STATE OF WISCONSIN

IN 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.

ON PETITION FOR REVIEW FROM A
DECISION AND OPINION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT III

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioners' request for review seeks a remarkable expansion of the role of courts, and judicial fact-finding, on review of purely economic legislation. Relying on this Court's decision in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, Petitioners urge the Court to jettison decades of well-established case law, so that circuit courts may, at their discretion, overrule the Legislature on matters of economic policy. Petitioners' target here is a suite of consumer-protective laws that prohibit funeral homes and cemeteries from being owned or operated by the same person or entity (the "anti-combination laws"). The courts below rejected Petitioners' substantive due process and equal protection challenges, concluding that these laws were squarely within the Legislature's discretion, and were supported by multiple, legitimate governmental interests, including protecting vulnerable consumers navigating the "death-care industry."

Economic regulations like the anti-combination laws have traditionally been subject to the highly deferential "rational-basis review," and have been sustained unless the challenger showed beyond a reasonable doubt that there was no conceivable, rational basis for the law. But Petitioners suggest that this deference to the Legislature is misguided, and that Courts must engage in a more searching review of *evidence* to determine whether the State can prove, in litigation, that the Legislature acted properly. Their "rational basis with bite" approach relies on this Court's decision in *Ferdon*, a medical malpractice case.

Petitioners' request for review should be rejected. Most importantly, there is no need to rework the principles by which Wisconsin's courts examine the constitutionality of

economic regulation. Likewise, there is no need to expand the concept of "rational basis with bite" beyond this Court's one modern application (*Ferdon*). And there certainly is no need to inject a new standard of courtroom fact-finding into constitutional analysis, whereby circuit courts would be required to decide in every case whether the Legislature acted reasonably *enough* when adopting any law.

Even putting aside the breadth of Petitioners' request, review is also unnecessary because the court of appeals' treatment of their claims was thorough, definitive, and in accord with controlling Wisconsin law. That court examined Petitioners' claims and novel arguments, and concluded that under either traditional rational-basis review or the Petitioners' proposed "rational basis with bite" test, the anti-combination laws bear a reasonable relationship to legitimate legislative ends.

There is no need to revisit that well-reasoned decision. That court properly rejected Petitioners' attempt to inject a revolutionary change in Wisconsin's law, and instead reaffirmed that Wisconsin courts presume that legislation is constitutional. The petition provides no reason to depart from this fundamental approach, and should be denied.

REASONS FOR DENYING THE PETITION

Petitioners present two issues for review. Neither issue raises an open question under Wisconsin law. Instead, each asks this Court to overturn decades of established law regarding how courts evaluate substantive due process and equal protection challenges to purely economic regulations. Their first issue asks, in effect, whether economic regulation is subject to some form of heightened scrutiny. Based on this Court's established approach to rational-basis review, the answer is a resounding "No."

Petitioners' second issue effectively asks whether circuit courts should engage in courtroom fact-finding when deciding whether a law is constitutional. The law in this area is equally clear. Courts do not find facts about the adequacy of the Legislature's motives for economic legislation. Instead, courts presume the Legislature adhered to the constitution, and will sustain a law if there is any conceivable basis to do so, without regard to the quantum of evidence presented.

When properly framed, Petitioner's issues do not satisfy any of the criteria for this Court's review. There is no real and significant question of constitutional law, Wis. Stat. § 809.62(1r)(a); there exists no need for clarification or harmonization, Wis. Stat. § 809.62(1r)(c); and the court of appeals' decision does not create any conflict with controlling law, Wis. Stat. § 809.62(1r)(d).

I. Wisconsin law is clear, and there is no significant question of constitutional law regarding how Wisconsin courts approach rational-basis review.

