STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY
Branch #6

E. GLEN PORTER III and
HIGHLAND MEMORIAL PARK, INC.,

Plaintiffs,

and **Case No. 14-CV-1763**

SUMMARY JUDGMENT MOTION

STATE OF WISCONSIN, DAVE ROSS
and WISCONSIN FUNERAL DIRECTORS
EXAMINING BOARD,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Date of hearing: **June 20, 2016**

HONORABLE PATRICK C. HAUGHNEY,
Circuit Court Judge, Presiding.

Christine L. Grauer,
Court Reporter.

APPEARANCES:

MR. RICHARD M. ESENBERG and **MR. MICHAEL FISCHER,** Wisconsin Institute for Law & Liberty, Attorneys at Law, appearing on behalf of the Plaintiffs.

MS. KARLA Z. KECKHAVER and **MR. CLAYTON P. KAWSKI,** Assistant Attorney Generals for the State of Wisconsin, appearing on behalf of the Defendants.

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1 **TRANSCRIPT OF PROCEEDINGS**
2 (Proceedings began at 10:15 a.m. on June 20, 2016.)
3 THE COURT: The court will call the matter in
4 regards to Porter vs. State of Wisconsin. This is
5 14-CV-1763. Could we have the appearances, please?
6 MS. KECKHAVER: Good morning, your Honor.
7 Assistant Attorney General Karla Keckhaver and Clayton
8 Kawski for the defendants.
9 MR. ESENBERG: Your Honor, Richard Esenberg
10 and the firm of Wisconsin Institute for Law and Liberty
11 representing the plaintiffs Glenn Porter and Highland
12 Memorial Park. My colleague, Michael Fischer, is at counsel
13 table with me.
14 MR. FISCHER: Good morning, your Honor.
15 THE COURT: Good morning everyone. We are
16 here today for oral arguments following the filing of
17 briefs. Apparently while I was out on medical leave, I
18 think one of the judges in my absence acquiesced to your
19 filing supplemental briefs. Do I have that right or wrong?
20 MS. KECKHAVER: That's incorrect.
21 THE COURT: Okay. Certainly there's been
22 a volume of paperwork filed, I don't know if I'm supposed
23 to thank you or not thank you for that, Counsel. I'm
24 glad you're smiling. We'll go ahead and begin with the
25 plaintiff.

1 MR. ESENBERG: Well, your Honor, we're here
2 on the --
3 THE COURT: Opposition.
4 MR. ESENBERG: Defendant's motion for summary
5 judgment. I'm happy to speak to that.
6 THE COURT: Why don't you go ahead and do
7 that. Well, let me ask both of you. How do you want --
8 what's the order you want to take? Sometimes I make people
9 argue both sides, other times people want to respond to each
10 other. What's the preference?
11 MS. KECKHAVER: I think since it's our
12 motion, I'd like to argue first, and then after Mr. Esenberg
13 argues have a short response.
14 THE COURT: Does that work?
15 MR. ESENBERG: That's fine with me.
16 THE COURT: It's fine with the court.
17 MS. KECKHAVER: All right. Thank you, your
18 Honor.
19 Wisconsin's anti-combination laws which
20 are at issue here preserve competition and protect Wisconsin
21 consumers during their time of need. The plaintiffs are
22 asking the court to get rid of those laws even though the
23 legislature has refused to do that on three separate
24 occasions.
25 The court's role here is limited. You

1 must uphold the law if it's rationally related to a
2 legitimate state interest, and the anti-combo laws here
3 easily meet that test, so we're asking this court to grant
4 summary judgment in favor of the defendants.
5 I want to talk a little bit first about
6 the legal test at issue here. The test under federal law is
7 traditional rational basis scrutiny. The plaintiffs are
8 asking for a more evidence-based test, where the court can
9 consider evidence and empirical data, but the US Supreme
10 Court has never used that test for an economic regulation
11 like the ones at issue here. And under traditional rational
12 basis scrutiny, that test does not involve the taking of
13 evidence and the state doesn't have to show that they're the
14 concerns that actually motivated the legislature or the
15 concerns will actually happen. It's enough that there's any
16 conceivable rational basis for the law.
17 Under state law, the test is still
18 traditional rational basis scrutiny. Again, the plaintiffs
19 are asking for a different test. They want rational basis
20 with teeth or rational basis with bite, which is another
21 more evidence-based test. But that test is the exception
22 not the rule, and it's rarely applied in Wisconsin. In
23 fact, in more recent cases, the Wisconsin Supreme Court has
24 applied traditional rational basis scrutiny. So in *Madison*
25 *Teachers, Inc. vs. Walker*, the case that upheld Act 10, the

