STATE OF WISCONSIN
SUPREME COURT
CASE NO. 2016AP1599

E. Glenn Porter, III and Highland Memorial Park, Inc.,

Plaintiffs-Appellants-Petitioners,

v.

State of Wisconsin, Dave Ross and Wisconsin Funeral Directors Examining Board,

Defendants-Respondents.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS DISTRICT III

Richard M. Esenberg, WI Bar No. 1005622
Thomas C. Kamenick, WI Bar No. 1063682
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiffs-Appellants-Petitioners

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Plaintiffs-Appellants-Petitioners respectfully petition the Wisconsin Supreme Court for review of the August 29, 2017 decision of the Court of Appeals.

ISSUES PRESENTED FOR REVIEW

Issue One: Must statutes that restrict the ability of Wisconsin citizens to engage in otherwise lawful business activities bear a real and substantial relationship to some legitimate exercise of the State's police power in order to be constitutional?

Court of Appeals Decision: The Court of Appeals answered no. It ruled that such statutes are constitutional under the rational basis test without regard to whether the evidence establishes that ~~or not there is any evidence that~~ such a real and substantial relationship exists.

Issue Two: If there must be a real and substantial relationship between a challenged law and a legitimate exercise of the police power, does the presumption of constitutionality permit courts to ignore disputed issues of material facts when considering a motion for summary judgment?

Court of Appeals decision: The Court of Appeals ruled that summary judgment was proper and that it was not necessary to resolve disputed issues of material fact. According to the Court of Appeals, the

existence of a genuine factual dispute necessarily means that there is a "reasonable difference of opinion" as to whether or not the statutes in question are related to some legitimate governmental interest. (Ct. App. Dec. ¶¶46-49, P. App. 125-26.) Because there is a reasonable difference of opinion, the Plaintiffs cannot meet their burden of proving that the challenged statutes are unconstitutional beyond a reasonable doubt. Therefore, the finder of fact does not need to resolve the disputed facts, and summary judgment was appropriate.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

Wisconsin's "anti-combination" laws prevent operators of cemetery companies from engaging in the funeral home business, and operators of funeral establishments from owning or operating cemeteries. Those laws prohibit the existence of "combination firms" – businesses that offer funeral and cemetery services under a single roof. These laws were enacted at the behest of funeral directors, and are anticompetitive in purpose and effect. The Plaintiffs-Appellants-Petitioners challenged them as being arbitrary and capricious in violation of the Wisconsin Constitution's guarantees of due process and equal protection.

The Circuit Court entered summary judgment against the Plaintiffs and the Court of Appeals affirmed. Both courts acknowledged that there were genuine issues of material fact, but held that summary judgment was nevertheless proper. Applying a "rational basis" test, they concluded that material disputes as to the facts need not be resolved by the trier of fact. Given the presumption that statutes are constitutional and the need for the Plaintiffs to prove unconstitutionality beyond a reasonable doubt, they held that the mere existence of a genuine dispute establishes a rational basis for the challenged statutes. The Court of Appeals said that it could apply two different versions of a rational basis test to the challenged statutes. Under the traditional test, a statute may be upheld without regard to the facts, so long as the State or even the court can devise some plausible reason for its enactment. The Court of Appeals also purported to apply the enhanced level of scrutiny described by this Court as "rational basis with bite," although it said that it was not required to do so. But it did so in a way that ignores this Court's clear direction that statutes evaluated under that standard must have an "objectively reasonable basis." *Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶165, 284 Wis. 2d 573, 701 N.W.2d 440.

1. This case presents real and significant issues of state constitutional law. *See* Wis. Stat. (Rule) §809.62(1r)(a). Specifically, how is the rational basis test applied to due process and equal protection claims brought in cases involving statutes that infringe on the right to earn a living – a right that Wisconsin courts have long described as fundamental and protected by the Wisconsin Constitution?

2. The Plaintiffs argued below that the Wisconsin Constitution requires a "real and substantial" relationship (sometimes called "rational basis with bite") between economic regulations that impair the right of citizens to engage in lawful businesses and some legitimate state interest. A rational basis test that permits the State or a court to rely on plausible and hypothetical justifications that have no basis in fact cannot possibly establish such a real and substantial connection. This case thus offers this Court an opportunity to harmonize and clarify the law. *See* Wis. Stat. (Rule) §809.62(1r)(c). It should rule that under the Wisconsin Constitution, statutes that impair economic liberty require a "real and substantial" relationship between the ends that are sought and the means that have been chosen. This issue is not factual in nature, is likely to recur unless resolved

by this Court, and will have statewide impact. *See* Wis. Stat. (Rule) §809.62(1r)(c)2., 3.

