UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROMAN CATHOLIC ARCHDIOCESE OF NEWARK, EMILIO MAZZA, and DENNIS FLYNN, SR., Plaintiffs, v. CHRISTOPHER CHRISTIE, in his official capacity as Governor of New Jersey; and JOHN JAY HOFFMAN, in his official capacity as Attorney General of New Jersey, Defendants. NEW JERSEY STATE FUNERAL DIRECTORS ASSOCIATION, INC. Intervenor Defendant.	Civil Action No. 3:15-cv-05647(MAS)(LHG) **Filed Electronically**

BRIEF OF INTERVENOR DEFENDANT NEW JERSEY STATE FUNERAL DIRECTORS ASSOCIATION, INC. IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Intervenor defendant New Jersey State Funeral Directors Association, Inc. ("NJSFDA") submits this brief in support of its motion to dismiss the Complaint of plaintiffs Roman Catholic Archdiocese of Newark ("Archdiocese"), Emilio Mazza and Dennis Flynn, Sr. (collectively, "Plaintiffs") for failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

In 1971, the New Jersey Legislature codified the common law prohibition against the sale of monuments, vaults and private mausoleums by public non-sectarian cemeteries. N.J.S.A. 8A:5-3, *repealed by* Cemetery Act of 2003, N.J.S.A. 45:27-1 *et seq.* That law and its successor, the Cemetery Act of 2003, exempted private religious cemeteries because such regulation was unnecessary – private, religious cemeteries simply did not engage in the monument or vault businesses. In 2013, after 160 years of contrary practice, the Archdiocese began selling "inscription rights" for monuments – another name for selling monuments. A State trial court held that such commercial conduct by a private religious cemetery was not restricted by the Cemetery Act of 2003. In response to the State court's decision, the New Jersey Legislature passed and, on March 23, 2015, Governor Christie signed amended Assembly Bill 3840 ("A3840" or the "Amendment") into law, codified as N.J.S.A. 16:1-7.1, aligning the restrictions upon private religious cemeteries with those that had long prohibited all other New

Jersey cemeteries from manufacturing or selling memorials and vaults, or the business and practice of funeral directing.

Plaintiffs have challenged the Amendment on several constitutional grounds: (1) Due Process; (2) Equal Protection; (3) the Privileges or Immunities Clause of the Fourteenth Amendment; and (4) the Contracts Clause of Article I, Section 10. Plaintiffs' challenge to the Amendment must fail because all of the public policy considerations justifying restrictions upon public non-sectarian cemeteries apply with equal or more force to private religious cemeteries. In short, New Jersey's consumer protection interests are rationally furthered by the State's determination to prevent all cemetery owners from leveraging their inherent competitive and State-granted special economic advantages to the detriment of the public and those engaged in the businesses of selling memorials, vaults and private mausoleums.

STATEMENT OF FACTS

I. Enactment of the Amendment And Preexisting New Jersey Law Regulating The Manufacture And Sale Of Memorials, Private Mausoleums and Vaults By Secular Cemeteries.

The Amendment eliminates an exemption for religious cemeteries from longstanding prohibitions against New Jersey cemetery companies engaging in the manufacture or sale of memorials, private mausoleums, and vaults. *See*

Governor's Conditional Veto Message to A.3840;[1] *compare* N.J.S.A. 16:1-7.1(a) and N.J.S.A. 45:27-16(c). The preexisting prohibitions are set forth in the New Jersey Cemetery Act, N.J.S.A. 45:27-16(c), which regulates statutorily defined "cemetery companies" which exclude private religious cemeteries.[2] *See* N.J.S.A. 45:27-2.

II. The Archdiocese's Sale Of Memorials and Private Mausoleums And The Resulting State Court Litigation By The Monument Builders Of New Jersey.

In 2006, the Archdiocese implemented a program which it now calls the "inscription rights" program. Compl., ¶ 112.[3] Initially, the Archdiocese used this program to offer private mausoleums at its cemeteries, which the Archdiocese would own and agree to maintain, repair and restore. Compl., ¶ 125; *Monument Builders of New Jersey, Inc. v. Roman Catholic Archdiocese of Newark*, 2015 WL 3843706, *1 (N.J. Super. App. Div. June 23, 2015). Later, in June 2013, the

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[1] A true and correct copy N.J.S.A. 16:1-7.1, together with the Governor's Conditional Veto Message, is attached as Exhibit 1 to the Certification of Karen A. Confoy, Esq. filed in support of NJSFDA's motion to intervene. The Court can and should consider the legislative history of the Amendment in connection with NJSFDA's motion to dismiss. *See infra* at Argument § I.

[2] Private religious cemeteries are subject to some provisions of the Cemetery Act and can elect to subject themselves to other provisions of that law in circumstances not relevant to this motion. *See generally* N.J.S.A. 45:27-1 to -41.

[3] For purposes of this motion only, NJSFDA accepts as true any "well-pleaded" facts asserted in the Plaintiffs' Complaint.

Archdiocese began selling "inscription rights" for monuments; the Archdiocese had never previously sold monuments through its cemeteries in the 160 years since its foundation in 1853. *Monument Builders*, 2015 WL 3843706 at *1; *see also* Compl., ¶¶ 13, 127.

