 8:1-1; N.J. Stat. Ann. § 8:2-27). The Court found that "a corporation so organized and enjoying the special privileges

and immunities granted by the Legislature is a charitable trust," and any scheme directed toward the making of a profit is unlawful." *Id.* at 492. The Court further observed that because cemeteries are tax exempt, cemeteries have "a decided competitive advantage" over their competitors when they enter into the market of selling memorials, which is "enhanced psychologically through the close contact with the family of the deceased before, at the time of, and after burial." Due to these factors, which provide cemeteries with a "preferred economic position and ease of access to prospective customers," the Court concluded that it would be contrary to public policy to allow cemeteries incorporated under Title 8 to sell monuments. *Id.* at 493.

In 1971, the Legislature passed the Cemetery Act, which exempted religious organizations from its purview. N.J. Stat. Ann. § 8:1-2. The Legislature then reorganized the statutory scheme again in 2003. As reorganized under Title 45, the Cemetery Act regulates cemetery companies, which are defined as:

> a person that owns, manages, operates or controls a cemetery, directly or indirectly, but does not include a religious organization that owns a cemetery which restricts burial to members of that religion or their families unless the organization has obtained a certificate of authority for the cemetery.
>
> [N.J. Stat. Ann. § 45:27-2.]

The Cemetery Act further provides that cemetery companies shall be exempt from certain taxes, N.J. Stat. Ann. § 45:27-20.

The Cemetery Act specifically prohibits cemeteries from manufacturing or selling monuments. N.J. Stat. Ann. § 45:27-16(c)(1) to (2).

B. THE STATE'S REGULATIONS OF RELIGIOUS CEMETERIES BEFORE THE PASSAGE OF A3840.

Title 16 governs the incorporation of religious societies and congregations within the State. N.J. Stat. Ann. § 16:1-1. In particular, Title 16 allows any Roman Catholic church, congregation, or diocese to incorporate, N.J. Stat. Ann. § 16:15-1, -9, and allows an incorporated archdiocese to:

> [a]cquire, purchase, receive, erect, have, hold and use leases, legacies, devises, donations, moneys, goods and chattels of all kinds, church edifices, schoolhouses, college buildings, seminaries, parsonages, sisters' houses, hospitals, orphan asylums, reformatories and all other kinds of religious, ecclesiastical, educational and charitable institutions, and the lands whereon the same are, or may be erected, and cemeteries or burying places and any lands, tenements and hereditaments suitable for any or all of said purposes, in any place or places in any such diocese; and the same or any part thereof, to lease, sell, grant, assign, demise, alien and dispose of[.]
>
> [N.J. Stat. Ann. § 16:15-11.]

Title 16 permits any religious society, however formed, to hold, convey and dispose of land convey to it for the purpose of a cemetery and the burial of the dead. N.J. Stat. Ann. § 16:1-7. Title 16 further provides that any revenue generated by the sale of burial plots must be devoted to the care and maintenance of the cemetery or burial grounds and prohibits the use of that revenue for any other purpose. *Id.*

C. THE LEGISLATURE FINDS THE PASSAGE OF A3840 WOULD FURTHER THE PUBLIC INTEREST.

Before 2006, no religious cemetery in the State sold monuments. (Pl. Compl., ¶ 125). After Plaintiff Archdiocese began doing so, Assembly Bill No. 3840 was introduced in the Legislature. (Exhibit A). As originally introduced, A3840 would prohibit "religious corporations, associations, organizations or societies from engaging in certain practices involving cemeteries, funeral homes and mortuaries." (*Id.*). In particular, A3840 would prohibit

> a religious corporation, association, or organization or society that owns or controls a cemetery or that engages in the management, operation or sales of or for a cemetery, or the owner or operator of a religious cemetery, from engaging in: the ownership, manufacture, installation, sale, creation, inscription, provision or conveyance, in any form of memorials; the ownership, manufacture, installation, sale, creation, provision or conveyance, in any form, of vaults, including vaults installed in a grave before or after sale and including vaults joined with each other in the ground; or the ownership, manufacture, installation, sale, creation, provision or conveyance, in any form, of a mausoleum intended for private use, except for a mausoleum built for use by or sale to the general public membership of a religious organization.
>
> [(*Id.*).]