3. And this Court should dispel the notion that courts can apply the "real and substantial relationship" test to economic regulation without giving full consideration to the facts. Although determining the constitutionality of a law can never involve substitution of the opinion of a court for that of the legislature, courts must fully consider whether the record supports a conclusion that the posited justification for the law meets some standard of rationality. The Court of Appeals concluded it could do so without resolving disputed issues of fact. Instead, the Court of Appeals held that the mere fact that there were factual disputes was sufficient to resolve the case in the State's favor. In doing so, the Court of Appeals' decision conflicts with black letter law: summary judgment is inappropriate when there are disputed issues of material fact. *See* Wis. Stat. (Rule) §809.62(1r)(d). That rule is also inconsistent with the need for a "real and substantial" relationship between economic regulation and some legitimate state interest and with a test of a challenged regulation under the rational basis with bite test. This Court should clarify the manner in which courts are to resolve contested issues of fact in cases of this kind.

STATEMENT OF FACTS AND OF THE CASE

The Plaintiffs, a cemetery and a cemetery owner, challenge a collection of state statutes (the "anti-combination laws") that prohibit the joint ownership or operation of a cemetery and a funeral home. Wis. Stat. §157.067(2) provides that no cemetery authority may permit a funeral establishment to be located in a cemetery, and further prohibits such authorities, their employees, and their agents from having "an ownership, operation or other financial interest in a funeral establishment." Wis. Stat. §445.12(6) contains the reverse prohibition. There is no dispute between the parties as to the effect of these statutes. They prevent the Plaintiffs from engaging in business as a funeral establishment.

The Plaintiffs believe it would be in their best interest, and in the best interests of their customers, if they could own or operate a funeral home. They are willing and able to take all necessary regulatory steps to achieve that goal. But the law prevents them from offering this lawful service to their customers. They filed this lawsuit, arguing that the anti-combination laws are anticompetitive, irrational, and arbitrary in violation of the Wisconsin Constitution's protection of their right to earn a living. The statutes are nothing more than protectionist legislation enacted at the

behest of the funeral home industry in the 1930s. The Court of Appeals conceded as much. (Ct. App. Dec. ¶19, P. App. 110)

The Plaintiffs allege that the anti-combination laws violate substantive due process by impairing their right to earn a living without having a real and substantial connection to any legitimate government interest. Legitimate government interests do not and cannot include unvarnished protectionism or mere preference for one class of competitors over another. The Plaintiffs also allege that the law violates their guarantee of equal protection by forbidding cemeteries, but not other businesses involved in the death care industry (such as burial vault or casket manufacturers), from owning or operating a funeral home.

The Defendants moved for summary judgment, arguing that the law could be rationally related to the interests of the State in keeping large out-of-state firms out of the death care services business in Wisconsin, in promoting small and family owned firms in that business, in preserving competition, in avoiding commingling of funds that are required to be held in trust, and in fostering more personal service to bereaved families. (R. 19:13.) In support of their motion, the Defendants filed an expert report and affidavits from two funeral directors. (R. 21; R. 22; R. 23.)

The Plaintiffs opposed summary judgment, submitting an expert report of their own and affidavits from two cemetery operators. The evidence advanced by the Plaintiffs shows that the anti-combination laws do not, as a factual matter, actually further any of the claimed governmental objectives and in fact are counter-productive to several of them. The Plaintiffs' evidence shows that the anti-combination laws actually harm competition and reduce consumer choices. It shows that they have nothing to do with keeping large firms out of the death care services industry. It shows that these laws have nothing to do with the danger that trust funds will be commingled or lost. And it shows that the law is unlikely to foster more personal or better service to grieving families. The Plaintiffs' evidence established a genuine dispute of material fact as to whether the statutes in question actually advance any of the interests claimed by the State. In particular, the Plaintiffs' expert established that none of the imaginative economic problems that the State and its witnesses say are raised by the existence of combination firms have actually turned out to be real problems in any of the 39 states that do not have anti-combination laws. The State's expert economist conceded that this is true. (R. 29:5-6; R. 29:26-27.)

Nevertheless, on June 20, 2016, the Circuit Court granted the Defendants' motion for summary judgment. (R. 33, P. App. 130-36.) The court concluded that it did not matter that there was genuine factual dispute as to whether the anti-combination laws bear a real and substantial connection to any of the governmental interests that the State says they are supposed to serve. The court ruled that the mere existence of a genuine dispute was sufficient to permit it to rule in favor of the law under the rational basis test, as such a dispute "stands as proof then that there is a basis for the law." (R. 33:32, P. App. 134.) On July 28, 2016, the Circuit Court entered an order dismissing the case. (R. 34, P. App. 128-29.) On August 11, 2016, the Plaintiffs timely filed a Notice of Appeal. (R. 37.)

On August 29, 2017, the Court of Appeals issued its opinion upholding the decision of the Circuit Court. Like the Circuit Court, the Court of Appeals held that summary judgment was proper even though there were disputed issues of material fact. It held that the mere existence of such a dispute established a "reasonable difference of opinion" on the question whether the law actually advances some legitimate state interest. According to the Court of Appeals, given the presumption of constitutionality, the mere existence of a genuine factual dispute is

sufficient to satisfy the rational basis test. And it held that this was the case whether the court applied the traditional rational basis or some higher level of scrutiny.