1 Wisconsin Supreme Court applied traditional rational basis
2 scrutiny as set forth in federal law and even cited *FCC vs.*
3 *Beach Communications*.
4 So I want to talk about two other cases
5 from different jurisdictions. In Michigan and
6 Massachusetts, courts upheld anti-combo laws that are very
7 similar to Wisconsin's. So these cases are *Deepdale*
8 *Memorial Gardens* and *Blue Hills Cemetery*. There the courts
9 applied traditional rational basis scrutiny and upheld the
10 anti-combo laws against equal protection and due process
11 challenges, just like this case. The courts held that the
12 laws were rationally related to legitimate state interests
13 in preserving competition and protecting consumers from poor
14 service. So the test under both state and federal law is
15 traditional rational basis scrutiny.
16 The state has set forth a number of
17 interests advanced by the anti-combo laws. They're set
18 forth on page 13 of our brief, and they're also discussed in
19 detail in the expert report of Dr. Jeffrey Sundberg and in
20 the state's other submissions. I want to talk briefly about
21 three of those state interests.
22 The first is that the anti-combo laws
23 preserve competition or have the potential to preserve
24 competition and protect Wisconsin consumers from high
25 prices. Dr. Sundberg, our expert, in his report --

1 THE COURT: Just one second, Counsel. For
2 the sake of my reporter, it's anti-combo, which is A N T I -
3 C O M B O. Does that help?
4 THE REPORTER: Thank you.
5 THE COURT: I forgot you didn't have the
6 brief. Go ahead, Counsel.
7 MS. KECKHAVER: So Dr. Sundberg discussed how
8 combo firms have the potential to foreclose competitors by
9 restricting their access to the cemetery, to a cemetery.
10 And he opined that while this might lower prices in the
11 short term, in the long-term it could result in the combo
12 firms gaining a greater market share and forcing competitors
13 out and then eventually raising prices. And as your Honor
14 knows, it's undisputed in the record that consumers spend
15 considerably more at combo firms than they do at non-combo
16 firms. In fact, it's on average 41 percent more.
17 The second interest I want to discuss is
18 that the anti-combo laws protect consumers from poor
19 service. Dr. Sundberg and funeral director Mary Lou
20 Charapata provided a number of examples of how a large combo
21 firm could reduce the quality of personal service and
22 increase the potential that consumers would be taken
23 advantage of.
24 Finally, the anti-combo laws have the
25 potential to reduce the abuses or reduce possible abuses in

1 the industry. Dr. Sundberg talked about how -- and a number
2 of our other submissions talked about how combo firms could
3 funnel business through the cemetery side of the operation
4 in order to avoid consumer friendly state and federal laws
5 that apply only to funeral homes.
6 So these are just a few of the interests
7 advanced by the combo laws. We don't have to show that
8 these concerns were what actually motivated the legislature
9 or that these concerns will actually happen, it's enough
10 that the concerns are rational.
11 So the Wisconsin legislature has already
12 weighed the benefits and burdens of the anti-combo laws, and
13 it's not this court's role to second guess that decision.
14 It's enough that there's -- that any rational basis can be
15 hypothesized, and we don't have to show proof. Here, the
16 plaintiffs cannot show that there's -- that the anti-combo
17 laws are completely irrational. So we ask this court to
18 uphold the anti-combo laws and grant summary judgment in
19 favor of the defendants.
20 THE COURT: Thank you, Counsel. Response
21 from the other side?
22 MR. ESENBERG: Thank you, your Honor.
23 I'm here on behalf of Mr. Porter and
24 Highland Memorial Park. We hear about the spectre of large
25 death care conglomerates coming into Wisconsin if we don't

1 have an anti-combination law. Mr. Porter is not that.
2 Mr. Porter and Highland Memorial Park are a family business,
3 he has been in this business for several generations, and he
4 and other similarly situated family cemeteries find
5 themselves in a very, very difficult situation. The State
6 of Wisconsin has substantially impaired their right to
7 conduct business and earn a living. It has systematically
8 favored one set of competitors, funeral home directors, over
9 them. Each of the plaintiffs -- or Mr. Porter is in the
10 cemetery business. State regulation has placed funeral home
11 directors between them and their potential customers.
12 Only a licensed funeral home director
13 can embalm a body. Even if a family wishes to skip this
14 service, only a licensed funeral home director can transport
15 the body on behalf of the family to the place of final
16 disposition. This makes it almost certain that funeral home
17 directors will be the first point of contact for bereaved
18 families.
19 Now, whatever the merits of these
20 regulations and advantages that funeral home directors have,
21 Mr. Porter wants to take advantage of them. He wants to
22 comply with them. He wants to become a licensed funeral
23 home director, and he will go through whatever steps the
24 state reasonably says are necessary for him to do so. He's
25 willing to comply with whatever reasonable health and