The "right" at issue in this case is not "the right to earn a living."[1] Instead, this case revolves around Petitioners' purported "right to own and operate both a cemetery and a funeral home." Correctly, Petitioners have conceded that this "right" is not fundamental, and that rational-basis review is appropriate. Given the economic nature of the right at issue and the laws being challenged, Petitioners have appropriately

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[1] In their petition, Petitioners make multiple references to the "fundamental right to earn a living." (*See* Pet. 22; *see also id.* at 4, 10, 13.) But there is no question that the right at issue in this case is *not* a fundamental right; Petitioners have conceded as much. (*See, e.g.*, Appellant's Reply Br. 1 ("The parties are in agreement that the statutes in question must pass a 'rational basis' test in order to be constitutional under Wisconsin law.").)

acknowledged that their challenge is subject to rational-basis review.

There is no significant question about how courts apply rational-basis review in such challenges.

Indeed, not two years ago, in *Blake v. Jossart*, 2016 WI 57, 370 Wis. 2d 1, 884 N.W.2d 484, *cert. denied*, 137 S. Ct. 669 (2017), this Court applied rational-basis review to a law that prohibited certain individuals from obtaining licensure as child-care providers. Petitioners do not point to anything suggesting that those principles of constitutional review have changed, such that a significant question now exists that this Court missed last year.

To the contrary, the principles this Court relied on in *Blake* are well established in Wisconsin and federal case law. Those established principles embody a strong level of deference to the Legislature. *Blake*, 370 Wis. 2d 1, ¶¶ 27, 32. To effectuate this deferential approach, this Court stated that "[i]t is not sufficient for the challenging party merely to establish doubt about a statute's constitutionality, and it is not enough to establish that a statute probably is unconstitutional." *Id.* ¶ 27. Rather, the challenger must prove unconstitutionality "beyond a reasonable doubt." *See id.*

This inquiry presents a question of law, not fact. *See Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 13 n.8, 358 Wis. 2d 1, 851 N.W.2d 337 (quoting *Ferdon*, 284 Wis. 2d 573, ¶ 68 n.71). On rational-basis review, the "beyond a reasonable doubt" standard means that courts "give[ ] great deference to the legislature, and a court's degree of certainty about the unconstitutionality results from the persuasive force of legal argument." *Id.* This Court has described this standard as "frequently insurmountable" for challengers. *See Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 44, 235 Wis. 2d 610, 612 N.W.2d 59 (involving challenge to municipal ordinance).

As this Court recognized in *Blake*, this deference means that courts will not substitute their "'personal notions of good public policy for those of' the legislature." *Blake*, 370 Wis. 2d 1, ¶ 32 n.16 (citation omitted). Instead, courts "must identify or, if necessary, construct a rationale supporting the legislature's determination." *Id.* ¶ 32 (quoting *Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 62, 332 Wis. 2d 85, 796 N.W.2d 717). And once the court identifies a rational basis for the challenged law, "the court must assume the legislature passed the act on that basis." *Id.* (quoting *Ferdon*, 284 Wis. 2d 573, ¶ 75).

Federal case law is in accord with this highly deferential approach. As the court of appeals in this case cited, the Seventh Circuit recently rejected a similar constitutional challenge to an Indiana law that prohibited beer distributors from also holding licenses for liquor distribution. *See Monarch Beverage Co. v. Cook*, 861 F.3d 678, 680 (7th Cir. 2017); *see also Porter v. State*, 2017 WI App 65, 2017 WL 3731006, ¶ 17 (citing *Monarch*). In rejecting the challenge, the *Monarch* court recognized that the deferential approach on rational-basis review "is a notoriously 'heavy legal lift for the challenger.'" *Monarch*, 861 F.3d at 681 (quoting *Ind. Petroleum Marketers v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015). Like Wisconsin courts, the court in *Monarch* noted that a challenger on rational-basis review bears the burden to "'negative every conceivable basis' that might support the challenged law." *Id.* (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314–15 (1993).