ARGUMENT

Since the State's founding, Wisconsin courts have recognized the right to earn a living as a fundamental right. While that has not yet led our courts to review legislation impairing that right under strict scrutiny, it has – as it should – led them to view protectionist legislation with a high degree of skepticism. Contrary to the courts below, this Court has held that to support such legislation, the evidence must show a real and substantial connection between the law and its claimed objectives. That is necessarily a question of fact. The Plaintiffs here bear the burden of proving that there is no such connection, but at the same time they must be given a chance to do so. Summary judgment is never appropriate if there is a genuine dispute of material fact. The Plaintiffs have put forth sufficient evidence to prove that the anti-combination laws not only fail to further the claimed government interests, but actually work contrary to some of them. The State has produced evidence to the contrary. The finder of fact must weigh the evidence, as in any other case. And if the Plaintiffs are right, then the

anti-combination laws must be struck down as arbitrary and irrational, and therefore unconstitutional, as they impair the Plaintiffs' right to earn a living.

This is not to say that courts are to substitute their own will for that of the legislature or determine whether a challenged law is a "good idea." But determining whether a course of action is "rational" requires consideration of not only whether it is "possible," but also sufficiently likely to achieve its goals such that a reasonable person might choose to take it. No rational person would make that determination if the facts showed that the contemplated course of action would not further the goal, or worse, would have the opposite affect; it is irrational to believe something to be true when the facts show it is false. Likewise, no court can conclude that a restriction of liberty is rational – that it actually is something about which there is a "reasonable" difference of opinion – without considering the evidence. To be sure, close and even not so close questions will be resolved in favor of the statute. But just as a criminal defendant does not create a reasonable doubt and secure his freedom by offering a mere scintilla of evidence supporting his innocence, a court must consider whether the evidence before it permits a conclusion that there is a

"real and substantial' connection between a law and a legitimate objective. This may well require resolution of disputed issues of material fact.

I. JUDGING THE CONSTITUTIONALITY OF ECONOMIC REGULATION REQUIRES AN EVIDENTIARY DETERMINATION OF WHETHER THE LAW HAS A REAL AND SUBSTANTIAL CONNECTION TO A LEGITIMATE GOVERNMENTAL INTEREST

This case is about the freedom of Wisconsin residents to engage in a lawful business and to earn their living – a freedom guaranteed by the Wisconsin Constitution's Declaration of Rights. At the time the Wisconsin Constitution was ratified in 1848, it was generally understood that state constitutions and state courts provide an important and independent guarantee of the liberty of state citizens:

> A mere glance at the history of the times . . . will suffice to convince us that the respective states were regarded as the essential, if not the sole guardians of the personal rights and liberties of the individual citizens.

In re Booth, 3 Wis. 13, 87 (1854) (Smith, J., concurring). Prior to the adoption of the Fourteenth Amendment, only the Wisconsin Constitution protected Wisconsin citizens from the usurpation of their rights by the State.

A. The Wisconsin Constitution Protects Economic Liberty as a Fundamental Right

The Court of Appeals said that it was undisputed in this case that the anti-combination laws do not affect any fundamental right or suspect class. (Ct. App. Dec. ¶16, P. App. 109.) But the Plaintiffs argued that the anti-combination laws do infringe a fundamental right – the right to earn a living. (Appeal Brief at 18.) Although the Plaintiffs did not assert that strict scrutiny was required, they argued that to protect the fundamental right of economic freedom, courts must apply an enhanced level of scrutiny to assure a "real and substantial" connection between the law in question and some legitimate governmental purpose. The Court of Appeals ruled that no such test is necessary.

Article I, Section 1 of the Wisconsin Constitution, as ratified in 1848, provides that "all people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." These words give rise to the due process and equal protection safeguards that protect Wisconsin citizens from the power of the State.

Wisconsin courts have long understood the State Constitution to secure and protect the right of citizens to engage in lawful and productive commerce as a "fundamental right." As early as 1859, this Court

characterized the right to earn a living as "one of the great bulwarks of individual freedom" that was "guarded by [the State's] fundamental law" of the Constitution. *Maxwell v. Reed*, 7 Wis. 582, 594 (1859). "The citizen is an essential elementary constituent of the State; that to preserve the State the citizen must be protected; that to live, he must have the means of living." *Id.*

Early Wisconsin cases reinforced the importance of economic liberty under the Wisconsin Constitution. *See Taylor v. State*, 35 Wis. 298, 301 (1874) (right to engage in business is a fundamental right; limitations on the location of businesses that in reality posed no danger to neighbors could not be upheld); *State v. Benzenberg*, 101 Wis. 172, 76 N.W. 345, 346-47 (1898) (striking down state statutes that favored associations of plumbers over individual plumbers; the Constitution protects "the right of the citizen to pursue his calling"); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1102 (1902) ("'The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment.'") (quoting *Ruhstrat v. People*, 57 N.E. 41, 44 (Ill. 1900)).