Under the "inscription rights" program, the Archdiocese typically orders a monument when the contract is formed and the cost paid. Compl., ¶ 118. The Archdiocese then takes delivery of the monument from a manufacturer in Vermont, called Rock of Ages. *Id.* After the parishioner passes away, the Archdiocese arranges for the final inscription of the date of death onto the monument. *Id.*, ¶ 119. The Archdiocese also displays blank headstones from Rock of Ages for sale above empty plots in its cemeteries. *Id.*, ¶ 120. These are intended to be bundled for sale along with the grave space they mark. The Appellate Division called the "inscription rights" program for what it is – a triumph of form over substance: "[a]lthough marketed as purchases of inscription rights, the purchasers are in essence, paying for the headstones." *Monument Builders*, 2015 WL 3843706 at *1. Plaintiffs acknowledge that is so by characterizing this lawsuit as one seeking to vindicate the "right of the . . . Archdiocese . . . to sell cemetery monuments such as headstones to its parishioners when they are interred in the Archdiocese's own cemeteries." Compl., Introduction.

Soon after "the Archdiocese began to sell monuments in 2013," the Monument Builders of New Jersey, Inc. ("MBNJ") sued the Archdiocese. *Id.*; *see also* Compl., ¶ 140. After a six-day bench trial, the New Jersey state trial court held that the Cemetery Act did not forbid private religious cemeteries from selling monuments because the statutory definition of "cemetery company" excludes private religious cemeteries. Compl., ¶¶ 145-150; *Monument Builders*, 2015 WL 3843706 at *2. A3840, the bill later enacted as the Amendment, was introduced in the New Jersey Assembly in response to that state trial court ruling less than six months later. Compl., ¶¶ 147-157; *see also Monument Builders of New Jersey, Inc. v. Roman Catholic Archdiocese of Newark*, Docket No. MID-C-124-13 (N.J. Super. Ch. Div., April 29, 2014)[4], *aff'd*, 2015 WL 3843706 (App. Div. June 23, 2015).

III. Historical Development Of Pertinent Cemetery Regulation In New Jersey.

The New Jersey Cemetery Act of 2003 tracks the former Cemetery Act of 1971 in that both statutes: (i) prohibit public, nonsectarian cemeteries from selling monuments, vaults or private mausoleums; and (ii) exempt private religious cemeteries, such as the Archdiocese, from this prohibition. Compl., ¶¶ 143-145. Before 1971, New Jersey common law likewise forbade public cemeteries from

[4] A copy of the state trial court's unpublished Letter Opinion is attached as Exhibit A.

selling monuments, vaults or private mausoleums. *See Frank v. Clover Leaf Park Cemetery Ass'n.*, 29 N.J. 193, 203 (1959) (holding cemetery's sale of memorials is "*ultra vires* as well as contrary to the public interest"); *Terwilliger v. Graceland Mem'l Park Ass'n.*, 35 N.J. 259, 267-68 (1961) (holding cemeteries operated by companies under the General Corporation Act were public cemeteries "subject to all the restrictions which public policy has imposed[,]" including restrictions on selling markers); *see also* Compl., ¶ 141. Among the policy interests identified by the New Jersey Supreme Court in *Frank* as supporting the prohibition against public cemeteries selling monuments was the "decided competitive advantage" that cemeteries enjoyed over private enterprise due to, *inter* alia, tax exemption, ease of access to prospective customers, and psychological advantages arising from close contact with the family of the deceased before, during and after the burial. *Frank*, 29 N.J. at 202-203.

IV. Plaintiffs' Complaint Challenging The Constitutionality Of The Amendment

In their Complaint, Plaintiffs allege the Amendment violates the Due Process, Equal Protection and Privileges or Immunities clauses of the Fourteenth Amendment to the U.S. Constitution because the Amendment is not rationally related to a legitimate government purpose. *See* Compl., ¶¶ 226 – 237, 246 – 250. Plaintiffs also allege the Amendment violates the Contracts Clause of Article I, Section 10 of the U.S. Constitution because the Amendment impairs the

Archdiocese's approximately 600 "inscription rights" contracts, including those with Plaintiffs Mazza and Flynn, and no legitimate public justification for the law substantially outweighs the harm inflicted on the contracting parties. *Id.*, ¶¶ 238-245. Plaintiffs seek to enjoin Governor Christie and Acting Attorney General Hoffman from enforcing the Amendment, which will become effective on March 23, 2016.

ARGUMENT

I. The Complaint Must Be Dismissed Because Plaintiffs Fail To Plead Sufficient Facts To State A Claim For Relief.

Dismissal of a complaint is appropriate under Federal Rule of Civil Procedure 12(b)(6) where the plaintiffs have failed to state a claim upon which relief may be granted. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a complaint under Rule 12(b)(6), the court should consider the factual allegations of the complaint as well as "documents that are attached to or submitted with the complaint, . . . items subject to judicial notice, matters of public record, order, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (internal quotations and citations omitted). This includes legislative history. *In re Morgan Stanley Smith Barney LLC Wage & Hour Litig.*, No. 2:11-

cv-3121(WJM), 2012 WL 6554386, at *2 (D.N.J. Dec. 14, 2012) (citing *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27 (1959)). The court "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" *In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429 (3d Cir. 1997) (citations omitted).

The court's analysis involves "three steps: First, the court must tak[e] note of the elements a plaintiff must plead to state a claim." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (quotations omitted). "Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* "Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Applying the standards enumerated in *Santiago* here, Plaintiffs have not stated a plausible claim for relief against Governor Christie or Acting Attorney General Hoffman.