Notably, the court also pointed out that neither that court nor the U.S. Supreme Court has ever "invalidated an economic regulation on rational-basis review" on the basis that the Legislature could have effectuated its chosen policy through

alternative means.[2] *See id.* at 685. The court also reaffirmed that on rational-basis review of economic regulation, "it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.*

Both Wisconsin and federal law demonstrates that there is no significant question about how courts apply rational-basis review to economic legislation. And like other economic legislation, the anti-combination laws at issue here are subject to these traditional rational-basis principles. The court of appeals faithfully applied these principles, and Petitioners fail to show how that application creates a significant question that necessitates this Court's review.

II. This Court need not accept review in this case to clarify or harmonize the law.

Under Wis. Stat. § 809.62(1r)(c), Petitioners suggest that review is necessary to clarify or harmonize Wisconsin law. (*See* Pet. 4–5.) As set forth above, this Court's cases make clear that Wisconsin courts afford great deference to economic legislation. *See, e.g., Blake*, 370 Wis. 2d 1, ¶¶ 27, 32 & n.16; *see also, e.g., Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 21, 376 Wis. 2d 528, 898 N.W.2d 70 (noting deferential approach to evaluating constitutional challenges, citing *Blake*). Just as there is no "significant question," there is no need for clarification.

Petitioners point to *Ferdon* and a number of older cases as injecting a more searching approach into Wisconsin's

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[2] As this Court has noted on multiple occasions, Wisconsin courts generally interpret the Wisconsin Constitution's due process and equal protection provisions consistent with the United States Supreme Court's interpretations of the parallel provisions in the federal Constitution. *See, e.g., State v. Ninham*, 2011 WI 33, ¶ 45, 333 Wis. 2d 335, 797 N.W.2d 451.

rational-basis review, and suggest that this discrepancy demands "harmonization." (*See* Pet. 13–22.) Specifically, Petitioners contend that, under these authorities, the State must prove that its laws bear a "real and substantial" relationship to the Legislature's intended ends. They assert that this approach must be harmonized with the prevailing standard that a law satisfies rational-basis review if there is any conceivable, legitimate basis for it. (*See id.* at 4, 15–22.)

Petitioners lean heavily on *Ferdon* in support of the "real and substantial" approach. (*See id.* at 13–22.) As they must—*Ferdon* is the only recent case in which this Court applied a heightened standard of review to invalidate economic legislation.

Ferdon demands no such harmonization. This Court has had no problem confining *Ferdon*'s "with bite" approach to the facts of that case, and applying traditional, highly deferential rational-basis review in every case since. *See, e.g., Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 106, 370 Wis. 2d 500, 881 N.W.2d 702 (quoting *Ferdon*, 284 Wis. 2d 573, ¶ 74, for the proposition that on rational-basis review, courts "are obligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination"); *Blake*, 370 Wis. 2d 1, ¶ 32 (same); *Madison Teachers*, 358 Wis. 2d 1, ¶ 76 (same).

Ferdon involved a constitutional challenge to the noneconomic damage cap in medical malpractice claims. Since *Ferdon*, this Court has not applied the "with bite" approach outside that very narrow context. In fact, the only other Wisconsin case in which an appellate court relied on *Ferdon* to overturn an economic regulation was the court of appeals' recent decision in *Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 2017 WI App 52 (petition for review pending). Just like *Ferdon*, *Mayo* involved a challenge

to the noneconomic damage cap for medical malpractice claims. *See id.* ¶ 1.

Thus, if there is a need to harmonize the law, it is in the context of medical malpractice damage caps, which is currently the only outlier from the traditional approach to rational basis. And if such harmonization is needed, the better vehicle to do so is the *Mayo* case, which is already pending on a petition for review before this Court (at the time of this writing). A challenge to the anti-combination laws does not present a need or an appropriate vehicle for harmonization of Wisconsin law.

It makes no difference that the court of appeals analyzed Petitioners' claims under both the traditional approach to rational-basis review and the "with bite" approach. *See Porter*, 2017 WI App 65, ¶¶ 28–46 (discussing challengers' failure under both standards). For one thing, the court did not hold that *Ferdon*'s approach was correct, or even that it necessarily remained viable. *See id.* ¶¶ 27–28. Instead, the court simply pointed to *Mayo* as undercutting the State's argument that Wisconsin courts no longer apply *Ferdon*'s "with bite" approach. *See id.* ¶ 27.