A polity in which the State had the plenary power to command or prohibit where people could work or how they could earn a living would not be a free one. The State may have broad leeway in matters of economic legislation, but it cannot base such regulation on untethered conjecture about the markets involved.

B. Laws that Infringe Economic Liberty Must Have a Real and Substantial Relation to a Legitimate Governmental Purpose

Wisconsin courts have evaluated claims that the State is engaged in economic protectionism or some other inappropriate impairment of the right to earn a living with a form of scrutiny that considers evidence and requires a "real and substantial" justification for the restrictions. In *Kreutzberg*, this Court stated that, while the legislature should be afforded the "fullest exercise of discretion within the realm of reason," 90 N.W. at 1105, economic regulation must still bear a "real [and] substantial" relationship to the objectives that it purports to secure, *Id.* at 1102. Furthermore, such laws must not "under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations." *Id*. at 1102 (citations omitted); *see also State v. Redmon*, 134 Wis. 89, 114 N.W. 137, 141 (1907)

(courts have a duty to protect the constitutional guarantee of liberty by striking down laws that have no real or substantial relation to their purported goals).

In *Redmon*, this Court made it clear that mere claims of serving some reasonable health or safety objective were insufficient; courts must look at facts to see whether the objectives claimed are actually served:

> "It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

Id. (emphasis added) (quoting *In re Jacobs*, 98 N.Y. 98, 110 (Ct. App. N.Y. 1885)). These cases establish that, in Wisconsin, "[t]here must be a reasonable ground for the police [power] interference and also the means adopted must be reasonable for the accomplishment of the purpose in view." *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882, 885 (1914) (emphasis added).

It is illegitimate for the State to favor one class of competitors over another. When a law has this effect and little else to be said for it, concerns about regulatory and process failure require some form of meaningful review. In *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369

(1927), this Court struck down a law banning the sale of oleomargarine and other substitutes for butter in Wisconsin. This Court concluded that "[T]here is no basis **in the evidence** upon which a claim of unfair competition [against the dairy industry] can be based." 214 N.W. at 373 (emphasis added). Observing that the State "has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef cattle industry, or to prohibit the manufacture and sale of cement for the benefit of the lumber industry, it noted that "courts will look behind even the declared intent of Legislatures, and relieve citizens against oppressive acts, where the primary purpose is not to the protection of the public health, safety, or morals." *Id*. (emphasis added).

Some twenty-five years after *Jelke*, the Wisconsin dairy industry sought the assistance of the State to ban an innovative frozen dairy product made by a new company called Dairy Queen. Based on record facts, this Court concluded that the safety related statutes the State was attempting to enforce could not properly ban the sale of the product as no genuine health or welfare interest was implicated. *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 478, 51 N.W.2d 34 (1952).

Several *amicus* organizations, including about 85 Wisconsin manufacturers of ice cream, sought rehearing in favor of Dairy Queen. *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 52 N.W.2d 791 (1952) (re-hearing denied). They claimed that enforcement of the statutes in question by the State was necessary to preserve "a generation's work in fixing dairy product standards" and that failure to enforce them would result in "the destruction of the reputation of the state" which was of great importance to its economy. *Id.* at 474. This Court rejected their concerns, reiterating the rule established in *Jelke*. *Id.* at 478.

This Court noted as a factual matter that Dairy Queen was a "nourishing, wholesome and healthful food which contains no deleterious substance," that posed "[n]o threat of danger to the public health," and that the government had made no "showing that sale of the product would prejudicially affect either the milk producer or the consuming public." *Id.* at 477. Because *Jelke* would require it to overturn the law if it were interpreted to ban the sale of Dairy Queen, this Court found the law did not ban such sales. *Id.* at 478.

In *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982), this Court reviewed a

Milwaukee ordinance requiring that a Class "A" liquor license applicant receive at least 50 percent of its income from the on-premises sale of intoxicants. Like the anti-combination laws, this ordinance was ostensibly passed to protect "the little guy" from "the big guy," an illegitimate purpose. *Id.* at 209-10 & n. 5.

This Court found the ordinance constitutionally infirm. In a passage particularly relevant here, it noted that "the Court should receive with some skepticism post hoc hypotheses about legislative purpose unsupported by legislative history." *Id*. at 211 (citation omitted). In discussing the proper test to apply, this Court stated:

> Although the rational-basis standard of review of the instant ordinance forbids us from substituting our notions of good public policy for those who adopted the ordinance, this does not mean that our evaluation is limited to form and not substance. As the [United States] Supreme Court has very recently opined: The rational-basis standard of review is 'not a toothless one.'