1 consumer protection regulations that the state might impose
2 on licensed funeral home directors. But unlike every other
3 citizen in the State of Wisconsin, Mr. Porter can't do that.
4 He can't improve his business, he can't earn a living,
5 because he's also in the cemetery business.
6 It is ironically this denial of equal
7 protection and impairment of liberty that forecloses
8 competition in the death care industry. It leaves licensed
9 funeral home directors in a privileged position and protects
10 them from the most likely source of competition; i.e., those
11 who are already in the industry operating cemeteries. It
12 denies all citizens of the State of Wisconsin, businesses
13 like the plaintiffs', the right to supply something that
14 they may wish to provide, a full panoply of death care
15 services. It denies all citizens of the State of Wisconsin
16 something that they may wish to purchase; that is, one stop
17 shopping for funeral services and cemetery services should
18 they desire them. And it does so for one reason and one
19 reason only. To protect a politically powerful special
20 interest. We know this because of the history of the law.
21 It was proposed and drafted by the funeral home industry in
22 response to the rise of combination laws. And we know it
23 because of the extraordinary weaknesses of the
24 justifications offered by the state here.
25 It is no coincidence, your Honor, that

1 this law, supposedly evenhanded, is uniformly supported by
2 funeral home directors and uniformly opposed by cemeteries.
3 Now, to justify this, the state raises
4 the spectre of something it calls foreclosure, a process by
5 which the death care industry will be taken over by large
6 providers who will somehow drive out mom and pop operations.
7 Let's put aside for a moment whether reducing the size of
8 competitors is a legitimate state interest. There are at
9 least three problems with this positive justification.
10 First, as Dr. Harrington points out --
11 and incidentally, Dr. Harrington is the only expert here
12 who's actually studied the death care industry, Dr. Sundberg
13 has not. As Dr. Harrington points out, the circumstances
14 for foreclosure are not present here, because even if large
15 operators swooped into Wisconsin and managed to drive out
16 mom and pop operations, when they subsequently raise their
17 prices, there are no barriers to entry, other competitors
18 can come in. Cemeteries do not have the power to tie the
19 purchase of cemetery land to the purchase of other funeral
20 services, because the demand for cemetery land has fallen
21 through the floor. Cemeteries can't sell the cemetery land
22 that they have because most consumers, quite frankly, don't
23 buy cemetery land. They choose cremation.
24 Second, even if this process occurred,
25 this process of predatory prices and tying, it would already

1 be illegal under Wisconsin law and under the federal
2 anti-trust laws. So in other words, we have something here
3 that isn't likely to happen given economic theory, and it
4 would be illegal for competitors to attempt to do that.
5 The law, moreover, is both radically
6 over-inclusive and radically under-inclusive. If the fear
7 here is that large operators will come in and drive out mom
8 and pop operations, the anti-combination law does not to
9 further that interest. It does not, it's radically
10 under-inclusive because it places no limits on the size and
11 consolidation of funeral homes, a big death firm can come in
12 and purchase every funeral home in the state and the
13 anti-combination law would have nothing to say about it.
14 And it's radically over-inclusive because it prohibits small
15 family operations like Mr. Porter from entering the funeral
16 home business.
17 But apart from the fact that economic
18 theory suggests that this won't happen, apart from the fact
19 that it would be illegal for anybody to try to do it, we
20 have here the gold standard in social science. We have a
21 real live experiment. Because we know that 39 states permit
22 combination funeral homes, and the state is unable to point
23 to one instance, in one of these states, at any time in
24 which the foreclosure that it fears has happened. You'd
25 think that if a law had a rational basis, if it had some

1 real and substantial relationship to a legitimate state
2 interest, that we would be able to find one instance, in one
3 place, at one time where the thing that is feared has
4 happened. And the fact of the matter is, that it has not.
5 Now, the state's expert says, well,
6 nobody could really know whether that happens, but I don't
7 know why that is. In anti-trust laws we measure the degree
8 of concentration and competition in the market all the time.
9 Dr. Harrington did that. He came to the conclusion that
10 combination firms approximate about 3 1/2 percent of funeral
11 homes nationally and about 18 percent of funeral homes in
12 counties which have at least one combination firm. Hardly
13 enough to result in the foreclosure.
14 The state says, well, you know, there is
15 some evidence that consumers pay 40 percent more at
16 combination firms, but that doesn't mean the prices are
17 higher. That simply means the combination firms tend to
18 occupy the high end of the market. You know, if you go to a
19 Mercedes dealer or you go to a Lexus dealer and you buy
20 high-end merchandise, you're going to spend more than if you
21 go to a Kia dealer, but that doesn't mean there's been
22 foreclosure or lack of competition. In fact, the statistic
23 which is cited by the state proves just the opposite. If,
24 in fact, we can say that consumers spend 40 percent more at
25 combination firms than they do at stand-alone firms, it must