In a veto message, Governor Chris Christie recognized that

> [u]nder current law, cemetery companies are prohibited from engaging in the manufacture or sale of memorials, private mausoleums, and vaults. The law specifically exempts religious cemeteries from the definition of 'cemetery company.' This bill eliminates that exemption.
>
> [(*Id.*).]

The Governor also observed that "[c]hoosing a memorial is a deeply personal decision that often impacts families at the most difficult time." The Governor recommended that the implementation of the act be delayed to avoid permit religious cemeteries sufficient time to bring their operations into compliance with the statute. (*Id.*).

After the Governor issued his veto message, the Legislature adopted the recommendation to delay implementation of A3840, and the statute passed on March 23, 2015.

STANDARD OF REVIEW

A. MOTION TO DISMISS, PURSUANT TO FED. R. CIV. P. 12(B)(1)

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction requires that the court consider the allegations of the complaint as true and make all reasonable inferences in plaintiff's favor. *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). "[T]he person asserting jurisdiction bears the burden of showing that the case is properly before the Court at all stages of the litigation." *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993).

B. MOTION TO DISMISS, PURSUANT TO FED. R. CIV. P. 12(B)(6)

Although a court must accept all facts alleged in the complaint as true, *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993), a court is not bound to accept as true a legal conclusion couched as a factual allegation. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

POINT I

A3840 WITHSTANDS RATIONAL BASIS SCRUTINY, AND THUS COMPORTS WITH THE SUBSTANTIVE DUE PROCESS CLAUSE.

A3840 comports with substantive due process because it survives rational basis review. The Legislature could have rationally concluded that the statute furthers the legitimate state interest in (1) protecting consumers who must venture into the potentially exploitative market for funeral services from explicit and more subtle efforts to condition the purchase of a burial plot with the sale of a monument, and (2) maintaining a competitive market for funeral services. Therefore, Plaintiffs cannot carry their burden of negating every conceivable basis

that might support the statue, and their substantive due process claim must be dismissed.

The Court evaluates substantive due process claims under a rational basis analysis. "A legislative act will withstand substantive due process challenge if the government 'identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.'" *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000) (quoting *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997)). This deferential review sounds in the judiciary's reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and the risk that "the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the Supreme Court]," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). *See also Albright v. Oliver*, 510 U.S. 266, 272 (1994) (noting that protections of substantive due process for the most part apply to matters relating to marriage, family, procreation, and right to bodily integrity).

The parameters of the rational basis inquiry are well-established. "A statute is presumed constitutional and 'the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*,

410 U.S. 356, 364 (1973)). "This standard of review is a paradigm of judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and is ordinarily insurmountable. *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 575 (D.N.J. 2010), *aff'd*, 669 F3d 374 (2012).

"In reviewing a state statute or constitutional provision under the due process or equal protection clause, a court must determine if the provision rationally furthers any legitimate state objective." *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir. 1980). "[I]t is entirely irrelevant whether this reasoning in fact underlay the legislative decision." *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 611 (1960)). Moreover, "[t]he legitimate purpose justifying the provision need not be the primary purpose of the provision." *Id*. "A governmental interest that is asserted to defend against a substantive due process challenge need only be plausible to pass constitutional muster[.]" *Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014). "A court engaging in rational basis review is not entitled to second guess the legislature on the factual assumptions or policy considerations underlying the statute." *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995). Finally, "[t]he law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational

way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 347-48 (1955).

The State has a "legitimate interest in protecting the health, safety and welfare of its citizens through the regulation of the funeral profession.'" *Heffner*, 745 F.3d at 67 (quoting *Brown v. Hovatter*, 561 F.3d 357, 368 (4th Cir. 2009)). While Plaintiffs assert that A3840 does not advance these interests, (Pl. Compl., ¶ 229), they are wrong. The Legislature could have rationally concluded that A3840 serves legitimate state interests that would satisfy the rational basis analysis.

