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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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

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RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

The motions to dismiss should be denied. The allegations of the Complaint, which are presumed true, describe A3840 as an act of private economic protectionism intended to destroy the inscription-rights program and prohibit vault sales when the statute goes into effect in March. The New Jersey Legislature enacted the statute, which is literally the only cemetery regulation applicable to private religious cemeteries, to protect the financial interests of headstone dealers.

Plaintiffs have stated substantive due-process, equal-protection, and Contracts Clause claims. Their substantive due-process and equal-protection claims are viable because private economic protectionism is not a legitimate government interest. Plaintiffs have also stated a viable Contracts Clause claim because the challenged statute, which specifically targets the Archdiocese, impairs over 600 inscription-rights contracts for the illegitimate purpose of private economic protectionism. Thus, the motions to dismiss should be denied.

FACTS

The following facts are drawn solely from the allegations of the Complaint and hence are presumed true.

A. The Archdiocese of Newark and Interment in Its 11 Cemeteries

The Archdiocese of Newark is a jurisdiction of the Roman Catholic Church with 219 parishes in Bergen, Union, Hudson, and Essex counties. Compl. ¶¶ 11, 15, 18. The Archdiocese is a nonprofit religious society under New Jersey law. *Id.* ¶ 23.

Canon law requires the Archdiocese to provide consecrated ground for the interment of the Catholic faithful. *Id.* ¶ 24. To that end, the Archdiocese owns 11 cemeteries in northern New Jersey, the oldest of which dates to 1849. *Id.* ¶ 23. The cemeteries are private, reserved for their Catholic parishioners and their families who want to be buried in northern New Jersey, and not

open to the general public. *Id.* ¶ 26. There are nearly one million existing graves in the Archdiocese's cemeteries. Roughly 3,600 are added each year. *Id.* ¶ 105.

B. Parishioners May Choose Among Four Ways to Be Interred

Parishioners choose how and where in the cemeteries to be interred. They may choose among four basic methods: (1) traditional in-ground burial; (2) interment in a private mausoleum; (3) interment in a community mausoleum; and (4) interment of cremated remains in a columbarium, crypt, or grave. *Id.* ¶ 31.

i. Traditional in-ground burial

A traditional in-ground burial involves purchasing a right of interment in a specific plot. *Id.* ¶ 32. The cost of a plot varies by cemetery and location within each cemetery. *Id.* ¶ 36. These days, the cost of a plot ranges from $750 to $3,900. *Id.* ¶ 40. There is also an interment fee on the day of burial of $2,050 to $2,400, which covers grave excavation and burial services. *Id.* ¶ 46. The Archdiocese sells most of its interment rights on a pre-need basis, meaning that they are purchased prior to death. *See id.* ¶¶ 42, 183.

The last step is installation of the headstone, which memorializes the decedent with an inscription such as "Rest in Peace." *Id.* ¶¶ 54–56. A headstone is typically made of stone such as granite or marble. *Id.* ¶ 56. It may be big or small, simple or elaborate. *Id.* ¶ 57. The headstone is mounted on a concrete foundation. *Id.* ¶ 58. In the past, headstones were handcrafted. *Id.* ¶ 59. Today, most headstones are produced and inscribed by machines in a factory. *Id.* ¶ 60.

Headstones are typically purchased from monument dealers. *Id.* ¶ 63. Monument dealers frequently open shops near cemeteries. For example, several private monument dealers are located directly across the street from the Archdiocese's Holy Cross Cemetery in North Arlington, New Jersey. *Id.* ¶ 65.

ii. Private family mausoleum

A parishioner may also choose a private family mausoleum, which is an above-ground, stone structure. *Id.* ¶ 68. The parishioner purchases the right to build the mausoleum on a particular site. *Id.* ¶ 70. A mausoleum has spaces for family members. *Id.* ¶¶ 73, 76. Plaintiff Mazza, for example, purchased a family mausoleum that presently contains his wife's remains. *Id.* ¶ 183, 185. His remains will also be interred there. *Id.* ¶ 186.

Parishioners typically purchased family mausoleums from private headstone dealers. *Id.* ¶ 71. Prices range from $25,000 to hundreds of thousands of dollars. *Id.* ¶ 77.

iii. Community mausoleums

Parishioners may also choose to be interred in one of the Archdiocese's community mausoleums, which are large structures with thousands of interment spaces. *Id.* ¶¶ 79–80. A typical space is 2.5 feet by 2.5 feet by 8 feet. *Id.* ¶ 82. These dimensions accommodate a single casket, though there are 16-foot spaces for two caskets. *Id.* ¶¶ 82–83. The community mausoleums contain religious art work that expresses the Catholic faith. *Id.* ¶ 86.

Once the body is sealed within the mausoleum space, the Archdiocese attaches a granite or marble outer cover with memorializing information such as the name of the person and the dates of birth and death. *Id.* ¶¶ 88–90, 92. The covers can also feature additional embellishments to memorialize the deceased. *Id.* ¶ 92. When people walk around inside a community mausoleum, they see row on row of these memorializing covers, just as people walking around outside in the cemetery see row on row of headstones. *See id.* ¶¶ 90, 92, 233.

The mausoleum space is the functional equivalent of a vault and cemetery plot. *Id.* ¶ 91. The mausoleum space's outer cover is the functional equivalent of a headstone. *See id.* ¶ 92. The

Archdiocese provides the outer covers with the interment rights. *Id.* ¶¶ 93–95. The cost of a space rages from $4,600 to $40,000, depending on its location in the mausoleum. *Id.* ¶ 87.

iv. Cremated human remains

Parishioners may also choose to inter their cremated remains in the Archdiocese's cemeteries. *Id.* ¶ 96. The interment of cremated human remains is the same as that for a body. *Id.* ¶¶ 97–98. Remains may be interred in a grave, private family mausoleum, or a community mausoleum, which have special niches and columbaria for cremated remains. *Id.* ¶¶ 99–100.

C. The New Jersey Legislature Has Always Exempted, and Continues to Exempt, Private Religious Cemeteries from the New Jersey Cemetery Act.

New Jersey regulates public, nonsectarian cemeteries through the New Jersey Cemetery Act of 2003, which is a reorganization of the Cemetery Act of 1971. *See* N.J. Stat. Ann. § 45:27-1 *et seq.* The dozens of provisions in the Act regulate public, nonsectarian cemeteries. For example, such cemeteries are supervised by the New Jersey Cemetery Board. *Id.* §§ 45:27-3, -4.

The Cemetery Act does not apply, however, to private religious cemeteries such as the Archdiocese. The definition of "cemetery company" expressly exempts private religious cemeteries. N.J. Stat. Ann. § 45:27-2. There is no separate statute that applies solely to private religious cemeteries. The New Jersey Legislature has left private religious cemeteries alone.

The statute challenged in this case, A3840, is the first time the New Jersey Legislature has subjected private religious cemeteries to a cemetery-specific regulation. Notably, the New Jersey Legislature imposed A3840 through the Religious Corporations Law and the Cemetery Act still does not apply to private religious cemeteries. *See* N.J. Stat. Ann. § 16:1-7.1.