A. Plaintiffs Fail To State A Claim Under The Due Process Clause Or The Equal Protection Clause Because The Amendment Satisfies Rational Basis Review.

Economic regulations, such as the Amendment, that neither create a suspect classification nor infringe upon fundamental interests are presumed constitutional

and must be upheld if they rationally relate to a legitimate state interest. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also* Compl., ¶¶ 226 – 237 (Plaintiffs allege the Amendment violates Due Process Clause and Equal Protection Clause under rational basis review). Such legislation "carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462 (1988) (citations omitted). Although Plaintiffs' Equal Protection Clause and Due Process Clause challenges to the Amendment seek to protect different interests, this Court's analysis of both should converge for purposes of determining whether the Amendment satisfies rational basis review. *See B & G Constr. Co., Inc. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233, 256 n. 22 (3d Cir. 2011) ("the analysis under substantive due process is essentially the same as an equal protection analysis, i.e., is there a rational basis underlying the legislation in question?") (citations omitted); *see also Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (stating same test for substantive due process challenge to statute) (citations omitted). The Court should dismiss Plaintiffs' Due Process Clause and Equal Protection Clause claims because the Amendment easily satisfies this forgiving rational basis standard.

Rational basis review is the "paradigm of judicial restraint" and allows legislative choices considerable latitude. *Beach Commc'ns*, 508 U.S. at 315. The

governmental interest asserted to defend challenged state action under rational basis review "need only be plausible to pass constitutional muster; [courts] do not second-guess legislative choices or inquire into whether the stated motive actually motivated the legislation." *Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014) (citing *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

"[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-321 (1993) (internal citations and quotations omitted). Indeed, the legislature need not articulate its reasons for enacting a statute, nor prove it is justified. *Beach Commc'ns*, 508 U.S. at 315 ("legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") (citations omitted). This deferential standard of review protects even improvident legislative decisions from judicial interference, such as legislative schemes that are not the most efficient, the most practical, or entirely logically consistent with their aims. *Heffner*, 745 F.3d at 84 (*citing Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955)). "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*, 348 U.S. at 488; *see also Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's

generalizations even when there is an imperfect fit between means and ends.") (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

The classification in the Amendment, which distinguishes between those religious corporations *that own or operate a cemetery* and those religious corporations that do not, satisfies rational basis review. To be clear, nothing in the Amendment (or any New Jersey law) precludes anyone, *except cemetery owners and operators*, from selling monuments or vaults. N.J.S.A. 16:1-7.1. It is entirely conceivable the Legislature determined that allowing cemeteries to manufacture or sell memorials, vaults and mausoleums (and engage in the business of funeral directing or mortuary science) would pose a risk to consumers and competition. That is because, in New Jersey, all cemeteries are by law income and property tax exempt and enjoy a natural land-based, vertical monopoly which, without protections, they could exploit to the detriment of competitors who cannot compete on the same grounds. *See* N.J. Const. art. VIII, § 2 (protecting tax exemption to property used exclusively for, *inter alia*, religious or cemetery purposes and owned by a non-profit corporation operating exclusively for such purposes).

Plaintiffs' contentions that the Legislature lacked a sufficient basis to enact the Amendment and purportedly did so solely to protect private financial interests are meritless and, more importantly for present purposes, irrelevant. *See Beach Commc'ns*, 508 U.S. at 315 ("it is entirely irrelevant for constitutional purposes

whether the conceived reason for the challenged distinction actually motivated the legislature.") (citations omitted). Once a court identifies any plausible basis upon which the legislature may have relied, the court's review is complete. *Fritz*, 449 U.S. at 179. Here, there are several plausible reasons for the Legislature's action, including:

- protecting bereaved individuals from the threat of unconscionable commercial practices;
- regulating the manner in which State-granted tax exemptions are utilized; and
- regulating how a scarce, non-replicable commodity – land – impacts unique markets that come under the State's purview.

Alone or in combination, these goals provide legitimate reasons for the Legislature to enact the Amendment.[5]

[5] Although these legitimate state interests constitutionally justify the Amendment, this Court could also dismiss Counts I and II because intrastate economic protectionism has long been recognized as a valid interest for state law. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285-288 (2d Cir. 2015) ("[t]he 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") (citations omitted); *Powers v. Harris*, 379 F.3d 1208, 1218-1222 (10th Cir. 2004) (same). Even those courts that have not accepted economic protectionism standing alone as a rational basis justification recognize that other legitimate state interests, such as those present here, may provide a rational basis for economic protection that is in fact favoritism, even as post hoc perceived rationales. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013)); *Cragmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same).

These consumer protection and competition concerns have permeated New Jersey law for more than fifty years, since at least 1959 when they drove the New Jersey Supreme Court to forbid public cemeteries from selling monuments:

> **An acute awareness** of the quasi-public nature of this charitable trust as well as **of its tax exemption and other privileges and immunities is necessary to a solution of the problem**. **Manifestly, in entering the market for the sale of memorials to lot owners in competition with private enterprise, these factors give the Association a decided competitive advantage. And, as has been said, the advantage is enhanced psychologically through the close contact with the family of the deceased before, at the time of, and after the burial. These factors of preferred economic position and ease of access to prospective customers in promoting sales**, in our judgment, make necessary a strict construction of the statute and the charter emanating therefrom in appraising the claim of implied power to engage in the activity in competition with private business.