First, the Legislature could have rationally concluded that prohibiting cemeteries from selling monuments would protect consumers. In any industry, there is a risk that a seller may require the purchaser of one product to also purchase another, distinct product. *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n*, 891 F.2d 1473, 1482 (10th Cir. 1989). "The risk posed by such arrangements is that the tied product will be purchased not on its competitive merits but because of its relationship to the tying product, thus depriving consumers of a competitive choice and unfairly disadvantaging competitors in the market for the tied product." *Id.* (citing *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 12 (1984)). These concerns are particularly acute in the funeral industry. As the Third Circuit has explained, "[g]enerally, the time in which the consumer seeks the services of a funeral establishment is a very emotional and

vulnerable time as a loved one has most likely just passed away leaving the consumer vulnerable and more susceptible to being deceived or cheated." *Heffner*, 745 F.3d at 83 (quoting *Klease v. Pa. State Bd. of Funeral Dirs.*, 738 A.2d 523, 526 (Pa. Comwlth. 1999)). Due to the vulnerability of the aggrieved under these circumstances, the Legislature "can hardly be faulted for imposing restrictions" on cemeteries "that are intended to address the unique concerns in [the funeral] industry." *Id.*

To satisfy the demands of rational basis review, the challenged legislation "need not be the least restrictive means of achieving a permissible end." *Tolchin v. Supreme Court*, 111 F.3d 1099, 1114 (3d Cir. 1997). So long as the Legislature could have rationally decided that the legislation would further its goal, the legislation will survive rational basis review. *Id.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). Therefore, in crafting a legislative solution to protect consumers in the potentially exploitative market for funeral services, the State has considerable latitude to determine the means by which to accomplish this end.

Plaintiffs allege that the Legislature did not consider any alternatives to A3840. (Pl. Compl., ¶ 170). But it was not required to do so. The Legislature could have reasonably concluded that passing A3840 would further the State's interest in protecting consumers who "venture into the potentially exploitative market for

funeral services." *Heffner*, 561 F.3d at 83. While federal antitrust law may prohibit religious cemeteries from expressly conditioning the purchase of a burial plot on the purchase of a monument, *Mich. Div. – Moument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726, 732 (6th Cir. 2008), the Legislature could have rationally concluded that such regulations insufficiently guard against more subtle efforts to disadvantage consumers and competitors.

Federal law does not inhibit the State from crafting a separate legislative solution to ensure that consumers are protected when they venture into the potentially exploitative market for funeral services. *Redwood Theaters, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990). The Supreme Court has consistently held that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies[.]" *Redwood Theaters*, 908 F.2d at 840 (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101-02 (1989); *Watson v. Buck*, 313 U.S. 387, 403 (1941)). This is true even where the state laws also have "interstate aspects." *Id.* (citing *Salveson v. Western Bankcard Ass'n*, 731 F.3d 1423, 1427 (9th Cir. 1984)). *See also St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (finding that the Federal Trade Commission's Funeral Rule did not preempt Louisiana from making its own independent assessment of consumer abuse by third-party intrastate sellers); *National Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136, 139 (1989) (recognizing that the FTC Funeral Rule "does not

attempt a comprehensive regulation of the funeral industry" and that "there is no language in the Funeral Rule that even alludes to an intent to preempt state regulation in the area it does cover").

So even though a state may not regulate its economy in a way inconsistent with federal antitrust laws, the States may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market or otherwise limit competition to achieve public objectives." *N.C. State Bd. of Dental Exam'rs v. FTC*, __ U.S. __, __, 135 S.Ct. 1101, 1109 (2015) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992)). In doing so, the State has considerable freedom to choose how to structure the regulation. Therefore, even though Plaintiffs may not agree with the Legislature's decision to separate the ownership and operation of a cemetery from the business of selling monuments, neither they nor this Court are entitled to second guess the Legislature. *Heffner*, 745 F.3d at 79; *Tolchin*, 111 F.3d at 1114.

Plaintiffs' arguments to the contrary fail to carry their burden of negating every conceivable basis for the legislation. *Heller*, 509 U.S. at 320. For example, they claim that no consumer groups supported the passage of A3840, and that no evidence was presented to the Legislature that indicated that allowing cemeteries to sell monuments had harmed consumers in any of the states where such sales are allowed or that any consumers who had participated in the Archdiocese's

inscription-rights program had been harmed as a result. (Pl. Compl., ¶¶ 163-166). But the Constitution does not require such evidence be presented to the Legislature. *Heffner*, 745 F.3d at 79. It is enough that the Legislature could have conceivably concluded that A3840 would protect consumers when they enter the potentially exploitative market for funeral services. *See id.*