Id. at 209. The factual question of whether the law actually furthered its objectives was relevant to the question of whether the law "tends to accomplish the objects for which the [government entity that created it] exists." *Id.* at 212 (quoting 5 McQuillin, Municipal Corporations, sec. 18.06, 347 (3d ed. 1969)). Looking at that factual question, this Court

noted a "glaring absence in the record of any public health, safety, morals, or general welfare problem or concern" and the lack of "any evidence in the record to demonstrate that there is any public need to limit the number of new liquor licenses." *Id.* (emphasis added). This Court concluded that the law was not rationally related to its proposed objectives because of that lack of evidence. *Id.* at 214; *see also Wisconsin Wine & Spirit Institute v. Ley*, 141 Wis. 2d 958, 971, 416 N.W.2d 914 (Ct. App. 1987) (striking down an exception to a liquor law, noting as a factual matter that the exception actually caused the opposite result of its claimed objective).

Wisconsin courts have variously called this evidence-based standard "rational basis with teeth," "rational basis with bite," or "meaningful rational basis." Although the rational basis with bite standard was most recently and fully explained in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440 (2005), *Ferdon* was by no means the first case to articulate or apply the standard. In *Doering v. WEA Ins. Group*, after noting that under the rational basis standard, a court must exercise judicial restraint, this Court went on to say that "the rational basis test is not a toothless one," 193 Wis. 2d 118, 132, 532 N.W.2d 432 (1995); *see also Grand Bazaar*, 105 Wis. 2d

at 209. The proper test "allows the court to probe beneath the claims of the government." *Doering*, 193 Wis. 2d at 132.

Ferdon did not involve the right to earn a living, but is nevertheless instructive. After reciting the familiar requirements of the federal rational basis test, this Court stated that nevertheless, in Wisconsin "there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." 2005 WI 125, ¶77. "The court must probe beneath the claims of the government to determine if the constitutional requirement of some rationality . . . has been met." *Id.*

As in the cases cited above, the *Ferdon* court looked behind the purposes stated by the legislature and those defending the statute to determine if there was an "objectively reasonable basis" to support a cap of $350,000 on noneconomic damages in medical malpractice cases. *Id.*, ¶165. As in this case, the State offered evidence in support of the law, but unlike the lower courts here, this Court carefully weighed it against competing evidence. The court exhaustively analyzed each of six proffered justifications for the law, concluding that <u>in practice</u>, the cap furthered none of them. *Id.*, ¶¶97-176. The court even noted that while it was a plausible

theory that a cap on damages would reduce health care costs, as a practical matter, it did not. *Id.*, ¶¶159-166. Finding that there was no objectively reasonable basis, this Court invalidated the law. *Id.*, ¶188; *see also Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2017 WI App 52, ___ Wis. 2d ___, ___ N.W.2d ___ (July 5, 2017) (looking at record facts to determine whether claims the State made about the effect of a new medical malpractice cap actually furthered the claimed objectives).

Whether or not one agrees with how this standard was applied in *Ferdon*, this evidence-based requirement of a "real and substantial" connection tested by "meaningful scrutiny" is part of this Court's jurisprudence, particularly in cases involving the fundamental right to earn a living. While there is language in this Court's cases that, taken out of context, suggests more extreme deference, this deferential language was also cited in *Ferdon* and *Grand Bazaar*. Yet, in those cases and others, this Court made a reasoned decision – based on the evidence – as to whether or not the legislation in question actually had the effect of promoting its claimed objectives.

It is not enough, therefore, that the claimed connection between economic regulation and its stated benefits is possible. It must be real and

substantial. The Court of Appeals concluded that it could dismiss the Plaintiff's claims because there was "some evidence" in the record supporting the laws' purported objectives. It did not simply give the State the benefit of the doubt as to that evidence. It held that any evidence the State introduced should conclusively be presumed sufficient to support the law's constitutionality. It was not necessary to determine whether the State's factual claims were true. Merely by making a factual claim, the State established its truth, in the Court of Appeals' view. It was not necessary to determine whether, when weighed against competing evidence, it had substantial, little, or no persuasive value. (Ct. App. Dec. ¶¶43-44, 46, 49, P. App. 124-26.)

It is difficult to imagine a case in which the government could not present an expert or some other witness to say that some form of regulation might possibly achieve some benefits that are claimed for it. But experts and other witnesses are sometimes wrong. And while the State may be entitled to a substantial benefit of the doubt, it is the business of the courts to evaluate what witnesses say and determine the truth of the matter. Judicial scrutiny that does not involve such fact finding is not rational basis with any kind of bite at all.

The Court of Appeals also ignored Wisconsin cases holding that protectionist legislation intended to further the interests of some businesses at the expense of others is subject to searching judicial scrutiny. The Court of Appeals acknowledged that the first of the anti-combination laws was passed at the behest of Wisconsin funeral directors as a protectionist measure (Ct. App. Dec. ¶19, P. App. 110), but did not engage in searching judicial scrutiny, merely accepting the State's purported justifications as conclusive.