Frank, 29 N.J. at 202-203 (emphasis added).

The Legislature could plausibly believe these same concerns apply with equal force to the Archdiocese and other cemeteries governed by the Amendment. *See id.* at 199 ("There can be no doubt that the Association's intimate contact with the family of the deceased in connection with the burial gives it a decided advantage, competitively and psychologically, over other persons engaged in the business of selling memorials."). It is entirely rational for the Legislature to combat these same evils by extending the same longstanding prohibitions on

monument and vault sales to operators of private religious cemeteries through the Amendment. The Legislature's concerns about cemeteries, including private religious cemeteries, exploiting their natural psychological and economic advantages are not merely plausible; the Complaint validates those concerns by revealing how the Archdiocese has begun pre-positioning itself to take that psychological advantage by asserting that only it "is in the best position to help parishioners select an appropriate vault because the Archdiocese best understands the requirements of its own cemeteries." Compl.,¶ 205.

These conditions are ripe for abuse, as the record in *Frank* revealed where "[p]roof was adduced by plaintiff to indicate unfair practices and pressures to which lot owners were subjected in order to interfere with and prevent competition by outsiders." *Id.* at 199; *see also Terwilliger* 35 N.J. at 268 ("There can be no doubt that defendants' intimate relationship with lot owners and members of the bereaved families gives them a competitive advantage over plaintiff in a locality where they both vie for customers."). New Jersey's courts are not alone in recognizing these concerns.

Federal courts, including the Third Circuit, have declared that a state "clearly has a legitimate interest in protecting consumers who must venture into the potentially exploitative market for funeral services." *Heffner*, 745 F.3d at 83 (citing *Brown v. Hovatter*, 561 F.3d 357, 368 (4th Cir. 2009)). "Generally, 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 *Kleese v. Pa. State Bd. Of Funeral Dirs.*, 738 A.2d 523, 526 (Pa. Cmwlth. 1999)).

The Archdiocese's monument and vault sales implicate the same risk of exploiting bereaved individuals acknowledged in *Frank*, *Terwilliger* and *Heffner*. The Amendment attempts to combat those risks in the same manner as the New Jersey Supreme Court did – by prohibiting cemeteries from being involved in such sales. Clearly, this response is "not so attenuated as to render the distinction arbitrary or irrational." *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 110 (2003) (citations omitted).

Moreover, the logic of placing limitations on the scope of cemetery operations in exchange for the granting of one or more tax exemptions is eminently rational. *See East Ridgelawn Cemetery Co. v. Frank*, 77 N.J.Eq. 36, 40-41 (N.J. Ch. 1910) ("It is not likely that the Legislature intended to confer immunity from taxation and levy . . . in order that some individual might make an increased profit out of those extra-ordinary powers and immunities"). The state has a legitimate interest in regulating the manner in which the tax exemptions it grants are utilized (*see id.*), and how a non-replicable commodity impacts markets such as cemetery

and funeral goods in which that commodity – land dedicated for cemetery purposes – naturally lends itself to a vertical monopoly. The state also has a legitimate interest in enhancing competition by prohibiting participation in certain markets by those uniquely positioned to exploit natural advantages to the detriment of other competitors in those markets. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (rejecting due process challenge to Maryland law prohibiting producers and refiners of petroleum products from operating retail gas stations within Maryland, "[r]egardless of the ultimate economic efficacy of the statute," because the law clearly "bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market. . . .").

At its core, Plaintiffs' attack upon the Amendment is nothing more than mere disagreement with the Legislature's judgment and with the wisdom of the Amendment. Those challenges must fail because "[u]nder the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 639 (1993) (citations omitted).

Further, an otherwise rational legislative response to a given concern cannot be invalidated under the Due Process Clause merely because the chosen solution is not perfect because "legislatures are generally free to consider and balance several

interests in carrying out their legislative responsibilities." *Heffner*, 745 F.3d at 81 (citations omitted); *see also Fitzgerald*, 539 U.S. at 109 ("Once one realizes that not every provision in a law must share a single objective, one has no difficulty finding the necessary rational support for the . . . [tax rate] differential here at issue."). Instead, all that is necessary to sustain legislative action is that the selected means is rationally linked to the stated ends. *See Stretton v. Disciplinary Bd. of Supreme Court of Pa.*, 944 F.2d 137, 146 (3d Cir. 1991) ("A state is permitted to take steps . . . that only partially solve a problem without totally eradicating it.") (citing *Williamson*, 348 U.S. at 489).

B. Plaintiffs Fail To State A Claim Under The Contracts Clause Because The Amendment Does Not Substantially Impair Plaintiffs' Contractual Relationships.

The Contracts Clause provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. However, "it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (citations omitted). To establish a Contract Clause violation, a plaintiff must demonstrate that a change in state law "operated as a substantial impairment of a contractual relationship." *Am. Express Travel Related Serv.s, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 368 (3d Cir. 2012) (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)). That, in turn, requires: (1) the existence of a

contractual relationship, (2) a change in law that impairs that contractual relationship, and (3) that the impairment is substantial. *Romein*, 503 U.S. at 186.[6] That is not the end of the inquiry. Even if the court finds a substantial impairment of a contract right, it must then "inquire whether the law at issue has a legitimate and important public purpose and whether the adjustment of the rights to the contractual relationship was reasonable and appropriate in light of that purpose." *Transp. Workers Union Local 290 v. SEPTA*, 145 F.3d 619, 621 (3d Cir.1998); *see also Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-413 (1983) (unless the State is a contracting party, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.") (citations omitted). Plaintiffs' purported Contracts Clause claim fails at the threshold because the Amendment does not operate as a substantial impairment of Plaintiffs' contractual relationships.