Plaintiffs also allege that A3840 would preclude the Archdiocese from realizing certain advantages that would accrue to it because of the inscription-rights program. (Pl. Compl., ¶ 124). However, "[a]n otherwise rational legislative response to a given concern cannot be invalidated under the Due Process Clause merely because the chosen solution creates other problems while addressing the original concern." *Heffner*, 745 F.3d at 81. "[L]egislatures are generally free to consider and balance several interests in carrying out their legislative responsibilities." *Id.; see also Salazar v. Buono*, 559 U.S. 700 (2010) (recognizing "Congress's prerogative to balance opposing interests"); *Dennis v. United States*, 341 U.S. 494, 539-40 (1951) ("How best to reconcile competing interests is the business of legislatures . . . ."). Therefore, the Legislature was free to conclude that the State's interest in protecting consumers warranted the passage of A3840 notwithstanding Plaintiffs' claims about the allegedly deleterious effects that it will have on the Archdiocese's operations.

The Fifth Circuit's decision in *St. Joseph Abbey* supports the State, not Plaintiffs. In explaining why a rule by the Louisiana Board of Funeral Directors granting funeral directors an exclusive right to sell caskets was not related to Louisiana's interest in consumer protection, the court stressed that "third-party sellers do not have the same incentive as funeral home sellers to engage in deceptive sales tactics" *St. Joseph Abbey*, 712 F.3d at 223-26. Here, by contrast, the Legislature could have rationally concluded that a cemetery that is also engaged in the business of selling monuments has an incentive to tie the sale of a burial plot to the sale of a monument. So where the rule in *St. Joseph Abbey* inhibited competition by restricting third-party sellers from selling caskets, A3840 enhances the competition and market for monuments by ensuring that third party sellers have a place in the industry and that no entity has any incentive to tie the sale of one product with another, either explicitly or implicitly.

Second, given the potential that a cemetery engaged in the business of selling monuments might accrue monopolistic power; the Legislature could have rationally concluded that it no longer makes sense to permit religious cemeteries to sell monuments while their non-religious counterparts are prohibited from doing the same. For over a century now, New Jersey courts have recognized that non-religious cemeteries are quasi-public institutions established "for the purpose of holding lands to be used exclusively for cemetery purposes." *Frank v. Clover Leaf*

Park Cemetery Ass'n, 148 A.2d 488, 492-93 (N.J. 1959) (recognizing that cemeteries are charitable trusts); *East Ridgelawn Cemetery Co. v. Frank*, 75 A. 1006, 1008 (N.J. Ch. Ct. 1910) (observing that cemeteries serve, "if not a strictly charitable use, a public and pious" one). Consistent with this view, the Supreme Court has approved regulations prohibiting non-religious cemeteries from selling monuments. *Frank*, 148 A.2d at 492-93; *Terwilliger v. Graceland Memorial Park Association*, 173 A.2d 33, 37-38 (N.J. 1961); *see also Zucchi v. Lakeview Memorial Park Assoc.*, 270 A.2d 56, 57 (N.J. App. Div. 1970).

Such regulations advance the legitimate State interest of enhancing and protecting competition in the marketplace. Under New Jersey law, public cemeteries are organized as charitable trusts and enjoy special privileges immunities such as tax exempt status. *Frank*, 148 A.2d at 492; *Di Cristofaro v. Laurel Grove Memorial Park*, 128 A.2d 281, 287 (N.J. App. Div. 1957) (citing *Atlas Fence Co. v. W. Ridgelawn Cemetery*, 160 A. 688, 693 (N.J. E. & A. 1932); *Moore v. Fairview Mausoleum Co.*, 120 A.2d 875, 877 (N.J. App. Div. 1956)). As a result, when cemeteries enter into the market of selling monuments in competition with private enterprise, non-religious cemeteries have "a decided competitive advantage." *Frank*, 148 A.2d at 493. That advantage "is enhanced psychologically through the close contact with the family of the decease before, at the time of, and after burial." *Id.*; *see also Terwilliger*, 173 A.2d at 38 (finding that

cemeteries have a competitive advantage over their private counterparts when engaged in the business of selling monuments due to the "intimate relationship" cemeteries have with members of bereaved families). Because these factors imbue public cemeteries with a "preferred economic position and ease of access to prospective customers in promoting sales," the Supreme Court has concluded that it would be contrary to public policy to allow public cemeteries to enter into the business of selling monuments. *Frank*, 148 A.2d at 493.