1 be the case that stand-alone firms continue to exist. So
2 the foreclosure that they fear has not happened as the very
3 statistic that they cite to support it demonstrates. And as
4 Dr. Sundberg -- or as Dr. Harrington pointed out, for
5 consumers to drive past stand-alone funeral homes in order
6 to do business at combination firms, presumably they do so
7 because they want what is on offer.
8 So we have a situation here where the
9 principle justification, and I'll talk about some of the
10 others in a moment, but the principle justification offered
11 by the state is something which economics tells us won't
12 happen, it would be illegal to try to do, and all the extant
13 evidence in the real world says hasn't happened, and yet the
14 state claims they should win anyway. And they say they
15 should win anyway because they're offering here an extremely
16 radical view of what rational basis scrutiny is. It is not
17 an exaggeration for me to say that the state has argued to
18 this court that they ought to win the case as long as we
19 can't show that the justification that they offer is
20 absolutely impossible. In other words, they win, they say,
21 as long as the justification doesn't somehow defy the laws
22 of physics. That's not rational basis scrutiny. It's not
23 rational basis scrutiny in federal court, and it's not
24 rational basis scrutiny under Wisconsin law, and
25 particularly is not rational basis scrutiny when the

1 allegation is that the right to earn a living, something
2 that the Wisconsin Supreme Court for the last 160 years has
3 said is very, very important and requires careful
4 protection, is said to have been impaired and when the
5 allegation is that the state is favoring one set of
6 competitors at the expense of others, something that the
7 Wisconsin Supreme Court and federal courts have said should
8 be treated with some type of suspicion and requires careful
9 examination.
10 Now, the state says, well, you know, the
11 federal courts have never considered evidence. They have
12 never considered evidence in passing upon a rational basis
13 case, and that's simply not true. We cited a number of them
14 in our brief where federal courts, including the United
15 States Supreme Court, has done that.
16 State says, well, it hasn't done it in
17 economic regulation cases. That's not true either. In the
18 case of *Metropolitan Life Insurance vs. Ward*, the court
19 actually remanded to the lower courts for the taking of
20 evidence on whether or not a law that protected one part of
21 the insurance industry against other parts of the insurance
22 industry could be justified. And Justice Kennedy remarked
23 in a different context, he said: A court confronted with a
24 plausible accusation of impermissible favoritism to private
25 parties ought to treat the objection as a serious one and

1 review the record to see if it has merit.

2 And if we look at -- you can find pull

3 quotes that say the federal courts won't do that, but if you

4 look at what federal courts actually do, you'll find that,

5 in fact, they do look carefully at economic regulation

6 cases, they do look carefully at the positive justification

7 and rational basis cases.

8 We quoted an article from Timothy

9 Sandefur, relying on the work of Robert McNamara and Clark

10 Neily found that before the Supreme Court since 1970,

11 plaintiffs who won about 20 percent, almost 20 percent of

12 rational basis cases. If the standard of review that's

13 offered by the state here was the accurate standard of

14 review, then plaintiffs wouldn't win any of those cases,

15 because certainly in those cases the justification posited

16 by the state was not impossible.

17 We've seen that both the Fifth Circuit

18 and the Sixth Circuit, in cases similar to these cases in

19 which there was an attempt to protect consumers from

20 supposed abuses in the death care industry, has struck down

21 laws favoring licensed funeral directors and has done so by

22 carefully examining rationales and justifications very

23 similar to those offered by the state here. Those are the

24 *St. Joseph Abbey* and the *Craigmiles* case, which are

25 discussed on pages nine and ten of our brief.

1 In response to that, the state has cited
2 to the *Powers* case, a Tenth Circuit case, which disagrees
3 with the *Craigmiles* case. But the *Powers* case disagreed
4 with *Craigmiles* in part because *Craigmiles* said that
5 favoring one class of competitors over another was a
6 legitimate state interest. That might be the law in the
7 Tenth Circuit, but it's not the law, as we're about to
8 speak, in the State of Wisconsin.
9 Here in Wisconsin -- here in Wisconsin
10 there's a long line of cases which have recognized the
11 importance of protecting the right to earn a living,
12 starting with the *Maxwell vs. Reed* case in 1859, continuing
13 to *Jelke* in 1924 and the *Dairy Queen* case in 1954 and *Grand*
14 *Bazaar* in 1982, in which the courts have engaged -- they
15 have taken evidence, they have considered evidence -- they
16 have engaged in real and careful scrutiny of supposed
17 justifications of economic regulation, particularly where
18 what was happening was favoring one set of competitors over
19 another. In the *Jelke* case it was banning the sale of
20 oleomargarine. In the *Dairy Queen* case it was placing a
21 burden on the sale of an alternate ice cream product that
22 was called Dairy Queen. In the *Grand Bazaar* case it was
23 limiting the ability of grocery stores to sell liquor in
24 competition with liquor stores, kind of an anti-combination
25 law, if you will.

