STATE OF WISCONSIN
SUPREME COURT
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.

Appeal from the Circuit Court of Waukesha County
Honorable Patrick C. Haughney Presiding
Case No. 14-CV-1763

PLAINTIFFS-APPELLANTS-PETITIONERS' BRIEF AND APPENDIX

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INTRODUCTION

It's Just the Same Old Story

Writing in Federalist No. 10, James Madison warned against the danger of what he called "faction" – the risk that "a number of citizens, whether amounting to a majority or minority of the whole, who are united by and actuated by some common impulse of passion or interest, adversed to rights of other citizens, or to the paramount and aggregate interests of the community" might be able to bend government to its will. Modern public choice theory confirms our Founders' concern, teaching us that highly motivated special interests – often acting in prosaic areas unlikely to attract much attention – can enlist the coercive power of the state to extract economic rent from the rest of us.[1] This phenomenon caused one federal court to observe that, "[w]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." *Powers v. Harris*, 379 F.3d 1208, 1221-22 (10th Cir. 2004).

[1] James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, THE THEORY OF PUBLIC CHOICE – II, at 11 (James M. Buchanan et al. eds., 1984); Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22CRITICAL REVIEW, 253, 257-62 (2010).

This case involves yet another iteration of that same old story. And while the *Powers* court thought itself helpless to intervene, leaving the rights of citizens to a political process that had been hijacked, Madison understood that "auxiliary precautions" were needed to restrain faction, including an engaged judiciary that, while never substituting its views on public policy for that of the legislature, would enforce constitutional imitations on the power of the state. (THE FEDERALIST NO. 51 (James Madison)). When faction (appearing as special economic interests) infringes upon the right of Wisconsin citizens to earn a living, the Wisconsin Constitution requires laws resulting from such efforts to bear a real and substantial relationship between the restriction on liberty and some legitimate governmental purpose. That purpose can never consist of the desire to grant favors to some competitors at the expense of others.

This Court should make it clear, as it has in the past, that protectionist legislation favoring one group of competitors over another is highly suspect. And it should make it clear, as it has in the past, that legislation interfering with the economic liberty of Wisconsin citizens must do more than pass a rational basis test that simply accepts whatever rationale the state asserts, and upholds a challenged law no matter how

insubstantial or unlikely its posited benefits may be. While such legislation may not be subject to strict scrutiny, it still must bear a "real and substantial" relationship to some legitimate governmental purpose, and a plaintiff must be given a chance to introduce evidence demonstrating that this relationship does not exist. It is, put simply, irrational to act on a course of conduct that the evidence shows will not accomplish its purpose.

STATEMENT OF ISSUES

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 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 require the courts to ignore

disputed issues of material facts in favor of the State when considering a motion for summary judgment?

Court of Appeals decision: The Court of Appeals ruled that, even if a real and substantial relationship must be shown, the mere ability to articulate a possible justification for a restriction 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.) To say that something is possible is enough to establish that it is reasonable to believe it without regard to the need to test or weigh the evidence.

STATEMENT ON ORAL ARGUMENT & PUBLICATION

The Court has already scheduled oral argument in this case. The Court should publish the decision in this matter, as it usually does. It is likely to clarify the proper role of Wisconsin courts in assessing constitutional challenges to economic regulation that is protectionist in character and that infringes on the rights of Wisconsin citizens to earn a living.

STATEMENT OF THE CASE

The Plaintiffs challenge a collection of state statutes (collectively referred to as the "Anti-Combination Law") that, generally speaking, 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 similar provisions as applied to funeral directors. It also prohibits a licensed funeral director from operating a mortuary or funeral establishment located within a cemetery, whether or not that funeral director has any form of ownership in the cemetery.

The Plaintiffs are cemetery operators who believe it would be in their best interest, and in the best interests of their customers, to operate a funeral home. They are willing and able to take all necessary regulatory steps to achieve that goal and to operate a funeral establishment in full compliance with all Wisconsin laws and regulations relating to such an

operation. But the law prevents them from offering this lawful service to their customers.