Although these cases pre-date A3840, that is of no moment. "Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries— 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration.'" *Beach Commc'ns*, 508 U.S. at 315-16 (quoting *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). The Legislature's determination to exclude religious corporations from the purview of the Cemetery Act, N.J. Stat. Ann. § 45:27-1 to -41, neither renders the Cemetery Act suspect nor inhibits the Legislature from later subjecting religious corporations to a similar prohibition, as it did by passing A3840. *See id.* at 316 (observing that the Legislature "must be allowed leeway to approach a perceived problem incrementally"). On the contrary, where a legislature proceeds

incrementally on an issue as the Legislature did here, the rationale supporting the earlier iterations of the legislative remedy also support the later. *Id.* at 317. So in passing A3840, it is plausible that the Legislature concluded that the rationale for prohibiting non-religious cemeteries from selling monuments applies equally to religious corporations and the statute consequently survives rational basis review.

Indeed, the considerations that compelled the Supreme Court to find that it would be against public policy to allow non-religious cemeteries to sell monuments also militate in favor of finding that religious cemeteries should likewise be barred from selling monuments. For example, like their non-religious counterparts, religious cemeteries enjoy tax exempt status.[1] As a result, in entering into the market of selling monuments, a religious cemetery would have a competitive advantage over other, non-religious firms. (Pl. Compl., ¶ 135). At the same time, religious cemeteries also have a competitive advantage because they have the same "close contact" that non-religious cemeteries have with the family of the deceased before, at the time of, and after burial. (Pl. Compl., ¶¶ 137, 195).

Plaintiffs may contend that such considerations amount to naked economic protectionism. But they would err in doing so. In *Sensational Smiles*, the appellants

[1] As with cemetery companies, religious cemeteries are generally exempt from the sales and use tax, N.J. Stat. Ann. § 54:32B-9, the payroll tax, N.J. Stat. Ann. § 40:48C-41, property taxes, N.J. Stat. Ann. § 54:4-3.6, the gross income tax, N.J. Stat. Ann. § 54A:2-1, and the corporation business tax, N.J. Stat. Ann. § 54:10A-3(e).

similarly argued that the State Dental Commission declared that only licensed dentists were permitted to provide certain teeth-whitening procedures to protect the monopoly on dental services enjoyed by licensed dentists in Connecticut. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, __ (2d Cir. 2015). The Second Circuit rejected the argument, explaining that "because the legislature need not articulate any reason for enacting its economic regulations, 'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction motivated the legislature.'" *Id.* at __ (quoting *Beach Communications*, 508 U.S. at 315). The Second Circuit accordingly concluded that even if the Commission was in fact motivated purely by a desire to shield dentists from competition, the fact that "there is some relationship (however imperfect) between the Commission's rule and the harm it seeks to prevent" would be enough to uphold it. *Id.* The Second Circuit also reasoned that even if the only conceivable reason for the Commission's restriction was to shield licensed dentists from competition, it would still uphold the regulation because "the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes." *Id.*; *see also Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.").

While other courts offer differing views on this subject, A3840 would survive rational basis review even in those jurisdictions. As the Fifth Circuit explained, "protecting or favoring a particular intrastate industry is not an illegitimate interest when protection of the industry can be linked to advancement of the public interest or general welfare." *St. Joseph Abbey*, 712 F.3d at 222. The Ninth Circuit likewise recognized that "there might be instances when economic protectionism might be related to a legitimate governmental interest . . . ." *Merrifield v. Lockyer*, 547 F3.d 978, 991 n.15 (9th Cir. 2008). The Ninth and Fifth Circuits would thus agree that so long as there is "some perceived public benefit for the legislation," it will survive rational basis review notwithstanding allegations of economic protectionism. *See, e.g.*, *Sensational Smiles*, 793 F.3d at __ (Droney, J., concurring).

A3840 does not violate a specific constitutional provision or other federal laws. Therefore, under the Second and Tenth Circuits' reasoning, A3840 survives rational basis review and this Court's inquiry would be at an end. But even if this Court were to require that there be some other conceivable rationale for the legislation as the Fifth and Ninth Circuits have required, A3480 still survives. To be sure, the Legislature could have rationally concluded that A3840 furthers the public interest by protecting consumers who venture into the potentially exploitative market for funeral services. The Legislature could also have concluded

a cemetery engaged in the business of selling monuments would have an an unwarranted market advantage that would be destructive of competition contrary to the public interest.