1 In 2005, in the *Ferdon* case, the
2 Wisconsin Supreme Court reiterated that rational basis
3 scrutiny is not toothless and courts have to insist on an --
4 there has to be an objective basis to believe that there's a
5 real and substantial connection between the law that is
6 being challenged and the objectives that it is said to
7 achieve.
8 Now, the state has had a little bit of
9 fun in its reply brief, it argues that *Ferdon* is somehow an
10 outlier, that it shouldn't be followed, that this court
11 should disregard it. But this court can't disregard *Ferdon*,
12 and it can't disregard *Ferdon* even if I happened to
13 criticize it at the time that it came out. I'm very
14 attached to my opinions, but I can't make *Ferdon* go away any
15 more than a lower court would. I could explain why I think
16 the criticisms I made of *Ferdon* are not apposite here. I
17 think the *Ferdon* court actually afforded more than
18 rational -- more than the type of scrutiny that we are
19 calling for here. It went on for pages and pages and 79
20 paragraphs, and it resolved contested issues of fact in
21 order to come to the result it did.
22 But the fact of the matter is that
23 *Ferdon* reiterates, as these other cases have told us, that
24 real scrutiny is in order here. And we saw that most
25 recently in the circuit court for Milwaukee County, where

1 plaintiffs challenged a Milwaukee County ordinance which
2 limited the amount of taxicab medallions that were
3 available. Another restriction on the right to earn a
4 living. And Judge Jane Carroll took evidence. She engaged
5 in a careful examination of whether or not there actually
6 was a relationship between the ordinance in question and the
7 objective that it was attempting to achieve. And she
8 concluded that, in fact, there was not, and we cite and
9 discussed that case at pages 17 and 18 of our brief.
10 I want to address for a moment the
11 state's position that, well, if when we're relying on these
12 Wisconsin cases, you should somehow ignore *Jelke*, you should
13 ignore *Dairy Queen*, because the federal cases are what
14 counts, even though we've made claims under both the federal
15 and the state constitution, because they can find cases
16 which say that, well, you know, the Wisconsin Supreme Court
17 interprets the 14th Amendment in the same way as it
18 interprets Article 1, Section 1 of the Wisconsin
19 Constitution.
20 I think that argument is misplaced here
21 for a couple of reasons. First, it is misplaced because
22 even if the Wisconsin Supreme Court actually interprets
23 these provisions in these cognate provisions in lockstep,
24 this court nevertheless has to treat the precedent that's
25 been established by the Wisconsin Supreme Court as binding

1 in interpreting both the 14th Amendment and Article 1,
2 Section 1 of the state constitution. And as we've seen,
3 federal courts actually do take a closer look at these
4 regulations, and certainly the Wisconsin Supreme Court has
5 done so through the years.
6 Second, as we pointed out in our brief,
7 that line of cases within the federal system which adopt a
8 very differential view to economic regulation are rooted in
9 the *Nebbia* and *Carolene Products* cases. In *Dairy Queen*, the
10 Wisconsin Supreme Court explicitly said that it was not
11 following *Carolene Products* in cases like this. And we've
12 seen that both in the outcome in *Dairy Queen Products* (sic)
13 and the *Grand Bazaar* case, and it was reiterated most
14 recently in the *Ferdon* case. The *Ferdon* case, as I said
15 before, is not an outlier. In fact, the *Ferdon* case says
16 the same things, uses the same pull quotes that the state
17 relies on here. At paragraph 68 of the *Ferdon* decision the
18 court said, yeah, there's a strong presumption of
19 constitutionality and you have to prove unconstitutionality
20 beyond a reasonable doubt, but in the court's view that did
21 not foreclose a more careful examination of the posited
22 interests.
23 So I would have to say that in this
24 case, we're not asking this court to substitute its judgment
25 for that of the Wisconsin legislature, we're not asking this

1 court to apply strict scrutiny, but we're asking this court
2 to apply real scrutiny. And we have to remember that the
3 case comes before this court in the context of the summary
4 judgment motion, and I think that this record taken as a
5 whole, establishes that the justifications offered by the
6 state are extraordinarily weak. The foreclosure
7 justification is extraordinarily weak, the justification
8 that there somehow will be commingling of funds misstates
9 and misunderstands Wisconsin law. Both funeral homes,
10 because the argument the state is making is, well, they're
11 different trusting requirements and, you know, sometimes you
12 have to put aside X percent of the amount of product you
13 sell because the product will be delivered in the future
14 when someone dies, and in other instances you have to put
15 aside a higher percentage. Maybe even sometimes one hundred
16 percent of the cost of the product until such time as the
17 service is required.
18 But that -- those different trusting
19 requirements don't turn on whether a cemetery or a funeral
20 home sells the product. They turn on what the product is.
21 And so that situation where sellers have different trusting
22 requirements and could, I suppose, if they wanted to ignore
23 the law, try to shift the cost of goods from something where
24 there's a high trusting requirement to something where
25 there's a low trusting requirement, that exists today. The