D. The Inscription-Rights Program: a Successful Innovation to Help the Archdiocese and Its Parishioners

The Archdiocese has moral and contractual obligations to maintain the cemeteries in a dignified manner. *Id.* ¶¶ 101, 103. Fulfilling these obligations grows more difficult as the number of decedents, which will soon surpass one million, increases. *Id.* ¶¶ 104–05.

A major problem is that the Archdiocese does not own the monuments in its cemeteries. *Id.* ¶ 106. They are the property of the family. *Id.* There are over 500,000 monuments within the cemeteries, many of which date to the nineteenth century. *Id.* ¶ 108. Due to aging and the relentless freeze-thaw cycle, there are thousands of monuments in danger of collapse, including private family mausoleums that are no longer safe for visitors. *Id.* ¶¶ 107–108. The Archdiocese does not maintain monuments because it does not own them and does not have the financial resources to care for them. *See id.* ¶ 109–11

To better provide for the cemeteries overall and the monuments in particular, in 2006, the Archdiocese implemented an optional program it now calls the "inscription-rights program." *Id.* ¶ 112. Under the inscription-rights program, the parishioner can choose not to purchase a headstone or family mausoleum from a headstone dealer. *Id.* ¶ 113. Instead, the parishioner enters into a contract with the Archdiocese in which the parishioner chooses the monument and the inscription, but the Archdiocese retains ownership. *Id.* ¶¶ 113–14. The Archdiocese promises to maintain the monument in perpetuity, including replacement of damaged monuments, at no additional cost to the parishioner. *Id.* ¶¶ 115–16. For example, in 2012, the Archdiocese replaced an entire private family mausoleum that was acquired in 2010 following damage from Hurricane Sandy. *Id.* ¶ 116.

Parishioners are not required to use the inscription-rights program. They are free to purchase their monuments from anyone, just as parishioners have always done. The inscription-rights program simply provides parishioners with an additional choice. *See id.* ¶¶ 123–24.

The cost of the inscription rights for a conventional monument such as a headstone typically ranges from $1,000 to $4,000, though it is possible to spend more for larger, more ornate ones. Id. ¶ 128.

Plaintiffs Mazza and Flynn have participated in the inscription-rights program. *Id.* ¶¶ 183, 191. Plaintiff Mazza obtained his private family mausoleum through the program, and Plaintiff Flynn obtained his son's headstone through the program. *Id.* Under the terms of their inscription-rights contracts, Plaintiffs Mazza and Flynn expect the Archdiocese to own and maintain these monuments in perpetuity. *Id.* ¶¶ 188–89, 195–96.

E. The Headstone Dealers Sue the Archdiocese for Doing Something Perfectly Legal

The Archdiocese began the inscription-rights program in 2006 with private family mausoleums. *Id.* ¶ 125. In 2013, the Archdiocese expanded the program to headstones. *Id.* ¶ 127.

The expansion of the program to headstones drew objections, which were immediate, from one source only: the headstone dealers. *See id.* ¶ 131. John Burns, Jr., who is the president of the industry lobbyist Monument Builders Association of New Jersey and who owns headstone businesses near the Archdiocese's cemeteries, contacted the Archdiocese in 2013 to protest the expansion of the inscription-rights program. *Id.* ¶¶ 132–33. Mr. Burns expressed the view that the program would negatively affect the finances of headstone dealers. *Id.* ¶ 134. The Archdiocese declined to stop the inscription-rights program because it correctly believed that it had a legal right to operate the program for the welfare of parishioners, the cemeteries, and the Archdiocese as a whole. *Id.* ¶ 139.

The Monument Builders Association promptly sued the Archdiocese to enjoin the inscription-rights program, relying on various state-court-created doctrines that concerned only public, nonsectarian cemeteries and that significantly predated the New Jersey Cemetery Act of 1971 and its 2003 revision. *Id.* ¶¶ 140–43.

Following a six-day bench trial, the state trial court ruled against the Monument Builders Association. *Id.* ¶¶ 146–48. The trial court held that the Archdiocese was not prohibited from selling monuments because the Cemetery Act did not apply to private religious cemeteries. *Id.* ¶ 150. The trial court also held that the court-created common law upon which the Monument Builders Association relied, the youngest of which was more than 50 years old, did not apply to private religious cemeteries. *Id.* ¶ 149.

On June 23, 2015, the Appellate Division affirmed the trial court in its entirety. *Id.* ¶ 153. The Monument Builders have not filed a petition for certification to the New Jersey Supreme Court and the time for doing so has expired. N.J. Court R. 2:2-1.

F. The Headstone Dealers Successfully Lobby for the Law That They Did Not Have in Their Lawsuit

The headstone dealers lost their state-court lawsuit because they sued the Archdiocese for doing something perfectly legal. While that lawsuit was going on, the headstone dealers also hedged their bets by lobbying the New Jersey Legislature to pass A3840. *Id.* ¶ 154. The statute expressly forbids a religious cemetery such as the Archdiocese from owning monuments or inscribing and installing them. The statute also forbids the Archdiocese from selling vaults. A3840 (codified at N.J. Stat. Ann. § 16:1-7.1(a)(1) (prohibiting the "ownership, manufacture, installation, sale, creation, inscription, provision or conveyance, in any form, of memorials"); *id.* § 16:1-7.1(a)(2) (prohibiting the "ownership, manufacture, installation, sale, creation, provision or conveyance, in any form, of vaults"); *id.* § 16:1-7.1(a)(3) (prohibiting the "ownership,

manufacture, installation, sale, creation, provision or conveyance, in any form, of a mausoleum intended for private use")).

A3840 enacted these new prohibitions by amending the Religious Corporations Law, N.J. Stat. Ann §§ 16:1-1 *et seq.*, not the Cemetery Act. Compl. ¶ 174. A3840 did not subject the Archdiocese to any provision of the Cemetery Act. Under A3840, the Archdiocese and all private religious cemeteries remain free from the Cemetery Act and any form of supervision by the New Jersey Cemetery Board. *Id.* ¶ 175.

The headstone dealers and funeral directors sought this law to protect their businesses from competition by the Archdiocese specifically. *Id.* ¶¶ 155, 171, 210. The headstone dealers and funeral directors lobbied for A3840 with the same goal as the headstone dealers' lawsuit: stopping the Archdiocese specifically. *Id.* ¶ 156.

There is no evidence that the Archdiocese harmed any parishioner from the inception of the inscription-rights program in 2006 until now. *Id.* ¶¶ 166, 169. No consumer group supported A3840. *Id.* ¶ 163. There is no evidence of consumer harm from any of the 47 states where it is legal for cemeteries to sell headstones. *Id.* ¶ 165.

The sole purpose and effect of A3840 is to stop the Archdiocese's inscription-rights program and its future sale of vaults in order to protect headstone dealers and funeral directors from economic competition. *Id.* ¶¶ 155, 171, 210. These new prohibitions go into effect on March 23, 2016. Compl. ¶ 182. But for A3840, the Archdiocese would continue its inscription-rights program beyond March 23, 2016. Because A3840 exempts community mausoleums, N.J. Stat. Ann. § 16:1-7.1(a)(3), the Archdiocese will continue to provide the outer covers.