So the Plaintiffs filed this lawsuit, arguing that the Anti-Combination Law violates substantive due process by impairing their right to earn a living without having a real and substantial connection to any legitimate government interest. The Plaintiffs also allege that it violates their guarantee of equal protection by forbidding cemeteries, but not other businesses – including those involved in the death care industry (such as memorial, 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 a number of legitimate governmental interests. In opposition, the Plaintiffs submitted evidence showing that the Anti-Combination Law does not and could not further any of the asserted governmental objectives. On June 20, 2016, the Waukesha County Circuit Court, the Honorable Patrick C. Haughney presiding, granted the Defendants' motion for summary judgment. (R. 34; P. App. 128-29.) The court concluded that it did not matter that there was a genuine dispute of material fact. The court found that the mere existence of such a dispute was

sufficient to uphold 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.) In other words, the circuit court concluded that all factual disputes must be resolved in the state's favor as a matter of law, without the need to weigh evidence. 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 Circuit Court's decision. Although it purported to apply both what it called "traditional" rational basis review as well as "rational basis with bite," it said that, even under the latter approach, summary judgment was proper despite disputed issues of material fact. Following the Circuit Court, it concluded that the mere existence of such a dispute established a "reasonable difference of opinion" as to whether the law actually advances some legitimate state interest. There was no need to weigh the evidence against some standard – even one appropriately deferential to the State – or to allow it to be tested by an adversarial hearing. No matter how weak the evidence creating that dispute or how implausible the purported justification might be, the State wins unless the plaintiff can show that it is

impossible for the challenged restriction on liberty to serve a legitimate purpose. This is not deference. It's abdication.

STATEMENT OF FACTS

Plaintiff Highland Memorial Park, Inc. is a Wisconsin corporation and a duly-licensed cemetery. (R. 1:5.) Plaintiff E. Glenn Porter III is the President of Highland Memorial and one of its principal owners. (*Id.*) The Plaintiffs would, absent the Anti-Combination Law, combine their operations in some fashion with those of a licensed funeral establishment. (R. 27:2.)

Defendant Dave Ross was[2] the Secretary of the Wisconsin Department of Safety & Professional Services ("DSPS"), the state agency responsible for the enforcement of the Anti-Combination Law. (R. 1:5.) Defendant Wisconsin Funeral Directors Examining Board ("Board") is an agency of the State of Wisconsin operating within DSPS and charged with enforcing Chapter 445 of the Wisconsin Statutes, including § 445.12(6). (*Id.*)

[2] In February, 2017, Laura Gutierrez became the Secretary of DSPS. That change is immaterial, as this is an official-capacity suit brought against the person holding the title.

The Plaintiffs introduced substantial evidence showing that the Anti-Combination Law does not, in fact, serve any of the governmental interests claimed by the Defendants, and actually works counter to them. The Plaintiffs' expert, who has extensively studied the death care industry nationwide, demonstrated that none of the imaginative concerns that the State and its witnesses say could possibly be raised by the existence of combination firms have actually turned out to be real concerns in any of the 39 states that do not have Anti-Combination Laws. The State's own expert economist conceded that this is true. (R. 29:5-6, R. 29:26-27.)

STANDARD OF REVIEW

"Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Kruschke v. City of New Richmond*, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990). "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." *Waters v. U.S. Fidelity & Guar. Co.*, 124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985). "In evaluating the evidence, we draw all reasonable inferences from the evidence in the light

most favorable to the non-moving party." *Burbank Grease Services, LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

The grant of summary judgment is reviewed *de novo*. *Post v. Schwall*, 157 Wis. 2d 652, 656, 460 N.W.2d 794 (Ct. App. 1990). The constitutionality of a statute is a question of law that is reviewed *de novo*. *Wis. Medical Soc'y v. Morgan*, 2010 WI 94, ¶36, 328 Wis. 2d 469, 787 N.W.2d 22.