The State has made clear in the papers filed on September 25, 2015 that the Amendment operates prospectively, and therefore, cannot be enforced against Plaintiff's preexisting inscription rights contracts. [ECF No.18-1, pp. 23-29].

[6] The Court should also consider "whether the parties were operating in a regulated industry" because those operating in such industries do so "subject to further legislation in the area, and changes in the regulation that may affect its contractual relationships are foreseeable." *Sidamon-Eristoff*, 669 F.3d at 369 (citing *Kansas Power & Light Co.*, 459 U.S. at 411).

Thus, although Plaintiffs have contractual relationships, there is no impairment, much less a substantial impairment, of those relationships if the Amendment is not enforced against them. Because a prospective application of the Amendment avoids the need for the Court to consider the constitutionality of the Amendment, Plaintiffs do not state a claim that is ripe for consideration. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.") (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)). Because a prospective application of the Amendment will not impair Plaintiffs' preexisting inscription rights contracts, Count III of the Complaint should be dismissed. *See Philadelphia Fed'n of Teachers v. Ridge*, 150 F.3d 319, 322-326 (3d Cir. 1998) (affirming dismissal, on ripeness grounds, of Contracts Clause and other constitutional challenges to state law).

C. Plaintiffs Cannot State A Claim Challenging The Amendment Under The Privileges Or Immunities Clause.

The Court must dismiss Count IV under the Fourteenth Amendment's Privileges or Immunities Clause because the "Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. 36, 79-80 . . . (1872), . . . confined the reach of that clause to a set of national rights that does not include the right to pursue a particular occupation." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535,

548 (4th Cir. 2013) (affirming dismissal of claim under Privileges or Immunities Clause).[7] Plaintiffs do not state a claim under the Privileges or Immunities Clause because they do not articulate any right which is actually protected by that clause and allegedly abridged by the Amendment. *See* Compl., ¶ 247. Moreover, as citizens of New Jersey (Compl., ¶¶ 6-8), Plaintiffs could not possibly state a claim under that clause. *See Slaughter-House Cases*, 83 U.S. at 74 (the Privileges or Immunities Clause was not intended "as a protection to the citizen of a State against the legislative power of his own State. . . ."). Accordingly, this Court should dismiss Count IV with prejudice.

[7] The appellants in *Colon Health Centers*, who were represented by the Institute for Justice which also represents Plaintiffs here, conceded that the *Slaughter-House Cases* foreclosed claims to invalidate state laws that allegedly contravene the "right to earn an honest living" under the Fourteenth Amendment's Privileges or Immunities Clause. 733 F.3d at 548.

CONCLUSION

For all of the foregoing reasons, NJSFDA respectfully requests that the Court grant its motion and dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

By: /s/ Karen A. Confoy

Dated: October 2, 2015

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LOCAL CIVIL RULE 11.2 CERTIFICATION

Pursuant to Local Civil Rule 11.2, the undersigned attorney for intervenor defendant New Jersey State Funeral Directors Association, Inc. certifies that, to the best of her knowledge, the matter in controversy is not the subject of another action pending in any court or of any pending arbitration or administrative proceeding.

By: /s/ Karen A. Confoy
Karen A. Confoy
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Dated: October 2, 2015

Exhibit A

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
FRANK M. CIUFFANI
JUDGE

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April 29, 2014 Letter Opinion

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RE: **Monument Builders of NJ v. Roman Catholic Archdiocese of Newark**
Docket MID-C-124-13

Dear Counsel:

The issue before the Court is whether the Archdiocese's Private Mausoleums Program and Inscription Rights (Monuments) Program are statutorily authorized.

The Archdiocese is organized under Title 16 of the New Jersey Revised Statutes, N.J.S.A. 16:15-1 *et seq*. Pursuant to its statutory authority, the Archdiocese owns and operates nine cemeteries and manages one. Of the ten total cemeteries, only five have remaining spaces for burial of the dead. The remaining five had their burial spaces completely purchased over the years.

In September 2006, John Schafer, of the Archdiocese met with Plaintiff John Burns, Jr., President of the Monument Builders Association and informed Burns that the Archdiocese was starting a Private Mausoleum Program. Under the Private Mausoleum Program, the Archdiocese planned to purchase private mausoleums and sell burial rights in the mausoleum to the purchaser. The Archdiocese would own the mausoleum and be responsible for maintenance, repairs and restoration. The profits generated from the program would go into a maintenance fund for the perpetual care and maintenance of the cemeteries. Burns asked Schafer whether the Archdiocese intended to sell monuments and according to Burns, Schafer assured him that the Archdiocese would not sell monuments. Schafer's recollection of the encounter is slightly different.