The Court of Appeals' extraordinary deference is not justified by the general rule that statutes must be proven unconstitutional beyond a reasonable doubt. As this Court recently observed, "[w]hile this burden of proof is often associated with the requisite proof of guilt in a criminal case, in the context of a challenge to the constitutionality of a statute, the phrase "beyond a reasonable doubt" expresses the "force or conviction with which a court must conclude, as a matter of law, that a statute is unconstitutional before the statute or its application can be set aside." *League of Women Voters of Wis. Educ. Network v. Walker*, 2014 WI 97, ¶17, 357 Wis. 2d 360, 851 N.W.2d 302, *quoting In re Diana P.*, 2005 WI 32, ¶18, 279 Wis. 2d 169, 694 N.W.2d 344.

The Court of Appeals' decision demonstrates the need to clarify the nature and extent of such deference. It relied on this Court's decision in *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶13, n.8, 358 Wis. 2d 1, 851 N.W.2d 337, for the proposition that rational basis scrutiny was entirely a question of law with no fact-finding permitted, relying on language that stating that the "beyond a reasonable doubt" standard means that "a court's degree of certainty about the unconstitutionality results from the persuasive force of legal argument." This language cannot mean that whatever the State's witnesses say must be presumed to be true and sufficiently weighty to defeat a plaintiff's case, or that factual disputes need not be resolved. The quoted language comes from *Ferdon*, 2005 WI 125, ¶68, n.71, and *Ferdon* applied an evidence-based standard, carefully weighing the parties' competing claims and not upholding the law in question automatically because the State offered "some evidence" in its favor. This Court should grant review to clarify just how rational basis is to proceed in cases like this.

II. THE PLAINTIFFS HAVE PRODUCED SUFFICIENT EVIDENCE TO RAISE A GENUINE DISPUTE AS TO WHETHER THE ANTI-COMBINATION LAWS FURTHER THEIR CLAIMED OBJECTIVES

It is telling that over the course of this litigation the State has advanced a number of vital interests that the anti-combination laws are intended to further, only to abandon them along the way. At the outset of the case, for example, it was a vital state interest to keep large out-of-state companies from entering the funeral services business in Wisconsin, and that is the purpose of the challenged statutes. (*See, e,g.*, R. 19:2.) That apparently is no longer important.

Although it is not dispositive, the State's ability to mix and match justifications over the course of this litigation illustrates why the standard the Court of Appeals applied was incorrect. A rule that permits courts to uphold a statute on any basis that the State or even the court can invent cannot satisfy a "real and substantial" connection. The State can invent justifications as it goes along, replacing them whenever they begin leaking oil. Some new governmental interest can always be found around the corner. This is no way for the courts to protect constitutional rights, and one reason why, at least in cases involving economic liberty, courts must consider whether the law actually does advance its purported goals.

By the time the case arrived at the Court of Appeals, only two of the State's justifications for the anti-combination laws were still standing. First, that the challenged laws protect consumers from the possibility that higher prices might result from combination firms engaging in predatory behavior that is already forbidden by state and federal antitrust law. And second, that combination firms, if permitted to exist, might have an easier time than other death care services firms in cheating on trusting and record keeping requirements. The Plaintiffs' evidence shows that the laws do not serve either of these purposes. The State ought not to win this case simply because it produced some expert evidence to support the first point, and the opinion of the President of the Funeral Directors' Association to support the second.

A. The Anti-Combination Laws Are Not Procompetitive, but Rather Restrict Competition by Favoring One Class of Competitors over Another

The anti-combination laws do an extraordinary thing. They place one class of competitors in the death care industry – funeral directors – at a systematic advantage over another – cemeteries. They do so in a way that threatens the economic viability of many cemeteries in a shrinking market for cemetery property and cemetery services. They harm not only the

Plaintiffs, but consumers, by depriving them of a choice many of them desire.

The inability to act as a funeral home impairs the ability of cemeteries to sell products and services such as caskets, urns, cremation, and burial vaults. Almost by law, the funeral home is the first "point of contact" with the customer. Only a licensed funeral director may embalm a body for viewing. Wis. Admin. Code § DHS 135.05(1)(b). And even if a family wishes to dispense with embalming, it must have the deceased's body transported to its final resting place. Unless the family wants to do that on its own, it must hire a funeral director to arrange transportation, as with limited exceptions no one else is authorized to do so. DHS 135.05(1)(d).

Thus, for legal reasons and by custom (R: 28:3; R: 27:2), the funeral director is likely to be the first point of contact with the family, who must generally make decisions quickly (R: 29:8). Under those circumstances, being the first provider with the option to provide funeral services and other products they compete with cemeteries to sell is an enormous competitive advantage. It effectively makes funeral homes the "gatekeeper" for entry of customers into the market. (R: 28:3; R: 27:2.)