More basically, the court concluded that it "need not resolve the parties' dispute regarding whether the applicable level of scrutiny, here, is traditional rational basis review or rational basis with bite." *Id.* ¶ 28. In declining to decide which standard applied, the court noted that "[b]oth the parties and this court have devoted significant time and attention to the issue." *Id.* Under that pragmatic approach, the court declined to choose one test over the other, and instead assumed, without deciding, that either test could be applied. And under either test, Petitioners failed to establish beyond a reasonable doubt that the Legislature's anti-combination laws are unconstitutional. *Id.*

The court therefore did not extend *Ferdon* or suggest that its "with bite" approach was applicable outside the context of medical malpractice damage caps. In fact, the court of appeals' treatment of *Ferdon* reaffirms the applicability of the ultimate question on rational-basis review: whether the challenger can prove beyond a reasonable doubt that the challenged law is unconstitutional. *See id.* ¶¶ 34, 46.[3] By reaffirming that inquiry as the lodestar on rational-basis review, the court of appeals' treatment underscores that if harmonization is called for at all, it is in the limited context of medical malpractice damage caps, as presented in *Mayo*.

III. The Wisconsin Court of Appeals' decision faithfully applied controlling law, and does not create any conflict in the law.

In addition to their argument about *Ferdon*'s "with bite" approach, Petitioners also claim that the court of appeals erred by affirming summary judgment where (according to

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[3] The court of appeals also acknowledged that Petitioners relied heavily on a slightly older case, *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 209, 313 N.W.2d 805 (1982), as supportive of the heightened scrutiny they urge here. *See Porter*, 2017 WI App 65, ¶¶ 21–23, 44. The court in *Grand Bazaar* invalidated on equal protection grounds a Milwaukee ordinance regarding licensure for alcohol sales, stating that the rational-basis inquiry requires courts to determine whether a law is rationally related to the *stated purposes* for a challenged law. *See Grand Bazaar*, 105 Wis. 2d at 209. Wisconsin courts no longer apply this heightened scrutiny, and instead accept *any conceivable motive. See, e.g., Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 52, 332 Wis. 2d 459, 798 N.W.2d 287 (distinguishing approach used in *Grand Bazaar*, stating that courts no longer require "legislation . . . [to] expressly state a rationale[,] nor must [the legislation] contain legislative findings to support the law; rather, the legislation survives the substantive due process challenge if the court can conceive of a rational basis for the legislation").

Petitioners) there remained a "dispute of material fact." (*See* Pet. 10.) This, Petitioners argue, created a conflict with "black letter law," thus necessitating this Court's review under Wis. Stat. § 809.62(1r)(d).

The court of appeals' decision created no such conflict because there are no factual disputes that need to be resolved, material or otherwise. The court correctly recognized that "allowing for a fact-finding hearing would improperly elevate a so-called factual determination . . . as dispositive of the question of the anti-combination laws' constitutionality." *Porter*, 2017 WI App 65, ¶ 48. This holding creates no conflict with controlling case law from this Court or the U.S. Supreme Court. To the contrary, the courtroom fact-finding that Petitioners urge is neither necessary nor appropriate to resolve a rational-basis challenge. If any conflict exists, it is between Petitioners' argument and controlling legal principles.

The central principle on this issue is that courts may grant summary judgment where there is no dispute of *material* fact. Wis. Stat. § 802.08. "Materiality" is the guidepost here, and must be evaluated based on the legal standard that controls the claims at issue. *See Munger v. Seehafer*, 2016 WI App 89, ¶ 47, 372 Wis. 2d 749, 890 N.W.2d 22. A "material fact" is one that is "of consequence to the merits of the litigation." *Id.* (citations omitted). Here, the controlling legal standard is rational-basis review, under which a law will be upheld, as a matter of law, if there exists any conceivable rational basis for the law. *See Blake*, 370 Wis. 2d 1, ¶ 32.