G. The Archdiocese Also Wants to Sell Vaults

In the case of a traditional in-ground cemetery, the family may wish to place the casket within a vault, which is a rigid, durable box of metal or concrete. Compl. ¶ 47. A vault helps maintain the integrity of the cemetery surface after the casket eventually collapses due to decay. *Id.* The Archdiocese does not require vaults. *Id.* ¶ 50. A vault typically costs $1,000 to $2,000, and the law currently requires families to purchase the vault from a funeral director. *Id.* ¶ 48; *see* N.J. Stat. Ann. §§ 45:7-34, -47, -82 (defining vaults as funeral goods and stating that only licensed funeral directors are authorized to sell funeral goods). A3840 prohibits private religious cemeteries from selling vaults.

In addition to headstones, the Archdiocese also wants to sell vaults. *Id.* ¶ 199. Vaults will *not* be sold through the inscription-rights program. ¶ 203. The Archdiocese believes that it is in the best position to sell vaults for its own cemeteries because it best understands its own cemeteries. *Id*. ¶ 205.

H. Summary of Controversy

The Archdiocese wants to sell monuments and vaults. This will be illegal when A3840 goes into effect on March 23, 2016. The Archdiocese will still be able to sell community mausoleum spaces with their outer covers even though they are functionally equivalent to vaults and monuments, respectively. The only factual difference between vaults and monuments, on the one hand, and community mausoleum spaces and their outer covers, on the other, is that the former have typically been sold by funeral directors and headstone dealers, respectively, but the latter are sold by the Archdiocese.

STANDARD OF REVIEW

When considering such a 12(b)(6) motion, a court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 215 (3d Cir. 2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

LEGAL ARGUMENT

The motions to dismiss should be denied. The Complaint alleges that A3840 is an act of private economic protectionism with no redeeming public purpose. These allegations state substantive due-process, equal-protection, and Contracts Clause claims because private economic protectionism is never constitutionally legitimate, whether for the rational-basis test or for the Contracts Clause. More broadly, there is no rational distinction between selling community mausoleum spaces with their outer covers (legal) and selling vaults and monuments (illegal). This statutory distinction exists only because funeral directors and headstone dealers sell vaults and monuments, but the Archdiocese sells the community mausoleum spaces. Thus, Plaintiffs have stated facially plausible claims.

The gravamen of the motions to dismiss is that the fundamental principle of Rule 12(b)(6)—that the analysis is confined to the allegations of the Complaint and all ambiguities are construed against dismissal—does not apply. The Government and Funeral Directors believe that the rational-basis test and Contracts Clause doctrine allow them to make up whatever and however many facts they need to secure dismissal. Not only is this without any basis in the law, it is irrelevant as a practical matter because the facts the Government and Funeral Directors invent about consumer-protection concerns, for example, cannot be rationally squared with the

fact that private religious cemeteries are not, and have never been, subject to the Cemetery Act or any other cemetery regulation. In other words, it is not *rationally conceivable* under any standard of constitutional review that a Legislature would exempt private religious cemeteries from cemetery regulation, *except* for the sale of headstones and vaults (which, coincidentally, just happen to be the things that impact the bottom line of headstone dealers and funeral directors).

Part I explains why the motions to dismiss the substantive due-process and equal-protection claims should be denied. Part II explains why the motions to dismiss the Contracts Clause claim should be denied.

I. THE MOTIONS TO DISMISS THE SUBSTANTIVE DUE-PROCESS AND EQUAL-PROTECTION CLAIMS MUST BE DENIED BECAUSE THE COMPLAINT SATISFIES THE ELEMENTS OF THESE CLAIMS.

Plaintiffs have stated substantive due-process and equal-protection claims.[1] The Complaint alleges that the New Jersey Legislature enacted A3840 for the purpose of private economic protectionism. In Section A, Plaintiffs explain that, contrary to the argument of the Government and Funeral Directors, private economic protectionism is not a legitimate government interest, and thus the motions to dismiss must be denied based on the actual allegations of the Complaint. In Section B, Plaintiffs provide additional support for denying the motions to dismiss by demonstrating how the allegations of the Complaint are materially similar to constitutional challenges to restrictions on who may sell a casket in which the plaintiffs almost always won on the merits. Given that plaintiffs ultimately prevailed in four of the five casket cases and none were dismissed, Plaintiffs here have at least stated plausible claims. Finally, in Section C, Plaintiffs show that even if they are allowed under rational-basis review to invent

[1] Plaintiffs do not distinguish between these claims because their bottom line is the same: the absence of a rational relationship with a legitimate government interest. Plaintiffs *B & G Constr. Co., Inc. v. Dir., Office of Workers' Comp. Programs*, 662 F.3d 233, 256 n.22 (3d Cir. 2011).

facts at the 12(b)(6) stage, the Government Funeral Directors have still failed to establish that dismissal is warranted.

A. The Substantive Due-Process and Equal-Protection Claims Survive the Motions to Dismiss Because Private Economic Protectionism Is Not a Legitimate Government Interest.

A viable claim subject to rational-basis review must plausibly demonstrate that the challenged law lacks a rational relationship to a legitimate government interest. *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2079–80 (2012); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Countering this requires more than just stating a government interest and proclaiming that a challenged law advances it. Rather, there must be a plausible relationship in light of the real world and the overall regulatory structure. *Saint Joseph Abbey v. Castille*, 712 F.3d 215, 224 (5th Cir. 2013). Although rational-basis review is deferential and the government is allowed to invoke hypothetical justifications for a statute, the test is not "toothless." *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008). Indeed, of the 42 rational-basis cases that the Government and Funeral Directors cite, only four were dismissals, and they are factually distinguishable.[2]

At the motion to dismiss stage, the constitutional analysis is confined to the allegations of the Complaint, which are presumed true. The Complaint describes A3840 as an act of private economic protectionism. The Legislature enacted A3840 at the behest of the headstone dealers after they lost their private lawsuit against the Archdiocese in the state trial court and while their appeal was pending. Compl. ¶¶ 140, 147, 153–55, 171, 180. A3840 is New Jersey's first and

[2] *Albright v. Oliver*, 510 U.S. 266 (1994), involved an arrestee's incorrect reliance on the Due Process Clause rather than the Fourth Amendment. *Id.* at 811. *Collins v. Harker Heights*, 503 U.S. 115 (1992), involved the obligations of a municipality to its employees. *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), involved compensation for damages for pain and suffering. *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639 (3d Cir. 1995), involved midwifery.

only cemetery-specific regulation directed at a private religious cemetery. N.J. Stat. Ann. § 45:27-2 (defining cemetery company under the Cemetery Act of 2003 but excluding a "religious organization that owns a cemetery which restricts burials to members of that religion or their families"). The purpose of the Legislature's unprecedented regulation of private religious cemeteries was not public protection, but protection of the financial interests of headstone dealers and funeral directors. Compl. ¶¶ 147–50, 154–55, 157. The protectionist nature of the challenged law is manifest in the Funeral Directors' intervention. They intervened because Plaintiffs' success in this lawsuit "will have a direct and damaging impact on members of the [Association], for whom the sale of vaults is an important source of revenue." Funeral Directors Br. Supp. Mot. Intervene at 2. Thus, the specific impetus for A3840 was the fact that the headstone dealers were losing their lawsuit—brought out of financial self-interest—against the Archdiocese because a law like A3840 did not exist. The Complaint makes clear that parishioners loved the Archdiocese's inscription-rights program, that it harmed no one, and that there was no evidence it posed even hypothetical risks to parishioners. Compl. ¶ 173; *see, e.g.*, Compl. ¶¶ 189, 195.