ARGUMENT

HISTORY AND TEXT OF THE ANTI-COMBINATION LAW

The core of the Anti-Combination Law (preventing a funeral home and a cemetery from operating out of the same premises) is eighty years old. In 1939, the State Legislature adopted a statute preventing a licensed funeral director or embalmer from operating a mortuary or funeral establishment located within or connected to any cemetery. Drafting records explain that this was "[a] measure requested and sponsored by the Wisconsin Funeral Directors and Embalmers Association." Drafting Record, Chapter 93, Laws of 1939, p. 2. (R. 29:402.) The statute was drafted by the funeral directors and even submitted to the Legislature on

association letterhead – "Wisconsin Funeral Director's and Embalmer's Association, Inc., Legislative Committee." *Id.* at 20. (R. 29:404.)

The original statute was amended in 1943 to prohibit direct or indirect financial arrangements between funeral directors and operators of cemeteries. That amendment was also "[a] measure requested and sponsored by the Wisconsin Funeral Directors and Embalmers Association." Drafting Record, Chapter 433, Laws of 1943, p. 2. (R. 29:403.)

The purpose of the Anti-Combination Law is to protect funeral directors from competition by cemetery owners. Wisconsin funeral directors got the idea from California. The combination firm was invented there during the early 1930s, when Forest Lawn Memorial Park in Los Angeles proposed for the first time ever to own and operate a funeral home on cemetery property. That plan may have appealed to many Forest Lawn customers, but it did not appeal to California's funeral directors. They saw it as a new competitive threat to their business model and called the government to their defense. The California Board of Embalmers and Funeral Directors refused to grant the owners of Forest Lawn a license to operate as a funeral establishment. Litigation ensued. *See Forest Lawn*

Memorial Park Ass'n. v. State Bd. of Embalmers and Funeral Dirs., 24 P.2d 887 (Cal. App. 1933). Eventually, the funeral directors lost. Forest Lawn succeeded in pressing forward with its new business model, one that proved to be very popular with the public.

These developments in California received national attention. Funeral directors in other states, like their colleagues in California, saw combination firms as a new and unwanted competitive threat. So they enlisted the government to protect them. *See* Laura Kath, FOREST LAWN: THE FIRST 100 YEARS, 51-52 (2007). In Wisconsin, they succeeded. Wisconsin's Anti-Combination Laws have been revised and rewritten over the years and are now codified in Wis. Stat. §§ 445.12(6) and 157.067(2). Wis. Stat. § 157.067(2) reads as follows:

> No cemetery authority may permit a funeral establishment to be located in the cemetery. No cemetery authority may have or permit an employee or agent of the cemetery to have any ownership, operation or other financial interest in a funeral establishment. Except as provided in sub. (2m),[3] no cemetery authority or employee or agent of a cemetery may, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from a funeral establishment or from an owner, employee or agent of a funeral establishment.

[3] (2m) permits a funeral home to pass a burial fee paid by the deceased's family along to a cemetery.

Wis. Stat. §445.12(6) reads as follows:

> No licensed funeral director or operator of a funeral establishment may operate a mortuary or funeral establishment that is located in a cemetery or that is financially, through an ownership or operation interest or otherwise, connected with a cemetery. No licensed funeral director or his or her employee may, directly or indirectly, receive or accept any commission, fee, remuneration or benefit of any kind from any cemetery, mausoleum or crematory or from any owner, employee or agent thereof in connection with the sale or transfer of any cemetery lot, outer burial container, burial privilege or cremation, nor act, directly or indirectly, as a broker or jobber of any cemetery property or interest therein.

These statutes prevent the Plaintiffs from engaging in an otherwise lawful business in the State of Wisconsin, and absent the statutory prohibitions they would be ready, willing, and able to do so.