As the Supreme Court recognized in *FCC v. Beach Communications*, the government has a legitimate interest in advancing competition. 508 U.S. at 320. In that case, the Court considered a Congressional act that drew a distinction between cable television facilities that serve separately owned and managed buildings and those that serve one or more buildings under common ownership. *Id.* at 309. Congress exempted facilities in the latter category from the regulation so long as they did not use public rights-of-way. *Id.* In finding that the distinction was supported by a rational basis, the Court reasoned:

> Suppose competing [cable television] operators wish to sell video programming to subscribers in a group of contiguous buildings, such as a single city block, which can be interconnected by wire without crossing a public right-of-way. If all the buildings belong to one owner or are commonly managed, that owner or manager could freely negotiate a deal for all subscribers on a competitive basis. But if the buildings are separately owned and managed, the first . . . operator who gains a foothold by signing a contract and installing a satellite dish and associated transmission equipment on one of the buildings would enjoy a powerful cost advantage in competing for the remaining subscribers: He could connect additional buildings for the cost of a few feet of cable, whereas any competitor would have to recover the cost of his own satellite headend facility. Thus, the first operator could charge rates well above his cost and still undercut the competition.

[*Id.* at 319-20.]

The Court found that "[t]his potential for effective monopoly power might theoretically justify regulating the latter class of [cable television facilities] and not the former." *Id.* at 320.

A cemetery engaged in the business of selling monuments would have an advantage over other monument sellers arising from the cemetery's tax exempt status and its close relationship with the aggrieved. This advantage is not based on competitive merits but results solely from the dual roles as a cemetery and as a seller of monuments. A3840 fosters competition by prohibiting cemeteries, who have a market advantage not related to competitive merits, from engaging in monument sales.

Accordingly, Plaintiffs cannot negate every conceivable rationale that might support A3840 and A3840 survives rational basis review.

POINT II

A3840 FULLY COMPORTS WITH THE CONTRACTS CLAUSE.

A3840 does not substantially impair Plaintiff Archdiocese from satisfying any of its contractual obligations under the inscription-rights program. The act has prospective effect only and hence leaves undisturbed whatever contracts the Archdiocese may have entered before the statute's effective date. But even if the

statute had retroactive effect, the impairment would not violate the Contracts Clause because deference is owed to the Legislature's determination about the necessity and reasonableness of the legislation.

"If fairly possible," a statute should be construed "so as to avoid a constitutional question." *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 410 n.10 (1983) (citing *Machinists v. Street*, 367 U.S. 740, 749-50 (1961)). Yet, Plaintiffs suggest a reading of the statute that does just the opposite: they infer that A3840 prohibits Plaintiff Archdiocese from honoring any contracts already entered into. To construe A3840 in this manner runs afoul of the "principle that statutes operate only prospectively[.]" *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982).

In *Union Pacific Railroad Company v. Laramie Stock Yard Company*, the Supreme Court pointed out:

> [The] first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be unequivocal and inflexible import of the terms, and the manifest intention of the legislature.
>
> [231 U.S. 190, 199 (1913).]

The Supreme Court has likewise indicated that a statute "ought never" be retroactively applied if it is susceptible to any other construction. *United States*

Fidelity & Guaranty Co. v. United States, 209 U.S. 304, 314 (1908). Therefore, unless the Legislature unequivocally intended for legislation to operate retrospectively, the law should be given only prospective application. *Miller v. United States*, 294 U.S. 435, 439 (1935).

In accord with these principles, the Supreme Court has declined to read statutes literally where doing so would require the divestment of property interests that had been created before the enactment of the statutes. *Sec. Indus. Bank*, 459 U.S. at 80-81 (citing *Holt v. Henley*, 232 U.S. 637 (1914)). Hence, if the application of a new law would affects rights and obligations existing prior to the law's enactment, the statute should be construed prospectively. *Tyree v. Riley*, 783 F. Supp. 877, 884 (D.N.J. 1992) (citing *Davis v. Omitowoju*, 883 F.2d 1155, 1170-71 (3d Cir. 1989)). A3840 should thus be interpreted as permitting Plaintiff Archdiocese to own any monuments that it had a property interest in before the enactment of A3840 thus enabling it to comply with any contractual obligations it incurred prior to the statute's passage. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1983) (recognizing that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

This Court should give the statute a construction that avoids any constitutional infirmity and hence should read the statute to have prospective effect

only. Such a construction is consistent with the State's interpretation of the statute. Moreover, such a construction would leave unaffected whatever contracts the Archdiocese entered before the effective date of the act.