The key constitutional question for the motions to dismiss is whether Plaintiffs have stated a claim that A3840 violates their substantive due-process and equal-protection rights on the ground that private economic protectionism is not a legitimate government interest. The circuits are divided on this question and the Third Circuit has yet to weigh in. The Government and Funeral Directors argue, in reliance on Second and Tenth Circuit precedent, that Plaintiffs have failed to state a claim because private economic protectionism is a legitimate government interest. Defs.' Br. at 20 (citing *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015) and *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004)); Funeral Directors Br. at 12 (same). In a

statement that accurately describes what the New Jersey Legislature did here, the Tenth Circuit observed that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." *Powers*, 379 F.3d at 1221.

Plaintiffs agree with the Government and Funeral Directors that Plaintiffs lose if private economic protectionism is a legitimate government interest. That is, after all, exactly what is going on here, and if that is constitutionally legitimate, then Plaintiffs' Complaint should be dismissed. But this Court should reject *Sensational Smiles* and *Powers*. Supreme Court authority and the weight of circuit precedent firmly establish that private economic protectionism is *not* a legitimate government interest.

The controlling precedent is *Metropolitan Life Insurance v. Ward*, 470 U.S. 869 (1985). In *Metropolitan Life*, the Court examined an Alabama statute that taxed domestic insurance companies at a lower rate than out-of-state ones. *Metro. Life Ins.*, 470 U.S. at 871–72. The Supreme Court struck the law down under the Equal Protection Clause because holding that naked economic discrimination in favor of A against B "is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context." *Id.* at 882. The Supreme Court, in other words, rejected private economic protectionism because it amounts to a doctrine of *the government always wins* insofar as *every* economic regulation could be characterized as protectionist. *Id.* at 882 n.10 ("Indeed, under the State's analysis, *any* discrimination subject to rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another.") (emphasis in original).Yet that argument—the one the Supreme Court has expressly rejected—is the argument of the Government and Funeral Directors here: the Government wins because the New Jersey

Legislature enacted A3840 as an act of private economic protectionism against the Archdiocese.[3] Their argument would eviscerate the Equal Protection Clause.

The weight of circuit authority is also against private economic protectionism. The leading precedent is *Saint Joseph Abbey v. Castille*, which involves facts very similar to those here. The Benedictine monks of Saint Joseph Abbey in Louisiana wanted to sell their handmade wooden caskets to the public, but could not because only state-licensed funeral directors were authorized to sell caskets. *Saint Joseph Abbey*, 712 F.3d at 218. Like the Government here, Louisiana took the position that private economic protectionism is a legitimate government interest. *Id.* at 221–23. The Fifth Circuit, after surveying the cases that the Tenth Circuit relied on in *Powers*, concluded that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose" and further stated that private economic protectionism "is aptly described as a naked transfer of wealth." *Saint Joseph Abbey*, 712 F.3d at 222–23 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (holding that economic protectionism is not a legitimate government interest); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same).

[3] The Government will likely reply that *Metropolitan Life* is distinguishable because it involved interstate, not intrastate, economic protectionism. This is the same error that the Second Circuit made in *Sensational Smiles*. 793 F.3d at 287 n.4. The Supreme Court made it absolutely clear that it was deciding *Metropolitan Life* under equal-protection, not commerce-clause, principles. The dormant-commerce doctrine was inapplicable in *Metropolitan Life* because Congress had exempted state-level insurance laws through the McCarran Act. 470 U.S. at 880. The Supreme Court expressly rejected Alabama's argument that the Court's reasoning was "Commerce Clause rhetoric in equal protection clothing." *Id.* The Court specifically distinguished between equal-protection and commerce-clause analyses, and emphasized that "equal protection restraints are applicable even though the *effect* of the discrimination in this case is similar to the type of burden with which the Commerce Clause would also be concerned." *Id.* at 881(emphasis in original). Thus, *Metropolitan Life* is about the illegitimacy of naked economic discrimination in the equal-protection context, and nowhere even hints, much less holds, that only interstate discrimination is bad whereas intrastate discrimination is fine.

In sum, the motions to dismiss must be denied. The Complaint alleges private economic protectionism, which the Supreme Court and a preponderance of circuit authority have rejected as illegitimate. Thus, Plaintiffs have stated plausible claims.

B. Plaintiffs Have Stated Viable Substantive Due-Process and Equal-Protection Claims for the Further Reason That the Plaintiffs Most Often Win on the Merits in the Most Factually Analogous Cases Involving Casket Sales.

The preceding section established that the allegations of the Complaint set forth viable substantive due-process and equal-protection claims because private economic protectionism is not a legitimate government interest. Thus, the motions to dismiss those claims should be denied at this juncture and the Court may end its analysis here.

But if the Court wishes to proceed, then the viability of Plaintiffs' claims is further demonstrated by the fact that the allegations of the Complaint most closely resemble the category of rational-basis cases in which the plaintiffs almost always win: the casket cases. *Saint Joseph Abbey*; *Powers*; *Craigmiles*; *Casket Royale, Inc. v. Miss.*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); and *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

These five cases share common factual and legal elements: (1) the plaintiffs want to sell a simple funeral product, namely, a casket; (2) state law allows only state-licensed funeral directors to sell a casket; (3) the evidence indicates that the only plausible explanation for the law is the private economic protectionism of funeral directors; (4) the courts consider a plethora of hypothetical justifications for the challenged laws, including consumer protection; and (5) the plaintiffs win four out of five times under the rational-basis test.

The two appellate cases best demonstrate the material similarity of the facts and law here. In *Saint Joseph Abbey*, an order of Catholic monks wanted to sell their handmade caskets to the

public, but could not because Louisiana forbade anyone but a funeral director from selling caskets. 712 F.3d at 217–18. The Fifth Circuit rejected private economic protectionism as legitimate government interest, *id.* at 222, and then rejected various consumer-protection hypothetical rationales because there was no rational connection between those asserted justifications and the challenged law, *id.* at 225–26.[4] Likewise, in *Craigmiles*, an entrepreneur wanted to open a retail casket shop but could not because he was not a Tennessee-licensed funeral director. 312 F.3d at 223. After considering and rejecting various hypothetical justifications, the Sixth Circuit considered—and rejected—the only interest to which the casket-sales restriction was rationally tailored: illegitimate economic protectionism. *Id*. at 228–29.