Thus, a cemetery operator that wants to effectively compete in the death care markets might rationally conclude that it needs to be in a position to attract customers at their point of need. This is particularly true since the demand for cemetery land has been in sharp decline as families increasingly choose cremation. (R. 29:9.) Many families do not use a cemetery at all. This places financial pressures on cemeteries that, unlike funeral homes, cannot simply go out of business. (*Id.*) They must cut the grass forever.

Thus, in terms of competition, the anti-combination laws do the opposite of what the State says they are supposed to do. It is the anti-combination laws that "foreclose" effective competition by cemeteries in the market. The law protects funeral homes from the likeliest source of competition in the death care industry – cemeteries – by excluding them from the initial point of contact with consumers. If, as the State argues, grieving families are particularly vulnerable to unfair pressure, these laws most probably worsen that problem by insulating funeral homes from competition. That is, of course, exactly what the Plaintiffs claim they were intended to do.

Not only do the anti-combination laws prefer one class of competitors over another, they burden the Plaintiffs' right to earn a living. The laws unreasonably restrict their ability to adjust to the market and serve their customers. Combination firms operate in almost all of the states and offer consumers the choice to buy a combination of death care services from a single firm. (R. 29:4.) There are many reasons that consumers might choose to do so. They may, for example, prefer "one-stop shopping." Research by the Plaintiffs' expert shows that an appreciable number of consumers do prefer the broader package of services that combination firms offer in other states. (*Id.* at 5.) That should not be surprising. Some customers might like the idea that they can negotiate with a single firm for a broad array of services. Others might prefer the convenience of being able to arrange for funeral and burial services at a common location.

B. Combination Firms Are Innovative and Efficient

According to both the Plaintiffs' and the Defendants' experts, combination firms can achieve economies of scale and scope to offer consumers better services at lower prices. (R. 29:4; R. 21:7-9.) The Plaintiffs' expert estimated that if combination firms were permitted to do

business in Wisconsin, Wisconsin consumers could save as much as $192 per transaction. (R. 29:4.)

The State argues that combination firms might use their ability to offer packaged services in a way that might have an adverse effect on competition over the long run. The Defendant's expert argued that combination firms could package and price their combined services in a way that would constitute a tying arrangement or otherwise raise their rivals' costs, with the result that some independent funeral establishments would be put out of business. That would, he said, eventually allow combination firm to raise their prices to consumers. He did not say this was certain to occur or even likely to occur, but only that it was possible. (R. 29:26-27.)

For the State's professed concern about the danger of predatory behavior by combination firms to be rational, it would be necessary to have some evidence that such behavior has actually occurred in any of the dozens of states that have allowed combination firms to operate for the last several decades. It has not. (R. 26:1-2.) Even the Defendants' expert acknowledged that the predatory behavior he worries about has *never* happened in any of the states where combination firms operate. (R. 29:26-

27.) The Defendants' professed concern about the possibility of predatory behavior is no more rational than fear of the boogeyman.

The Court of Appeals explained the basis for Dr. Sundberg's professed concern about the possibility of unlawful foreclosure in its opinion. (Ct. App. Dec. ¶¶36-37, P. App. 119-20.) But it elected to ignore his admission that he has no evidence of such predatory behavior occurring in the numerous states that permit combination firms. This startling omission can perhaps be explained by the Court of Appeals' decision that it need not engage in any actual finding of fact, but rather can decide itself whether the State had advanced some evidence of some facts that might be true.[1]

As Plaintiffs pointed out, there is a simple reason that combination firms have not attempted to foreclose stand-alone competitors, even assuming they might have the power to do so.[2] Exclusionary behavior of that kind is already illegal in all of those states – and would be in

[1] In light of Sundberg's admission that he has no evidence of foreclosure in the states that permit combination firms, the Court of Appeals' statement that there is "no evidence in the record" that foreclosure does not occur is inexplicable. (Ct. App. Dec. ¶39, P. App. 122.)

[2] In any event, whatever may have been the case in 1939, restricting access to cemetery land would be an unlikely vehicle for squeezing out competitors or reaping excess profits today given that the demand for cemetery land has fallen precipitously. (R. 28:1-4.) "A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid." *Ferdon*, 2005 WI 125, ¶114.

Wisconsin – because it violates antitrust laws. State and federal antitrust laws forbid tying or predatory pricing arrangements that are likely to have actual anticompetitive consequences in the market for the tied product. For example, if a cemetery refused to sell plots to customers who purchased funeral services or products elsewhere, it would have engaged in an anticompetitive tying arrangement prohibited under both federal and Wisconsin antitrust laws.[3] Similarly, it would be unlawful for such a firm to use its pricing power in one market, such as for cemeteries, to increase its power in some other market, such as for funeral services.[4]

In other words, the State's concern is that combination firms may, by virtue of their structure, have the ability to engage in some forms of unlawful conduct that would improve their market position. It is of course equally the case that large and powerful stand-alone firms could, if criminally inclined, engage in exclusionary conduct that violates the

[3] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

[4] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 222, 224 (1993) ("First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. . . . [and second must] demonstrate[e] that the competitor had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices.").

antitrust laws, like predatory pricing. But Wisconsin does not outlaw large stand-alone firms. The question is whether the fear, however remote, that some kinds of firms might engage in unlawful conduct is sufficient to ban them altogether from doing business in Wisconsin when the evidence shows that similar firms elsewhere do not do so.