In 2012, the Archdiocese decided to start an Inscription Rights Program for Monuments. The Inscription Program commenced in April 2013. Under the program, the Archdiocese would purchase and own the monument and be responsible for setting and inscribing the stone. The

Archdiocese would own the monument and be responsible for maintenance, repairs and restoration. Before a customer enters into the Inscription Program Agreement, they are told the customer can purchase a monument from any other person or vendor. The Monument Builders sought injunctive relief from the Court on July 17, 2013. The Court denied their application.

The trial in this matter lasted several days with fact and expert witnesses, documentary evidence, legal memoranda and lengthy closing arguments. At the beginning of the trial, the Court observed that, given the very high probability of an appeal, the Court would allow both sides to fully develop the "record" that they felt they needed. The Court finds that the reasons offered by the Archdiocese for the institution of its private mausoleum and monument inscription program are irrelevant. The Archdiocese either is or is not authorized by statute to engage in those programs. Additionally, if the Archdiocese is authorized, then its alleged competitive advantage over the Monument Builders, is also irrelevant. If this Court's analysis is wrong, a remand to develop a "record" will not be necessary.

Similarly, what Mr. Schafer and Mr. Burns discussed in 2006, is only relevant to explain why in 2006 the Monument Builders did not file suit to stop the private mausoleum program. Mr. Schafer told Mr. Burns that the Archdiocese was not getting into the monument sale business. The Amended Complaint does not contain a count which seeks to enforce this "alleged" verbal promise. Even if this claim was before the Court, a verbal promise to restrict forever the use of land is not enforceable.

The Monument Builders rely on two cases decided by the New Jersey Supreme Court. First, in Frank v. Clover Leaf Park Cemetery Association, 29 N.J. 193 (1959), a monument seller sued a cemetery association. The Defendant was selling monuments for private profit and reserving an exclusive right of installation. The Court in Frank held that defendant's selling of monuments was ultra vires. The Court found that N.J.S.A. 8:1-1 *et seq.* did not allow for the defendant to sell monuments.

The second case is Terwilliger v. Graceland Memorial Park Association, 35 N.J. 259 (1961). The issue was whether the Defendant had the authority to participate in the marker and monument market. Defendant began to sell bronze markers and monuments to consumers in its cemetery. Plaintiff filed suit to enjoin the Defendant. The Court held the Defendant was properly enjoined by the lower court from selling bronze markers and monuments.

The primary issue before the Terwilliger Court was whether the defendant was a "public" cemetery. The Court held that:

> "A cemetery, although maintained by a private corporation or individual, is a public burial ground if it is open to the use of the public for the interment of the dead. * * * The criterion is public user for cemetery purposes; not whether ownership or control is in the hands of an individual, a general business corporation, or an incorporated cemetery association."

In the matter before the Court, the Archdiocese argues that Frank and Terwilliger are inapplicable to the present case. First, the Archdiocese argues that the cemeteries involved in Frank and Terwilliger were privately owned and operated by non-religious organizations incorporated under N.J.S.A. 8:1-1 *et seq*. The Archdiocese is a religious organization incorporated under N.J.S.A. 16:15-1 *et seq*. and exempt from the New Jersey Cemetery Act, which repealed N.J.S.A. 8:1-1 *et seq*. This difference is significant as the Court in Frank and Terwilliger ruled under a no longer existent statute regarding non-religious cemeteries. Whereas today, the relevant statute is N.J.S.A. 16:15-1 *et seq*.

Second, the Archdiocese argues that the Court in Frank and Terwilliger based their ruling on the fact that the cemeteries at issue were quasi-public institutions and charitable trusts. The criterion for making this determination was the fact that the cemeteries were for public use. The Archdiocese argues that the cemeteries that the Archdiocese owns and operates are not quasi-public institutions and charitable trusts. The cemeteries are not open for public use. Instead, the cemeteries are open only to Catholics and their family members. By having this exclusivity provision, the Archdiocese argues the cemeteries are not quasi-public institutions and charitable trusts.

There is a dearth of New Jersey case law relating to cemeteries owned and operated by religious entities. The Monument Builders rely in part on Parker v. Fid. Union Trust Co., 2 N.J. Super. 362 (Ch. 1944). In Parker, one of the issues before the Chancellor was the validity of a bequest in a Will to the Greenlawn Cemetery. The Court held that the Greenlawn Cemetery, which was not a religious cemetery, was a public cemetery. The Court in its decision stated:

> "In this respect public cemeteries are analogous to railroads and other public utilities. Here lots were sold to the public generally on the same plan in vogue with statutory cemetery associations and all persons had "the same measure of right for the same measure of money." The land has for more than 40 years been devoted to the purposes for which it was dedicated and I have no hesitancy in saying that this "God's acre" is as much a public cemetery as it would have been if owned and operated by a cemetery association incorporated under our statute." Ibid.

The Monument Builders refer the Court to that portion of Parker where the Chancellor uses the following quote from 14 C.J.S. page 63, par. 1:

> "The law contemplates two classes of cemeteries public and private. The former class is used by the general community, or neighborhood, or church, while the latter is used only by a family or a small portion of a community."

Cases from jurisdictions outside of New Jersey that have analyzed the issue of public versus private cemeteries in the context of religious entities have held that cemeteries owned and operated by churches or other religious corporations, on land not dedicated to the public, are not "public" cemeteries.