The motions to dismiss the substantive due-process and equal-protection claims here must be denied because the allegations of the Complaint are materially identical to the facts and law of the casket cases: (1) the Archdiocese wants to sell simple funeral products, namely, monuments and vaults; (2) state law does not allow a private religious cemetery to sell monuments or vaults; (3) the evidence of private economic protectionism is overwhelming; (4) the hypothetical consumer-protection issues that the Archdiocese faces are materially the same as the hypothetical consumer-protection issues that the monks faced in *Saint Joseph Abbey* and the entrepreneur faced in *Craigmiles*. If materially similar facts are ultimately sufficient to *win* most of the casket cases under rational-basis review (and lose only in a jurisdiction that countenances private economic protectionism), then the Plaintiffs here have at least stated plausible claims.

[4] Notably, the only casket case that the plaintiffs lost was *Powers*, and they lost only because the Tenth Circuit held that private economic protectionism *is* a legitimate government interest. *Powers*, 379 F.3d at 1218, 1222. In any event, *Powers* still does not help the Government and Funeral Directors because that case was decided after a full trial on the merits, not at the 12(b)(6) stage. *Id.* at 1214.

C. Even If the Court Considers Hypothetical Rationales at this Stage, the Motions to Dismiss the Substantive Due-Process and Equal-Protection Claims Must Still Be Denied.

The only argument the Government and Funeral Directors make based on the actual allegations of the Complaint concerns their view that private economic protectionism is a legitimate government interest. Defs.' Br. at 19–21; Funeral Directors Br. at 12 n.5, 15–16. They are unable to make any other argument based on the facts that Plaintiffs actually alleged.

Instead, the primary substance of their due-process and equal-protection arguments is based on imaginary facts that the Government and Defendants have invented. For example, the Government and Funeral Directors posit the supposed problem of product-tying—forcing a parishioner to buy a headstone as a condition of buying a cemetery plot—even though the Complaint makes clear that the Archdiocese does not tie cemetery plots to headstone purchases. Defs.' Br. at 11–12; Funeral Directors Br. at 14–15; *see* Compl. ¶¶ 63, 194. Elsewhere, they imagine the problem of religious cemeteries treating bereaved consumers poorly, even though the Complaint alleges that parishioners uniformly love the inscription-rights program.[5] Defs.' Br. at 13; Funeral Directors Br. at 13–25; *see, e.g.*, Compl. ¶¶ 189, 195.

The fact that the Government and Funeral Directors cannot muster a persuasive rational-basis argument rooted in the actual allegations of the Complaint should be dispositive. The

[5] In addition to making up facts, the Funeral Directors declare Plaintiffs' allegations about private economic protectionism to be "meritless." Funeral Directors Br. at 11. Setting aside the fact this declaration does not justify ignoring the material allegations of the Complaint at the 12(b)(6) stage, the specific allegations about private economic protectionism are hardly meritless. The *Saint Joseph Abbey* decision discussed at some length how the Federal Trade Commission had to promulgate what is known as the Funeral Rule because state funeral boards, dominated by funeral directors, had captured the machinery of government regulation and were using it for their own, rather than the public's, benefit. 712 F.3d at 218–19. Even if the rational-basis test ultimately requires courts to consider and even rely on hypothetical justifications for challenged laws after trial or on motions for summary judgment, the test does not require courts to pretend that those hypothetical justifications are actually true in the real world.

motions to dismiss should be denied on the bedrock principle that the allegations of the Complaint control the analysis under Rule 12(b)(6). *See Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 ("In determining whether a claim should be dismissed under Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments."). For their part, the Government and Funeral Directors cite no case for the proposition that the familiar presumptions of Rule 12(b)(6) in favor of Plaintiffs do not apply in the rational-basis context. Instead, they assume that they may invent as many convenient facts as they need. This assumption appears to be based on boilerplate statements from various cases that describe rational-basis review in the abstract, with a particular emphasis on the notion that the government can rely on hypothetical rationales to justify a challenged law.[6]

Yet the latitude the Government and Funeral Directors possess to invent facts at the 12(b)(6) stage—if such latitude even exists—must be exceedingly narrow. Courts recognize that allowing the government to rely on hypothetical justifications would render constitutional analysis meaningless if the plaintiffs were not given an opportunity to refute those hypotheses with actual evidence. In other words, "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of its irrationality." *Saint Joseph Abbey*, 712 F.3d at 223. Furthermore, a "hypothetical rationale, even post hoc, cannot be fantasy." *Id*. Nor can a hypothetical justification consist of a mere "abstraction" such as *maybe the Legislature was trying to enhance consumer protection*. *Id.* Thus, even if it is permissible to consider hypothetical justifications on motions to dismiss, the Court should be deeply skeptical because Plaintiffs have not yet had their opportunity to muster evidence to refute those hypotheses.

[6] *See, e.g.*, Defs.' Br. at 9-10; Funeral Directors Br. at 10.

In any event, the hypothetical rationales that the Government and Defendants advance are not coherent on their own terms, much less sufficient to so thoroughly strip Plaintiffs' claims of plausibility that dismissal is warranted. The Government and Funeral Directors posit two legitimate government interests that A3840 supposedly serves: consumer protection and ensuring "fairness" between nonprofit and for-profit entities. There are simple answers to both that render dismissal inappropriate.

i. There is no rational consumer-protection justification at the 12(b)(6) stage because the Legislature would not have structured the Cemetery Act or A3840 the way they are structured if private religious cemeteries were a danger to consumers.

A3840 is not a rational means of advancing consumer protection, whether that interest is framed as a concern about grieving parishioners, Defs.' Br. at 12; Funeral Directors Br. at 13–15, or product tying, Defs.' Br. at 11; Funeral Directors Br. at 13–15. The Government and Funeral Directors contend that A3840 is rational by portraying it as an almost ministerial act of bringing private religious cemeteries into line with public, non-sectarian ones. Defs.' Br. at 16–18; Funeral Directors Br. at 13–15.

But this portrayal is entirely false. Private religious cemeteries are not now nor have they ever been subject to the Cemetery Act. The Legislature has deemed them, since time immemorial, completely trustworthy when it comes to handling the cemetery affairs of their parishioners. A3840, in other words, does not bring private religious cemeteries into line with anything. It simply identifies a single, specific provision of the Cemetery Act (among dozens) and selectively imposes it—and it alone—on private religious cemeteries through the Religious Corporations Law. Thus, after A3840 goes into effect, the Archdiocese will still be able to sell one cemetery plot or ten plots or five $40,000 community-mausoleum spaces (including outer covers that are the equivalent of headstones) to a parishioner without an iota of government

regulation or supervision. But the Archdiocese will not be able to sell a parishioner a $1,000 headstone because, according to the Government and Funeral Directors, perhaps, hypothetically, the Legislature is concerned that the Archdiocese will "exploit" its grieving parishioner (but *only* when it comes to headstones and vaults).