But even if the state were given retroactive effect, the act remains valid as a necessary and reasonable exercise of the State's regulatory powers. Article I, Section 10 of the Constitution provides that, "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold or silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." The Contracts Clause "was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them[.]'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-03 n.30 (1987) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (Brennan, J., dissenting)). So unlike the other provisions of Article I, Section 10, the prohibition against the impairment of contracts is not to be read literally, *id.* at 502-03, and must accommodate "the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves*

Group v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983) (quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434 (1934)). "Were the Contracts Clause absolute, private parties could immunize themselves against future legislative action merely be entering into long-term contracts." *General Offshore Corp. v. Farrelly*, 743 F. Supp. 1177, 1196 (D.V.I. 1990); *see also Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.").

To reconcile the police power of the State with the proscription against impairing contracts, the Supreme Court has fashioned a test whereby a statute can work a substantial or even a total impairment of certain contracts without violating the Contracts Clause. Under this test, the threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel*, 438 U.S. at 244. If a plaintiff cannot demonstrate an impairment, or if the impairment is minimal, the inquiry ends. *Id.* at 244-45. But if a plaintiff can establish that the regulation substantially impairs a contractual relationship, the regulation survives constitutional challenge if the State is able to articulate "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy*

Reserves Group, 459 U.S. at 411-12 (citing *Allied Structural Steel*, 438 U.S. at 247, 249; *United States Trust Co.*, 431 U.S. at 22). If the State can identity a significant and legitimate purpose for the legislation, it must be upheld if it is based "upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves Group*, 459 U.S. at 412; *Keystone*, 480 U.S. at 505.

"[U]nless the State is itself a contracting party, courts should 'properly defer to the legislative judgment as to the necessity and reasonableness of a particular measure.'" *Keystone*, 480 U.S. at 505 (quoting *Energy Reserves Group*, 459 U.S. at 413). Thus, "[i]n cases involving impairment of contracts between private parties, the court does not independently review the reasonableness of the legislation; it should defer to the judgment of the legislature." *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 505 (5th Cir. 2001).

The State is not a party to any contract relevant to this case, but is exclusively a regulatory actor. Here, A3840 was meant to protect consumers of funeral services, who may be in an emotional and vulnerable state, ensuring that cemeteries cannot tie the sale of on produce, a burial site, with another distinct product, a monument. The statute also seeks to foster competition by preventing cemeteries, who have a market advantage in the sale of monuments not related to the competitive merits of their products, from engaging in monument sales. These

legitimate exercises of the State's regulatory powers satisfy the strictures of the Contracts Clause.

Because A3840 does not substantially impair any contracts, it is unnecessary to determine whether the statute is a necessary and reasonable measure. Nonetheless, should the Court proceed to this step, it must defer to the legislative will because the State is not a party to Plaintiffs' contracts. *See Keystone*, 480 U.S. at 505 (quoting *Energy Reserves Group*, 459 U.S. at 413). Therefore, Plaintiffs' as-applied[2] challenge under the Contracts Clause fails and must be dismissed.

POINT III

A3840 DOES NOT DENY PLAINTIFFS THE EQUAL PROTECTION OF LAW.

Because Plaintiffs do not even allege that A3840 treats some individuals differently than others, they cannot establish a *prima facie* claim that the statute violates the Equal Protection Clause.

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[2] Although Plaintiffs assert in their Complaint that A3840 is unconstitutional on its face, (Pl. Compl., generally), their Contracts Clause claim should be regarded as an as-applied challenge as opposed to a facial challenge. To establish that A3840 is unconstitutional on its face, Plaintiffs would have to establish that no set of circumstances exists under which the statute could be valid. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Therefore, even if Plaintiffs could establish that A3840 would violate the Contracts Clause as-applied to any preexisting contracts, they could not establish that it would be unconstitutional prospectively because private parties cannot immunize themselves against future legislative action by entering into contracts. *General Offshore Corp.*, 743 F. Supp. at 1196.