The Supreme Court of Pennsylvania, in Brnilovich v. St. George Indep. Serbian Orthodox Church of Pittsburgh, S. Side, Pa., 191 A. 655 (Pa. 1937), rejected the contention that a religious cemetery was a "public cemetery." Id. at 657. The right of control over cemeteries maintained by churches, like all other temporalities held by religious associations, is vested, under the laws of this state, in those designated by the canons, regulations, and customs of the church society. Ibid.

In holding that the cemetery owned and operated by the church was a private cemetery, the Supreme Court of Pennsylvania focused on the exclusion of the general public from burial in the cemetery. Ibid. The Court expressly rejected the contention that the cemetery was public, stating "the word "public" used in the church charter does not confer an unlimited right of burial to any one which cannot be denied by church authorities. . . . [T]he charter itself expressly makes the operation of the cemetery 'collateral' to the main purpose set forth, which is the 'support of the public worship of Almighty God *according to the forms, principles, doctrines and usages of that body of Christian worshipers known as Serbian Orthodox Church*. Ibid. (emphasis in original). This language limits the use of the cemetery to members of the Serbian Orthodox Church in good standing. Ibid. "It is quite evident if any one, irrespective of membership in the church, was permitted to assert a right of burial in this cemetery, the practical effect would be to deprive church members of the right to be interred in their own cemetery, and create religious disturbances." Ibid.

Similarly, where the legislature has devised a separate statutory scheme for public cemeteries, cemeteries operated by religious corporations are not considered to be "public cemeteries." In In re Front Street Sewer Assessment, 163 N.W. 978 (Minn. 1917), the Supreme Court of Minnesota held that a cemetery owned and operated by the Diocese of St. Paul was not a "public cemetery." Calvary Cemetery was owned and operated by the Diocese of St. Paul, a religious corporation. Id. at 978. The cemetery was used for the burial of persons of the Catholic faith, though members of other churches or nonchurch members, who are connected with families who are members of the Catholic Church, and have lots in the cemetery, are permitted burial there. Ibid. Calvary Cemetery attempted to claim it was a public cemetery so as to take advantage of a tax exemption. The Court disagreed, stating the Diocese was not a public cemetery association, so as to fall within the Minnesota statute exempting public cemetery lands and property from public taxes and assessments. Ibid.

The Court reasoned "the Legislature has seen fit to enact one set of laws for cemeteries owned and conducted by associations organized for that purpose, and another set of laws for cemeteries owned and conducted by private persons or religious corporations. And there can be no doubt that the appellant in this case comes under the second set of laws." Id. at 979. "It is hardly claimed that the Diocese of St. Paul can be called a public cemetery association. It is plainly a religious corporation with many activities other than conducting a cemetery. . . . We have already noted the statutes make a clear distinction between cemetery associations operating a public cemetery, and individuals or religious corporations that maintain cemeteries, either for profit, or for the burial of those of a particular faith." Ibid.

Historically, cemeteries have been regulated by the State of New Jersey since the mid-19th century. Most recently, the legislature passed the New Jersey Cemetery Act of 2003, N.J.S.A. 45:27-1 *et seq.* Pursuant to the New Jersey Cemetery Act of 2003, a cemetery established after December 1, 1971, may be owned or operated "only by a governmental entity, a religious corporation or organization or by a cemetery company" in accordance with the statute. See. N.J.S.A. 45:27-6. Additionally, a cemetery company, and any person engaged in the management, operation, or control of a cemetery company, may not directly or indirectly engage in the manufacture or sale of memorials, private mausoleums, or vaults. N.J.S.A. 45:27-16.

N.J.S.A. 45:27-2 exempts a religious organization that owns a cemetery which restricts burials to members of that religion or their families from the definition of "Cemetery Company" under the New Jersey Cemetery Act of 2003 and from regulation under such Act. Specifically, N.J.S.A. 45:27-16c, which prohibits a cemetery company from selling monuments or private mausoleums, is inapplicable to the Archdiocese because the Archdiocese is excepted under N.J.S.A. 45:27-2 from the definition of a "cemetery company". Both of these provisions are unchanged from their predecessor statutes, N.J.S.A. 8A:1-2 (as to the definition of a cemetery company) and N.J.S.A. 8A:5-3 (as to the prohibition of a cemetery company to sell monuments and private mausoleums). Title 8A was enacted in 1971 as P.L. 1971, c. 333. The enactment in 1971 and the re-enactment in 2003 of provisions exempting religious corporations from statutory regulation clearly evidence a legislative intent, on two occasions, to permit activities of religious organizations that are proscribed for non-sectarian organizations.

In the case at bar, the Archdiocese is participating in the mausoleum and monument market through its inscription program. The consumers are an exclusive group, limited to Catholics and their family members. The cemetery is not for use of the public at large. In addition, the consumers are allowed to purchase a mausoleum or monument from any vendor or builder they so desire.

The Court finds that because Archdiocese's cemeteries are restricted to members of the Catholic Church and their immediate families, the Archdiocese's cemeteries are not available to the general public and therefore are not "public cemeteries". The decision of the New Jersey legislature on two separate occasions, in 1971 and 2003, to exempt religious cemeteries from it's regulatory scheme is further evidence that religious cemeteries are not public cemeteries.

The Supreme Court in Frank set the "template" for the Court's analysis. The Court defined the issue which it had to decide as follows:

> "In our view, the fundamental problem present is whether defendant has the authority to engage in the business of sale and installation of bronze memorials.* * * does the sale of memorials exceed the authority granted by the statutory franchise?"