Rather than convey that the Legislature has ceased to trust private religious cemeteries with the cemetery affairs of their parishioners, A3840 underscores the opposite. The Legislature has conveyed in unambiguous terms that it has no concerns about consumer protection when it comes to private religious cemeteries. The Legislature drafted A3840 in the narrowest possible way to preserve the freedom of private religious cemeteries to the greatest degree possible while, under the allegations of the Complaint, appeasing the financial self-interest of headstone dealers and funeral directors. Indeed, the Legislature inserted A3840 into the Religious Corporations Law and not the Cemetery Act to emphasize that private religious cemeteries remain otherwise exempt from cemetery regulation.

The arbitrary nature of the consumer-protection justification is evident in the statutory distinction between community mausoleums, which are exempt from A3840, and monuments and vaults, which are not. A community-mausoleum space is the functional equivalent of a vault (resting place for the casket). The outer cover of a mausoleum space is the functional equivalent of a headstone (memorializes the dead). Why is it permissible for the Archdiocese to sell mausoleum spaces and their outer covers, but not vaults or monuments? Is it because one goes inside and one goes outside? No, because that would be irrational. The only *rational* explanation for this distinction is private economic protectionism, which is constitutionally illegitimate.

It is not *conceivable*, in other words, even under rational-basis review, that the Legislature enacted A3840 out of a hypothetical consumer-protection concern because that

imaginary concern cannot be rationally squared with a complete lack of consumer-protection concern in every other context.[7] It is no exaggeration to say that the consumer-protection argument of the Government and the Funeral Directors is the equivalent of someone saying: "I have had a weekly housekeeper for decades who has never stolen a thing, but I do not let her come over on Thursday because she looks like a thief and might rob me blind." The fact that A3840 is not, in light of the overall statutory scheme, rationally tailored to the advancement of consumer protection, compels recognition of the "more obvious illegitimate purpose to which [A3840] is very well tailored": private economic protectionism. *Craigmiles*, 312 F.3d at 228. Thus, while rational-basis review may be deferential and allow hypothetical justifications, the Court is not required to entertain conceptions of the legislative process that are literally irrational, particularly at the motion to dismiss stage.[8]

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[7] It is no answer for the Government and Funeral Directors to reply that perhaps the Legislature is regulating incrementally. Even incremental regulation must have some underlying indicia of rationality. The paradigmatic case about incremental regulation is the Supreme Court's decision in *New Orleans v. Dukes*, which concerned a ban on pushcart vending in the French Quarter, except for existing vendors who were grandfathered in but whose licenses would expire when they left the business or retired. 427 U.S. 297 (1976). New Orleans's decision not to ban all pushcart vending at once was part of a comprehensive scheme that balanced the legitimate interests of maintaining the French Quarter's historical character and the reliance interests of existing vendors. *Id.* at 304–05. Here, on the other hand, A3840 is not part of an incremental scheme to regulate private religious cemeteries, which are not now nor have they ever been subject to cemetery regulation. Instead, A3840 is tailored with mathematical precision to destroy the inscription-rights program without affecting any other aspect of the Archdiocese's operations (or the operations of any other private religious cemetery). There is no way to characterize that as some form of rationally incremental regulation.

[8] It is the truly *arbitrary* nature of the consumer-protection arguments advanced by the Government and Funeral Directors that requires denying the motions to dismiss. Plaintiffs recognize that it is insufficient merely to disagree with the legislature on a debatable point of public policy. *See, e.g.*, *Sammon*, 66 F.3d at 645. But that is not what Plaintiffs are doing. They are pointing out a fundamental incoherence in the asserted justifications for the law that make it *inconceivable* that a rational legislator would enact A3840 for legitimate reasons, rather than for the obvious actual and illegitimate purpose of protecting the financial interests of influential industry groups such as the headstone dealers and funeral directors.

The Legislature's decades-old refusal to subject private religious cemeteries to regulation, except in this one politically motivated instance, provides the answer to the misguided reliance of the Government and Funeral Directors on *Frank v. Clover Leaf Park Cemetery Ass'n*, 148 A.2d 488 (N.J. 1959), and *Terwilliger v. Graceland Memorial Park Ass'n*, 173 A.2d 33 (N.J. 1961). In those cases, the youngest of which is over 60 years old and the both of which predate the earliest version of the Cemetery Act, the New Jersey Supreme Court considered the sale of monuments by public, nonsectarian cemeteries. The Supreme Court was concerned about cemetery operators using their nonprofit status to conceal practices and ambitions consistent with those of a for-profit company. *Frank*, 148 A.2d at 492; *Terwilliger*, 173 A.2d at 36–37. To ensure that public, non-sectarian cemeteries did not become a clandestine vehicle for for-profit enterprises, the Supreme Court created a common-law rule forbidding public, nonsectarian cemeteries from selling monuments. *Terwilliger*, 173 A.2d at 37 (citing *Frank*). That rule did not extend to private religious cemeteries, and the Legislature—though codifying the rule of *Frank* and *Terwilliger* against public, nonsectarian cemeteries in the Cemetery Act of 1971—exempted private religious cemeteries from regulation altogether. In fact, the headstone dealers lost their lawsuit against the Archdiocese because neither *Frank* nor *Terwilliger* —nor the Cemetery Act in any of its versions—applies to private religious cemeteries. Compl. ¶¶ 149–50, 153; *Monument Builders of N.J., Inc. v. Roman Catholic Archdiocese of Newark*, No. C-124-13, 2015 WL 3843706 at *3 (N.J. Super. Ct. App. Div. June 23, 2015). Thus, there is nothing about *Frank* and *Terwilliger* that suggests that Plaintiffs have failed to state plausible claims as a private religious cemetery that is totally exempt from the Cemetery Act.[9]

[9] Defendants cite one Third Circuit funeral case, *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014),

ii. Asserting that it is "unfair" for the Archdiocese to sell headstones and monuments does not justify dismissal.

The inappositeness of *Frank* and *Terwilliger* also resolves the argument of the Government and Funeral Directors that the Legislature could have hypothetically enacted A3840 because it is unfair for a nonprofit with its tax status to sell the same product as a for-profit business. Setting aside the fact that this same scenario did not prevent the monks of Saint Joseph Abbey from *winning* their rational-basis case, the Government and Funeral Directors are simply recasting their invalid argument in favor of private economic protectionism as a "fairness" issue.

The bottom line is that dressing private economic protectionism in "fairness" clothing does not alter the fundamental truth that the "fairness" argument exists only because the headstone dealers and funeral directors stand to lose money. Nor does the "fairness" argument alter the fact that the practical effect of A3840 is to halt otherwise legal, peaceful, harmless, and productive commerce solely for the private financial benefit of headstone dealers and funeral directors. Again, and particularly at the motion-to-dismiss stage, the rational-basis test does not require the Court to entertain hypothetical justifications for A3840 that bear no rational connection to the reality described by the Complaint.