1 anti-combination law doesn't have anything to do with that.
2 The state says, well, you know, this
3 furthers consumer protection, because there are some
4 additional consumer protections that apply to funeral homes
5 that don't apply to cemeteries.
6 It's a little ironic that the state
7 would offer that justification since the funeral home
8 industry is about the only industry that I know of that
9 hasn't had to have a special FTC rule adopted because of the
10 way it was abusing consumers; but putting that aside for a
11 moment, those regulations turn not on whether someone is a
12 licensed funeral home director or a cemetery but what
13 services and products they sell.
14 And as I said at the outset of this
15 case, Mr. Porter warrants to become a licensed funeral home
16 director. He wants to do that so he can fully compete in
17 the market place and not be placed at a disadvantage. If he
18 does that, he will be subject to all the rules the funeral
19 directors are subject to. That justification simply does
20 not work.
21 The argument that somehow small firms
22 provide better service is an argument that, I think as Dr.
23 Harrington points out, has absolutely no basis in economic
24 theory or economic experience. I think most of us think
25 that we get pretty good service when we go to the Apple

1 store, perhaps not so much when we go to a mom and pop
2 store, it really depends on the competitor and not on the
3 size of their operation; but in any event, the anti-combo
4 law doesn't do anything about that because it doesn't
5 regulate the size of competitors, it regulates whether or
6 not someone can actually become licensed and engage in a
7 particular type of business.
8 So for these reasons, although I'm
9 certainly mindful of the fact that this is not a situation
10 where strict scrutiny is in order, it is a situation in
11 which real scrutiny is in order. The state has to do
12 something more than say that, well, it's not impossible that
13 what we are saying could be true, even though economic
14 theory says otherwise, even though it would be illegal to do
15 it, even though all the evidence in the real world suggested
16 it never ever happens. That's not enough. And it certainly
17 isn't enough in the context of a motion for summary
18 judgment.
19 So our request at this point -- in fact,
20 I would suggest if you look at this record, summary judgment
21 probably should be granted in favor of the plaintiffs. But
22 in any event, we're here on the state's motion for summary
23 judgment, and we respectfully request that it be denied.
24 THE COURT: Thank you, Mr. Esenberg. Before
25 returning to Ms. Keckhaver; Mr. Esenberg, I'd be remiss if I

1 did not comment on your sense of humor in your brief where
2 you start out with the Scottish saying in a case like this
3 about ghoulies and ghosties. That did give me a chuckle, so
4 thank you for that.
5 MR. ESENBERG: Well, your Honor, I'd like to
6 say that it's because my office looks out on a statue of
7 Robert Burns on Burns Square, which it does, that I came up
8 with that. But actually I have to be honest, because I am
9 in court and I am an officer of the court, that was
10 Mr. Fischer's.
11 THE COURT: Thank you, Mr. Fischer.
12 MR. FISCHER: You're welcome.
13 THE COURT: Response, Ms. Keckhaver?
14 MS. KECKHAVER: Your Honor, plaintiffs are
15 asking for a new standard that seems to be something like
16 real scrutiny, and they're talking about our standard of
17 traditional rational basis as being a radical view of
18 rational basis scrutiny. But plaintiffs' counsel didn't
19 once discuss the most recent Wisconsin Supreme Court
20 discussion of the test, which is in *Madison Teachers, Inc.*
21 You know, it's a 2014 case, *Ferdon* was a 2005 case, and the
22 court used traditional rational basis scrutiny to uphold the
23 law. So our view of rational basis scrutiny is not a
24 radical view, it is the traditional view, it is the view
25 that should be applied here, both under federal law and

1 under state law.
2 Mr. Esenberg talked about a couple cases
3 that he thought applied this more exacting scrutiny under
4 federal law. Those cases are cited in their brief,
5 *Lawrence*, *Romer* and *Cleburne,* but those laws affected
6 politically unpopular groups, so they're not applicable
7 here. And the cases that he cites that talk about economic
8 regulations don't discuss some different test. So the test
9 is rational basis scrutiny.
10 Then plaintiffs' counsel talked about a
11 number of the rational bases that we set forth, saying that
12 foreclosure was not possible. Dr. Sundberg said it may not
13 be likely but it is possible, and, you know, he used basic
14 economic principles to opine that foreclosure is possible in
15 this industry. Plaintiffs' counsel also said that
16 foreclosure would be -- or this idea of foreclosure would be
17 impossible under anti-trust laws, but they haven't cited any
18 particular anti-trust law at issue. Dr. Sundberg said these
19 laws could violate or might not violate anti-trust laws; and
20 even if they did, the state's free to regulate in more than
21 one way.
22 Plaintiffs also say that we have to have
23 evidence that there needs to be a real and substantial
24 relationship to the legitimate state interest. That, as
25 I've mentioned, is not the law, and the evidence that they