First, the Court must determine if there is express statutory authority. Without express authority, the Frank Court held that the Court should not "imply" authority because:

> "factors of preferred economic position and ease of access to prospective customers in promoting sales, in our judgment, make necessary, a strict construction of the statute and the charter emanating therefrom in appraising **the claim of implied power** to engage in the activity in competition with private business." (Emphasis added)

If the Archdiocese has the express statutory authority, the Court does not apply the above analysis.

Roman Catholic organizations that have not obtained a certificate of authority for the cemetery are instead subject to N.J.S.A. 16:15-1 *et seq*. The Archdiocese, pursuant to that statute enacted in 1908, have the power to:

> "Acquire, 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.S.A. 16:15-11. (Emphasis added)

In addition to the powers set forth in N.J.S.A. 16:15-11 which governs a Roman Catholic Religious Corporation, N.J.S.A. 16:1-4 sets forth the general statutory powers applicable for all religious societies and congregations. This section provides that every religious society or congregation incorporated by virtue of any law of the state of New Jersey can:

> f. Acquire, purchase, receive, have and hold and take by devise, bequest or gift without limit, real and personal property of all kinds, church edifices, schoolhouses, college buildings, parsonages, sisters' houses, hospitals, orphan asylums, 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 burial places, and any real estate suitable for any or all of said purposes;
>
> g. Lease, grant, sell and dispose of all or any part of such property; (Emphasis added)

N.J.S.A. 16:1-4 (f), (g).

Both statutes clearly give the power to religious institutions, in general, and to the Roman Catholic Church, in particular, (1) to acquire and purchase "personal property of all kinds" and "goods and chattels of all kinds", respectively, and (2) to lease, grant, sell and dispose of all or any part of such property" and "lease, sell, grant, assign, demise and dispose of..." such property or "any part thereof", respectively.

Black's Law Dictionary defines "tenement" as follows:

> "This term in its common acceptance, is only applied to houses and other buildings, but in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature, whether it be of a substantial and sensible, or of an insubstantial, ideal, kind."

As explained in American Jurisprudence, Second Edition:

> "Hereditaments" is the largest and most comprehensive word of the phrase "land, tenants, and hereditaments", and is almost as comprehensive as "property", because it embraces anything capable of being inherited, whether corporeal, incorporeal, real, personal, or mixed".

"Hereditaments" includes anything capable of being inherited, whether corporeal (tangible), incorporeal (intangible), real, personal or mixed. Ballentine's Law Dictionary, 42 Am J1st Prop § 17 (2010). Corporeal hereditaments are physical objects, while incorporeal hereditaments are not the subject of sensation, can neither be seen nor handled, are only creatures of the mind and exist only in contemplation. 2-14 Thompson on Real Property, Thomas Editions § 14.04. Examples of incorporeal hereditaments include fishing rights, boating rights, or easements of light and air.

The Court in Whitlock v. Greacen, 48 N.J. Eq. 359 (Ch. 1891), in distinguishing corporeal hereditaments from incorporeal hereditaments also stated that

> "Corporeal hereditaments are confined to land...and that incorporeal hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their own nature or use, annexed to corporeal inheritances, and are rights issuing out of them or concern them"

Id. at 360.

The inclusion of the term "hereditaments" in the granting powers regarding a Roman Catholic religious corporation under N.J.S.A. 16:15-11 and the authority granted therein relative to its cemeteries is of critical importance. The use of the term "hereditaments" expands the corporate powers well beyond the authority to simply hold and use lands for cemetery purposes.

The definitions above reveal that the use of the words "tenements" and "hereditaments" is meant to encompass a broad range of property including lands and all heritable property of a substantial and permanent nature upon those lands as well as heritable property of an intangible nature that does not fall within the classification of a corporeal hereditament. The private mausoleums and monuments purchased by the Archdiocese are installed on the land and owned by the Archdiocese. These private mausoleums and monuments are no different than the buildings erected upon the Archdiocese's cemeteries and are encompassed within the broad common law definition of hereditaments suitable for "any and all" purposes of having, holding and using the "cemeteries or burying places". Further, the rights associated with these private mausoleums and monuments which are sold by the Archdiocese to purchasers and inherited in the same manner as the rights to a burial plot, also constitute hereditaments of the Archdiocese. As such, the acquisition, installation and ownership of the private mausoleums and monuments in the Archdiocese's cemeteries for the sale of inscription rights is not ultra vires, but squarely within the powers granted to the Archdiocese under N.J.S.A. 16:15-11. Accordingly, the Court finds that the purchase of monuments and private mausoleums, with the sale of inscription rights thereon, lie within the Church's statutory powers.

The statutory scheme excludes regulation of religious cemeteries as long as use of the cemeteries is limited to members of that religion. During the trial, the Monument Builders established that members of the Coptic religion were allowed by the Archdiocese to be buried in one of its cemeteries. The Court finds that this fact does not invalidate the program. The program must, however, be limited to members of the Roman Catholic Church. While Coptics are, according to Mr. Schafer, in "communion" with Catholics, the Court makes no finding based on this record whether they are Roman Catholics.

Mr. Woodward shall prepare a proposed form of judgment consistent with this decision under the five (5) day rule.

Very truly yours,

FRANK M. CIUFFANI, PJ, CH
FMC/pv