The Court of Appeals considered this fear and decided that it was rational, because the legislature could have deemed it prudent to enact "additional measures" aimed at specifically preventing exclusionary conduct in the death care industry. (*See* Ct. App. Dec. ¶34, n13 P. App. 118-19.) But that is not what the legislature has done. The anti-combination laws do not regulate exclusionary conduct. They prevent a certain kind of firm from existing at all, and they do so because that kind of a firm might engage in conduct that is already illegal. This goes much too far, and cannot satisfy any rational basis test. Fear in the face of contrary evidence cannot establish a real and substantial basis for the anti-combination laws. *See Grand Bazaar Liquors*, 105 Wis. 2d at 214 (government produced no evidence to back up existence of dangers supposedly abated by law). It is irrational to believe that the prohibition of combination firms prevents competitive problems when the uncontroverted

evidence shows that those problems do not occur in any of the states that do not prohibit them. *Cf. Taylor*, 35 Wis. at 301 (noting that assuming a business was noxious and unhealthful would not be reasonable if the business in fact posed no such danger).

But the Court of Appeals accepted the Defendants' claims at face value, deciding that no matter what the facts actually show, it is enough that the government merely says combination firms could be dangerous. A "reasonable difference of opinion" entitles the State to summary judgment, whether or not it is right about the facts. That is not the law.

C. Combination Firms Are No More Able or Likely than Stand-Alone Funeral Homes to Co-Mingle Reserve Funds

Second, the Defendants argued that the anti-combination laws are justified because combination firms might take advantage of the broader nature of their business to cheat on laws that require funds received for certain "pre-need" funeral products and services to be held in trust. This argument was based on claims made in an untested affidavit filed by Mark Krause, the President of the Wisconsin Funeral Directors Association (an obviously self-interested proponent of the anti-combination laws). (*See* R. 22.)

As Mr. Porter pointed out in his affidavit, both the State and Mr. Krause misunderstand the requirements of Wisconsin law. Firms that sell pre-need products or services are required to hold some or all of the payments made in trust. But the trusting rules depend on the nature of the products sold, not the structure of business doing the selling. A seller of pre-need funeral merchandise, such as caskets, must hold 100% of the proceeds in trust. A licensed seller of cemetery merchandise, such as grave stones, need only hold 40% of the proceeds in trust. (R. 27:3-4.) These requirements apply equally to any seller, whether it is a cemetery or a funeral establishment. (*Id.* at 4.) *See also* Wis. Stat. §§440.90(8), 440.92(3), 445.125(1).

Existing firms in Wisconsin already sell products and services involving different trusting requirements, and existing firms could violate the law by cheating on those requirements in exactly the manner that the State fears combination firms might do. There is nothing about the structure of a combination firm that would make it more likely for a combination firm to decide to violate the law, or make it easier for such a firm to cheat. (R. 27:4.) There is no real and substantial relationship between this concern and the anti-combination laws.

CONCLUSION

The Plaintiffs are fighting for their fundamental right under the Wisconsin Constitution to earn a living by providing lawful services and products. They are denied this right by protectionist statutes that favor funeral home directors. The Plaintiffs seek to show that the facts do not justify these statutes under Wisconsin law. The Circuit Court and the Court of Appeals denied the Plaintiffs the right to fully present their case and instead ruled that the actual facts were irrelevant to a determination of the constitutionality of the statutes in question. The Plaintiffs ask this Court to take this case to determine if that is the correct approach under the Wisconsin Constitution.

Dated this 28th day of September, 2017.

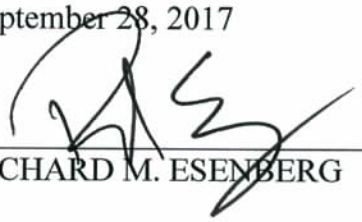
Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants-Petitioners

Richard M. Esenberg, WBN 1005622
(414) 727-6367; rick@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368; tom@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in section 809.19(8)(b) and 809.62(4)(a) for a brief produced with proportional serif font. The length of this petition is 7,822 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: September 28, 2017



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I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with this Court and served on all opposing parties.

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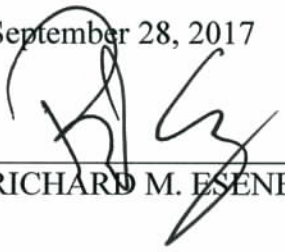

RICHARD M. ESENBERG