The Government makes an argument about how advancing competition is a legitimate government interest. While Plaintiffs do not dispute that promoting competition can be a

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for the proposition that funeral consumers can be vulnerable. Defs.' Br. at 11–13; Funeral Directors at 14–15. Although Defendants do not discuss it substantively, it bears emphasizing that *Heffner* does not support dismissal. First, it was decided at summary judgment for the plaintiffs (though reversed on appeal), not at the 12(b)(6) stage for the defendants, which indicates that challenges to the economic regulation of the funeral or cemetery industries should proceed past dismissal. Second, it is distinguishable on its facts. The primary issue in *Heffner* was whether a state-licensed funeral director could own and operate a funeral home through a restricted business corporation, rather than a general business corporation. *Heffner*, 745 F.3d at 63, 81–82. This complex question implicated the full range of goods and services that funeral homes provide the public, and bears no resemblance to whether New Jersey may prevent the Archdiocese from selling a monument or vault.

legitimate government interest when done for the public and not as a smokescreen for private economic protectionism, the Government's argument does not pass the minimal threshold for plausibility. For example, the Government suggests that the Legislature rationally banned the Archdiocese from selling monuments because it is possible for criminals to enter into a conspiracy to sell them in violation of state and federal antitrust law. *See* Defs.' Br. at 12–14.

But that is true of *literally everything*, from cars to lightbulbs to toothbrushes to…everything else. The mere possibility that it is possible to sell something in violation of antitrust law (or any other law) is not a rational reason to ban someone from selling something. This argument is the equivalent of the private economic protectionism argument that failed in *Metropolitan Life*. If an asserted justification for a regulation could apply to virtually every regulation, then it is tantamount to the principle that *the government always wins*, and that is not a valid constitutional argument. It is this sort of free-floating speculation that the Fifth Circuit had in mind in the *Saint Joseph Abbey* case when it emphasized that "hypothesized ends" cannot be an "abstraction." 712 F.3d at 223.

When examined with a little context, it becomes evident that there is no competition concern that warrants dismissal here. The Complaint makes clear that parishioners are not compelled to use the inscription-rights program and that those who have, such as Plaintiffs Mazza and Flynn, love it. *See* Compl. ¶¶ 63, 71, 186–87, 189, 194–95. Furthermore, the case that the Government most relies on, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993), is totally distinguishable on its facts (not to mention being a case that was not dismissed). As the Government's block-quote makes clear, the challenged regulation in *Beach Communications* was deemed a rational regulation of competition because it concerned distribution of a TV signal, which could be reproduced endlessly by the first one to obtain it for the cost of a few wires to

hook up each residence. Defs.' Br. at 22–23 (quoting *Beach Commc'ns*, 508 U.S. at 319–20). Cemetery monuments and vaults are tangible things, not something that can be reproduced infinitely and instantaneously by the first entrant. Thus, the motions to dismiss should be denied to the extent that the Government and Funeral Directors are raising competition concerns.

II. THE MOTIONS TO DISMISS THE CONTRACTS CLAUSE CLAIM SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE PLAUSIBLY ESTABLISHED THAT THE CONTRACTS CLAUSE DOES NOT ALLOW NEW JERSEY TO IMPAIR THE INSCRIPTION-RIGHTS CONTRACTS FOR THE ILLEGITIMATE PURPOSE OF PRIVATE ECONOMIC PROTECTIONISM.

The motions to dismiss Plaintiffs' Contracts Clause claim should be denied. A viable Contracts Clause claim must allege facts that plausibly satisfy the Supreme Court's three-prong test: (1) substantial impairment of a valid contract; (2) the absence of a "significant and legitimate public purpose, such as the remedying of a broad and general social or economic problem"; and (3) the failure of the impairment to be reasonable based on the legislature's purpose. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–12 (1983). Plaintiffs have stated claims here because: (1) A3840 substantially impairs over 600 inscription-rights contracts by forbidding the future ownership, inscription, creation, provision, or conveyance of headstones and private family mausoleums; (2) there is no reasonable necessity for A3840, which targets the Archdiocese specifically rather than a broad and general economic problem; and (3) the adjustment of the parties' rights is not based "upon reasonable conditions and [is not] of a character appropriate to [the legislature's] public purpose." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987).

The Government and Funeral Directors' primary response is that there is no substantial impairment because A3840 can be read, contrary to its plain language, not to apply to existing inscription-rights contracts. Defs.' Br. at 23, 25–26; Funeral Directors Br. at 18–19. But even if

the Government and Funeral Directors are correct about how to read A3840 to avoid the constitutional question, the Court must make it clear in its Order that A3840 does not apply to the existing inscription-rights contracts in order for Plaintiffs have an enforceable judgment upon which to rely in the future.

A. The Allegations of the Complaint Plead a Violation of the Contracts Clause Because They Describe the Impairment of Over 600 Contracts for Private Financial Benefit, Not a Legitimate Public Purpose.

A Contracts Clause claim has three elements: (1) impairment of a valid contract; (2) the absence of a legitimate public purpose related to a broad and general social or economic goal; and (3) a showing that the adjustment of contractual rights is not reasonable under the circumstances. *Energy Reserves*, 459 U.S. at 411–12. The degree of scrutiny that courts apply to a Contracts Clause claim is not fixed. Instead, "the severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). A "[s]evere impairment . . .will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id.* Furthermore, when a disruption is severe, the government cannot rest on hypotheses, but must instead make an evidentiary "showing in the record . . . that this severe disruption of contractual expectations was necessary to meet an important general social problem." *Id.* at 247. Finally, courts are particularly skeptical when legislation, as a practical matter, narrowly targets a small number of entities—as opposed to a general social or economic issue—and does so by "invad[ing] an area never before subject to regulation by the state." *Id.* at 250.

The Complaint sets forth a plausible claim under the Contracts Clause. First, the impairment of the inscription-rights contracts is not just severe, but total. A3840 expressly forbids a religious cemetery from owning, inscribing, creating, providing, or conveying

headstones and private mausoleums. N.J. Stat. Ann. § 16:1-7.1(a). There is literally nothing left of the inscription-rights contracts, which is not surprising given that the Legislature enacted A3840 for the specific purpose of destroying the inscription-rights program. Compl. ¶¶ 155, 171, 217.

Second, under the allegations of the Complaint, there is no legitimate public purpose for A3840. As the Supreme Court explained in *Allied Structural Steel*, the severe impairment of the inscription-rights contracts requires this Court to undertake a "careful examination of the nature and purpose of the state legislation." 438 U.S. at 245. According to the Complaint, the actual nature and purpose of A3840 is the destruction of the inscription-rights program for the private financial benefit of headstone dealers. Compl. ¶¶ 155–56, 170–71. Not only is private economic protectionism not a legitimate government purpose, but the Contracts Clause was intended to prevent politically connected insiders from using political power to interfere with valid contracts for their own financial gain. *Energy Reserves*, 459 U.S. at 412; *Allied Structural Steel*, 438 U.S. at 247–48 & n.20. In *Energy Reserves*, for example, the Supreme Court emphasized that the "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 459 U.S. at 412.