The Equal Protection Clause is essentially a directive that all individuals similarly situated should be treated alike. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). A rule that applies "evenhandedly to all persons within the jurisdiction unquestionably" complies with the Equal Protection Clause. *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). It is only when a state "adopts a rule that has a special impact on less than all persons subject to its jurisdiction" that a question arises as to whether the equal protection clause is violated. *Id.* at 587-88.

The Equal Protection Clause "does not require that things which are different in fact be treated in law as though they are the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The Fourteenth Amendment therefore "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). Given this discretion, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns, Inc.*, 508 U.S. at 313 .

Here, Plaintiffs allege that there "is no rational basis for forbidding the Archdiocese from selling a traditional monument such as a headstone while

allowing the Archdiocese to sell memorializing covers or plaques for its community mausoleums." (Pl. Compl., ¶ 234). But this is not a proper ground to base an Equal Protection claim. To establish an Equal Protection claim, Plaintiffs must instead allege that A3840 treats religious cemeteries differently than other similarly situated individuals or entities. The Archdiocese does not, because it cannot, allege that A3840 treats them any differently than other similarly situated individuals or entities. Indeed, A3840 mandates that, insofar as the sale of monuments are concerned, religious cemeteries are to be treated the same as non-religious cemeteries. Plaintiffs have failed to establish a *prima facie* claim that A3840 violates the Equal Protection Clause.

POINT IV

A3840 DOES NOT OFFEND THE PRIVILEGES OR IMMUNITIES CLAUSE.

Plaintiffs cannot establish that the Privileges or Immunities Clause protects a right to engage in a particular occupation and their claim is therefore without merit.

The Fourteenth Amendment's Privileges or Immunities Clause provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. Const. amend. XIV § 1. Since the Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. 36 (1872), "confined the reach of [the] clause to a set of national rights that does not include the right to pursue a particular occupation," the Privileges or Immunities

has remained largely moribund. *Colon Health Ctrs. Of Am., LLC v. Hazel*, 733 F.3d 535, 548-49 (4th Cir. 2013). The right to engage in an occupation free of state regulation thus does not fall within the narrow net of rights protected by the Privileges or Immunities Clause. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1047 (10th Cir. 2009); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1294 (N.D. Fla. 2010). Therefore, dismissal of Plaintiffs' Privileges or Immunities Claim is required because "this court lacks the authority to disturb an unimpeached precedent issued by a superior tribunal," especially when doing so "would open the door to a host of textually dubious challenges to state economic regulations of every sort." *Colon Health Ctrs.*, 733 F.3d at 548-49 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

POINT V

THE ELEVENTH AMENDMENT BARS PLAINTIFFS FROM ASSERTINGS ANY CLAIMS AGAINST DEFENDANTS FOR DAMAGES.

To the extent that Plaintiffs' Complaint includes any claims for damages, it should be dismissed because the Constitution bars federal jurisdiction over lawsuits brought by individuals against a state unless the state has consented to such jurisdiction. *See College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669 (1999); *see also Seminole Tribe of Florida v.*

Florida, 517 U.S. 44, 54 (1996). This protection from federal jurisdiction emanates from the Eleventh Amendment of the United States Constitution, which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
>
> [U.S. Const. amend. XI].

In other words, "'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984)(quoting *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 280 (1973)).

This sovereign immunity is not limited to the state itself, but extends to state agencies and state officers who act on behalf of the State, as well. *Natural Res. Defense Council v. California Dep't of Transp.*, 96 F.3d 420 (9th Cir. 1996). Eleventh Amendment immunity further bars recovery in suits brought pursuant to 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Moreover, a suit against state officials is barred if the decree would operate against the sovereign irrespective of whether the suit seeks monetary damages or injunctive relief. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984)(citing *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963)).

Therefore, to the extent that Plaintiffs assert a claim under § 1983 for damages, it would be barred by Eleventh Amendment immunity.

CONCLUSION

For the foregoing reasons, defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) should be granted, all claims against the defendant dismissed with prejudice, and discovery stayed pending this Court's determination in the matter.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Eric S. Pasternack
Eric S. Pasternack
Deputy Attorney General

Dated: September 25, 2015