1 provide from Dr. Harrington is social science. That's
2 precisely what courts have said we don't consider under
3 traditional rational basis scrutiny.
4 As far as the evidence that consumers
5 spend more at combination firms, Dr. Harrington provided
6 some explanation for that, but he couldn't say for sure that
7 that was the reason consumers spend more, and the ultimate
8 conclusion there is that consumers pay more, regardless of
9 why, they're paying more at combo firms.
10 Let's see. As far as *St. Joseph Abbey*
11 and *Craigmiles* go, those cases were criticized -- or at
12 least *Craigmiles* was criticized by *Powers,* as we discussed
13 in our brief, so they also can be distinguished on their
14 facts.
15 Wisconsin -- we haven't set forth
16 economic protectionism as one of our legitimate state
17 interests. Wisconsin closely regulates the food industry,
18 unlike the states in those cases, and the plaintiffs have
19 not negated every single one of our rational bases.
20 So I think the main point here is that
21 there's not a new standard. This is traditional rational
22 basis scrutiny. It is summary judgment, but if there's
23 competing opinions on what evidence there is and whether the
24 state has stated a rational basis, the state wins, because
25 under traditional rational basis scrutiny, to say there's a

1 dispute is to say there is at least some rational basis for
2 the law.
3 And, again, I'll mention that the
4 legislature has weighed the benefits and burdens of this
5 law, and there's one legislature in the sate, not two. So
6 this law has been thoroughly vetted, and the legislature has
7 decided that this is how it wants to regulate the industry.
8 So we ask this court to uphold the law
9 and grant summary judgment in our favor.
10 THE COURT: Thank you. Mr. Esenberg, I'm
11 going to allow you another comment, if you desire. Often in
12 summary judgment cases I do not, but when cases have a
13 little more meat on the bone, as this case does, you can
14 have some surrebuttal comments if you want.
15 MR. ESENBERG: Okay. Thank you, your Honor.
16 Just a couple of things.
17 First of all, we did cite those
18 anti-trust rules that would prohibit this type of predatory
19 pricing and tying. I mean, these are sort of the classic
20 things that you learn when you take anti-trust law in law
21 school. Predatory pricing is something that the anti-trust
22 laws prohibit. Tying is something that the anti-trust laws
23 prohibit. We cited authority for those propositions at
24 notes 12 and 13 at page 23 of our brief.
25 With respect to the *Madison Teachers*

1 case, *Madison Teachers* was a different kind of case. It
2 didn't *sub silencio* overrule *Ferdon* or all of these other
3 cases, it wasn't an economic liberty case, it wasn't a
4 freedom of contract case, it with a case in which the
5 plaintiffs said that the restriction of a statutory
6 privilege; that is, collective bargaining, actually limited
7 their rights of free association and expression. And the
8 court, not surprisingly, said, that you're just wrong,
9 there's no impairment whatsoever on your freedom of
10 association and expression, you can join whatever type of
11 organization you want. All the state has done here is it
12 has readjusted a statutory privilege; that is, collective
13 bargaining. Collective bargaining allows unions to have
14 exclusive representation, it allows them to take dues or
15 fair share payments from people who don't want to pay them,
16 at least it did before the right to work law was passed. It
17 allows them to force employers to bargain with them to
18 impasse subject to arbitration. All the state did was
19 readjust the type of privileges that it was according public
20 employee unions. And whether we think that's a good idea or
21 a bad idea, it certainly wasn't an a infringement of the
22 freedom of expression or association.
23 I'm interested in the statement that,
24 well, you know the federal cases that we cite can be ignored
25 because they involve politically unpopular groups. We're

1 talking about the *Romer* case, the *Lawrence* and the *Cleburne*
2 case.
3 First of all, that's not true. We have
4 cited *Met Life vs. Ward,* in which the case was remanded to
5 take evidence in an economic regulation case. We cited the
6 result of the research that was done by Mr. Neily and
7 McNamara. We cited a number of lower federal court
8 decisions, including two in the funeral home industry. We
9 cited a variety of state court cases.
10 And I think there's an interesting
11 reason for all of that, because this is, you know, sometimes
12 you get more intrusive scrutiny when you have a process
13 failure, where courts believe that this is a situation in
14 which the political process wouldn't work very well. This
15 is a situation just like that, where you have the state
16 legislators deciding to favor a very well-connected,
17 powerful political group, funeral home directors, that wants
18 to maintain the privileged position that it's in. Courts
19 ought to look at that with suspicion. The Wisconsin Supreme
20 Court has said that. The United States Supreme Court said
21 that. Justice Kennedy said it.
22 That's all we're asking in this case.
23 Again, that's strict scrutiny, but real scrutiny, scrutiny
24 that requires that the state demonstrate that there is an
25 objective reason to believe that there is a substantial and