Thus, on rational-basis review there should never be a factual issue that is "of consequence to the merits of the litigation": either there exists a conceivable rational basis for the law or not. This is a question of law, and courts should never make this decision based on credibility

determinations or courtroom fact-finding. *See Madison Teachers*, 358 Wis. 2d 1, ¶ 13 n.8.

In every case, then, summary judgment will be the appropriate stage at which to resolve a rational-basis challenge.[4] And under either traditional rational-basis review or "with bite," the only "material" issue is whether the challenger is able to prove the law unconstitutional beyond a reasonable doubt—that is, to negative every conceivable basis for the law. *See Madison Teachers*, 358 Wis. 2d 1, ¶ 13.

Therefore, the Petitioners created no dispute of "material" fact simply by proffering an expert who opined about the economic effects of the anti-combination laws. (*See* Pet. 8 (arguing that summary judgment was not appropriate because Petitioners' "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").) One expert hardly amounts to proof "beyond a reasonable doubt," particularly when that experts' conclusions were vigorously disputed by another, equally qualified expert in the field of economics. *See Porter*, 2017 WI App 65, ¶¶ 39, 42–43, 49. The court of appeals correctly concluded, as a matter of law, that Petitioners failed to carry their burden to show beyond a reasonable doubt that the law was unconstitutional. *Id.* ¶¶ 42–43.

As a final matter, it bears noting that Petitioners' proposed "fact-finding" approach would not only *create* a conflict with existing law, it would likely have sweeping effects on the judiciary, the Legislature, and the public.

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[4] In fact, virtually all rational-basis challenges should be resolvable on a motion to dismiss: if there is a conceivable basis for the challenged law, the challenger will have failed to state a claim on which relief can be granted.

First, Petitioners' heightened evidentiary standard would invite widespread constitutional challenges to every conceivable piece of legislation, and would require courts to engage in fact-finding on every challenge. Courts would be forced, in every instance, to sit as a super-legislature, reexamining whether there was *enough* evidence to support any given policy the Legislature enacted. This would result in courts, not the Legislature, deciding which policies our State should pursue, based only on whether the court was satisfied with the evidence produced in litigation.

Likewise, Petitioners' approach would unduly burden the Legislature by imposing onerous documentary obligations. The Legislature would have to ensure that there was *conclusive proof* supporting every single piece of legislation. Under Petitioners' evidentiary approach, courts could "find" a law unconstitutional simply because the Legislature did not "show its work" when enacting an otherwise unobjectionable law, one for which there might be numerous "conceivable" (but undocumented) legitimate rationales.

In the end, these impacts on the judiciary and Legislature would most harm Wisconsin citizens. Lawmaking would slow, as would court operations, with all litigants bearing the burden of that slowdown. Worst, citizens would lose confidence in these institutions because courts would regularly be called on to invalidate the work of the Legislature.

The court of appeals' decision created no conflict with controlling law and reaffirmed the fundamental principle underlying rational-basis review: courts will not second-guess the Legislature on matters of economic policy in the name of equal protection or due process. *See id.* ¶ 51. Adhering to this fundamental division between legislative and judicial roles, the court appropriately concluded that,

under either approach to rational-basis review, the anti-combination laws must stand.

CONCLUSION

The petition for review fails to demonstrate that any of the criteria for this Court's review are satisfied. There is no real and significant question of constitutional law; this case presents no need for clarification or harmonization of the law of rational-basis review; and the court of appeals' decision creates no conflict with controlling law. The petition should be denied.

Dated this 12th day of October, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)–(c) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 3560 words.

Dated this 12th day of October, 2017.

GABE JOHNSON-KARP
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 12th day of October, 2017.

GABE JOHNSON-KARP
Assistant Attorney General