The absence of a legitimate public purpose addressing a broad social or economic problem is evident in the fact that, under the allegations of the Complaint, A3840 is special-interest legislation enacted to confer an economic benefit on headstone dealers and funeral directors. The special-interest character of A3840 is further evident in the fact that the Legislature passed the law to target the Archdiocese in an area never before subject to regulation—the operation of private religious cemeteries that serve only their parishioners. The

targeted, parochial nature of A3840 in an area never before regulated represents exactly the set of facts that both the Supreme Court and Third Circuit have found to violate the Contracts Clause.

The leading Supreme Court precedent is *Allied Structural Steel*. In that case, Minnesota enacted a law regulating company pension plans of particular types of companies that had not been so regulated before. The Supreme Court concluded that this law, which affected only companies with pension plans and a specific number of employees, had a "narrow aim" that was "leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees." *Allied Structural Steel*, 438 U.S. at 250. That is materially similar to the situation here: New Jersey has imposed a regulation on private religious cemeteries for the first time that, as a practical matter, targets a single entity—the Archdiocese, the only operator of private religious cemeteries that dared to compete with headstone dealers by offering a superior combination of price and service. "Thus, [A3840] can hardly be characterized…as one enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248–49.

The narrow, special-interest nature of A3840 is also reflected in the fact that it was a response to a lawsuit between private parties. In *Nieves v. Hess Oil Virgin Islands Corp.*, the Third Circuit considered a workmen's-compensation statute that the Virgin Islands enacted after certain claims were resolved against some workers while other claims by other workers remained pending. 819 F.2d 1237, 1239–41 (3d Cir. 1987). The Third Circuit concluded that the targeted nature of the statute distinguished that case from various others in which a statute of broad general applicability—such as sales to public utilities in *Energy Reserves*—was a justifying public purpose. *Id.* at 1250. Here, as in *Nieves*, the New Jersey Legislature enacted A3840 at the

behest of the headstone dealers while their lawsuit against the Archdiocese was still pending in order to ensure that, regardless of their lawsuit's outcome, they would remain insulated from competition. The Appellate Division decision in their case was rendered after Governor Christie signed A3840. Compl. ¶¶ 153, 181; *Monument Builders of N.J.*, 2015 WL 3843706.

Finally, Plaintiffs have satisfied the third element of the Contracts Clause test as well: the reasonableness of the impairment in light of the legitimate purpose. Given that there is no legitimate actual purpose to A3840—and not even a hypothetical rationale for it, even if such hypotheses were permissible under the appropriate Contracts Clause analysis here (which they are not)—then any adjustment of the contractual rights of the parties cannot be reasonable, much less the total destruction of the parties' rights.

The Government offers a one-paragraph argument that it satisfies the legitimate-public-purpose prong of Contracts Clause doctrine by reiterating the justifications it asserted in its rational-basis arguments. Defs.' Br. at 28–29. The thrust of the Government's argument here is that the rational-basis test is also the standard for evaluating a Contracts Clause claim. While it is true that courts ordinarily "defer to the legislature's judgment concerning the necessity and reasonableness of economic and social legislation," that deference diminishes, for the reasons described above, when there is serious reason to believe that the legislation is merely special-interest politics. *Nieves*, 819 F.2d at 1249. As the Third Circuit put it in *Nieves*, legislation "aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes." *Id.*

In short, the Complaint satisfies the elements of a viable Contracts Clause claim. There is total impairment, the absence of a legitimate purpose, and hence the impairment is unreasonable. The Government's only counterargument (the Funeral Directors make none at all) is that the

Government prevails here for the same reason it supposedly prevails in the rational-basis context. Not only is this wrong because the Government has not established that dismissal is warranted in the rational-basis context, it is also wrong because under the allegations of the Complaint the Court has to be more skeptical than it might otherwise be. Thus, the motions to dismiss the Contracts Clause claim should be denied.

B. If the Inscription-Rights Contracts Are Enforceable Because the Statute Does Not Apply, Then the Court Should Make That Clear in Its Order.

The Government and Funeral Directors argue that the Contracts Clause claim can be avoided by interpreting A3840 as having solely prospective effect. Defs.' Br. at 24–25; Funeral Directors Br. at 18–19. They rely on cases indicating that statutes are generally interpreted as having prospective, rather than retroactive, effect, particularly when it comes to real property. Defs.' Br. at 25. Thus, the Government and Funeral Directors reason that A3840 does not apply to contracts formed prior to the date of the statute's passage, which is March 23, 2015.

The doctrine of constitutional avoidance does not apply, however, when the plain language is not susceptible of an interpretation that avoids the constitutional problem. *Gonzales v. Carhart*, 550 U.S. 124, 154 (2007) ("[T]he canon of constitutional avoidance does not apply if a statute is not 'genuinely susceptible to two constructions.'") (quoting *Almendarez–Torres v. United States*, 523 U.S. 224, 238 (1998))). As the Complaint makes clear, the constitutional problem here is the *prospective* effect of the statute on an existing contract. The Archdiocese is concerned about the legality of continuing to own existing monuments pursuant to the inscription-rights contract when the statute, which does not contain a grandfather clause, expressly forbids such ownership as of March 23, 2016. Compl. ¶¶ 208, 213–14; N.J. Stat. Ann. § 16:1-7.1(a)(1), (3) (a private religious cemetery is prohibited from engaging, directly or indirectly, in "(1) the ownership . . . of memorials" and "(3) the ownership . . . of a mausoleum

intended for private use.”). In addition, the statute forbids the Archdiocese from taking future actions to fulfill its contractual obligations such as inscribing and installing monuments when it becomes necessary to replace ones due to aging or damage. Compl. ¶ 215; N.J. Stat. Ann. § 16:1-7.1(a)(1), (3) (private religious cemetery is prohibited from engaging, directly or indirectly, in the “manufacture, installation, sale, creation, inscription, provision or conveyance, in any form, of memorials” and the “manufacture, installation, sale, creation, provision or conveyance, in any form, of a mausoleum intended for private use.”). Plaintiffs Mazza and Flynn have the exact same concerns about the legality of the obligations under their inscription-rights contracts. Compl. ¶¶ 220–25. According to the Complaint, it is inevitable that the Archdiocese will have to *do things in the future* that the plain language of the statute flatly forbids, such as replace the Mazza family mausoleum or the headstone of Plaintiff Flynn’s son. *See* Compl. ¶ 130. Thus, the doctrine of constitutional avoidance is inapplicable.

If the Court disagrees, however, Plaintiffs respectfully ask the Court to make it clear in its Order that A3840 does not apply so that Plaintiffs have an enforceable judgment on which to rely in the future.

CONCLUSION

For the foregoing reasons, the motions to dismiss should be denied.[10]

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[10] Plaintiffs concede that the Privileges or Immunities claim should be dismissed under the *Slaughter-House Cases*, 83 U.S. 36 (1872). They raise this claim to preserve it on appeal.

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Dated: October 19, 2015

CERTIFICATE OF SERVICE

I certify that on October 19, 2015, this document—Plaintiffs' Response to Defendants' Motion to Dismiss—was served on the following attorneys using the Court's CM/ECF system:

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