1 real connection between the law and this is language from
2 *Ferdon*, real connection between the law and the posited
3 objection.
4 I don't think that they can do that at
5 all. I think on this record it's clear that there simply
6 isn't one, this is an extraordinarily weak set of
7 justifications. It's certainly not enough to warrant
8 summary judgment in favor of the state.
9 THE COURT: Thank you, Counsel.
10 I want to compliment both sides on the
11 briefs that were submitted. Obviously, there is a lot
12 involved in this particular case, unlike on some of the
13 summary judgment cases that this court and other courts
14 handle.
15 That having been said, as I started
16 reading this, I was trying to look ahead a little bit and
17 formulate how difficult of a decision this was going to be.
18 And when it all boils down to what we have here, the court
19 finds it's really not a difficult decision to make.
20 I paused a little bit in terms of
21 whether or not summary judgment was appropriate. Not in the
22 sense that most summary judgment cases are handled. That
23 is, whether there are no material facts in dispute, but
24 whether or not there was enough here that perhaps
25 development of facts would be better by having a trial on

1 the matter. I concluded that's just unnecessary. There's
2 sufficient information before the court to make a decision
3 on the law. I didn't need any more benefit than what has
4 been submitted already.
5 The court finds that the law is
6 constitutional. The court finds that its role here is as
7 the attorney general argues, and whether or not there's any
8 traditional rational basis; that is, rationally related
9 reason for the law. I pay a lot of attention to the *Madison*
10 *Teachers* case, even though, Mr. Esenberg, I don't believe
11 you're wrong in some of your analysis that there are some
12 unique facts in that particular case that may not
13 necessarily make it stand for the proposition the state
14 wants it to. That having been said, however, I'm satisfied
15 there's enough in that case where the court has to look at
16 what the tests are.
17 This court does not need to go towards
18 an evidence based test, and, indeed, I think this court
19 would be making new law, based upon this record, if I
20 decided that's what we were going to apply.
21 Although the plaintiff argues here and
22 states that they do not ask this court to substitute its
23 judgment for that of the legislature, what this court finds,
24 and despite the fact that I think they make a good argument,
25 that's exactly what I'm being asked to do. It may be the

1 law in 39 other states, but that's for the legislature to
2 decide. When we use the number 39 other states, maybe those
3 39 other states are wrong and they should adopt the
4 Wisconsin approach. I say maybe, and I chose that word on
5 purpose, because, again, it's not my role to act as a
6 legislator or to vote as a legislator in this state or in
7 any other state. My role is limited to determining whether
8 or not there's any rationally related reason for the law and
9 to allow our legislature to have decided that Wisconsin is
10 going to have these anti-combination laws and reasons that
11 are cited by the attorney general in terms of preserving
12 competition, avoiding commingling of funds, preserving
13 consumer choices, avoiding higher prices, fostering personal
14 service, avoiding undue pressure on consumers are rationally
15 related to what the legislature can decide and to pick and
16 choose.
17 This is a case really where I'm being
18 called upon to be -- by the plaintiffs in this case, I'm
19 being called upon to be a super-legislator and decide that
20 this would be a better law; that is, what they proffer, than
21 what our legislature has come up with. And I'm satisfied,
22 even as the attorney general argues here today, that if
23 there are arguments over whether some of this works or some
24 of that doesn't work, it stands as proof then that there is
25 a basis for the law, and I'm satisfied that they have

1 prevailed.

2 This court is not supposed to decide

3 whether or not one type of law is better than the other, but

4 only whether or not there's a rational basis for it. And

5 the court finds that the Wisconsin legislature has a

6 rational basis for the law that it has passed; that is,

7 anti-combination laws in this state, and the court is

8 satisfied that I don't need to go beyond summary judgment

9 and to have a trial on the matter, because with what's

10 before me and that I'm called upon to decide this law,

11 there's enough information before the court that the court

12 finds the law is constitutional.

13 Even though this is the plaintiffs'

14 lawsuit in the sense that they started it, it's the state's

15 motion for summary judgment. I was going to have you draft

16 the order. Can that be done within the next thirty days

17 under the five-day rule?

18 MS. KECKHAVER: Yes, it can.

19 THE COURT: Thank you both for what you have

20 submitted. Is there anything else to conclude the record

21 today from the state?

22 MS. KECKHAVER: No, your Honor.

23 THE COURT: From the plaintiffs?

24 MR. ESENBERG: No, your Honor.

25 THE COURT: Thank you both.

(Conclusion of proceedings
at 11:05 a.m. on 6-20-16.)

STATE OF WISCONSIN)
) SS.
COUNTY OF WAUKESHA)

I, Christine L. Grauer, do hereby certify that I am the official reporter for Circuit Court Branch #6, Waukesha, Wisconsin; that as such reporter I made full and accurate stenographic notes of the foregoing proceedings and transcribed same with the aid of a computer-aided transcription system and certify that the foregoing transcript is a true and correct transcript of the proceedings at said time.

Dated at Waukesha, Wisconsin, this 1st day of July, 2016.

____
Christine L. Grauer, CSR, CM.
Court Reporter