I) THE TEST ESTABLISHED BY THIS COURT TO DETERMINE THE CONSTITUTIONALITY OF ECONOMIC REGULATION REQUIRES AN EVIDENTIARY DETERMINATION OF WHETHER THE LAW HAS A REAL AND SUBSTANTIAL CONNECTION TO A LEGITIMATE GOVERNMENT PURPOSE

A) The Wisconsin Constitution Protects Economic Freedom as a Fundamental Right

Article I, Section 1 of the Wisconsin Constitution, 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." This declaration of rights establishes – both expressly in its guarantee of liberty and implicitly in the recognition that the State's power over its citizens is not plenary – that our constitutional scheme is not one of simple majoritarianism, but confers some measure of general protection for individual liberty.

In interpreting this protection, it is Wisconsin cases that matter, not federal cases.[4] The rights of Wisconsin residents under their own Constitution are not limited to or subject to the same limitations as those rights protected under the Fourteenth Amendment to the U.S. Constitution. As this Court has explained:

> It is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment.

State v. Doe, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

Wisconsin courts have long understood the State Constitution, including the concept of "liberty," 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

[4] Yet as shown below, even the federal rational basis review is not the walk-over the defendants have claimed it to be. *See infra* Section I.D.2.

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). As this Court explained,

> [T]he 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; to act and to be a citizen, he must be free to act and to have somewhat wherewith to act, and thus to be competent to the performance of his high functions as such.

Id.

Other early Wisconsin cases reinforced the importance of economic liberty under the Constitution. *See Taylor v. State*, 35 Wis. 298, 301 (1874) (right to engage in business is a fundamental right; holding that 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 favoring associations of plumbers over individual plumbers; holding that 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.").

A long line of Wisconsin cases spanning three centuries apply meaningful judicial scrutiny to laws that interfere with this fundamental economic liberty. The way in which courts have discussed this protection of liberty and limitation on the authority of the state has changed over time. Older cases are more likely to speak in terms of limits on the State's police power. *See, e.g.*, *Mehlos v. City of Milwaukee*, 156 Wis. 591, 146 N.W. 882, 885 (1914) ("There must be a reasonable ground for the police interference and also the means adopted must be reasonable for the accomplishment of the purpose in view."); *Bonnett v. Vallier*, 136 Wis. 193, 116 N.W. 885, 888 (1908) (when a police regulation goes beyond the legitimate scope of government, it is "no law at all"). Although modern cases might come to a different result on certain questions – *Bonnett's* invalidation of a building code would be unlikely to be repeated today – contemporary cases also recognize that the police power is limited to reasonable regulation that serves the public welfare. *State v. Hamdan*, 2003 WI 113, ¶119, 264 Wis. 2d 433, 665 N.W.2d 785. While courts do not substitute their judgment for that of the Legislature in "fairly debatable circumstances," *Id.*, there are legitimate and illegitimate exercises of the police power, and courts must distinguish the one from the other. As a

matter of the text and original understanding, courts that test the exercise of police power are enforcing a structural limitation on government. The police power has never been understood to mean "anything goes."

More recent cases have spoken in the language of due process and equal protection. *See, e.g.*, *State v. Smith*, 2010 WI 16, 323 Wis. 2d 377, 780 N.W.2d 90. Additionally, courts have sometimes spoken as if there is a stark dichotomy in the application of these safeguards: strict scrutiny (quite difficult for the government to overcome) of laws that infringe certain enumerated rights and non-enumerated but preferred "fundamental rights" contrasted to rational basis review (amounting to virtually no protection at all) of all other liberty and equal protection claims. But the reality is more complicated. In both federal and state court, plaintiffs win rational basis cases. And, in Wisconsin, they win them when the State infringes the right to earn a living without a real and substantial relationship between the infringement and a legitimate state objective.

B) To Protect that Fundamental Right, Courts Require Laws Infringing It to Have a Real and Substantial Relation to their Objectives

Of course, most economic regulations have been upheld, and Wisconsin courts have never freely substituted their own views of public

policy for that of the Legislature. But the courts have evaluated allegations of economic protectionism and impairment of the right to earn a living with a level 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, the law 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*. (citations omitted).

In *State v. Redmon*, 134 Wis. 89, 114 N.W. 137 (1907), this Court stated that if a regulation purporting to have been enacted to protect the public welfare has no real or substantial relation to its object, it is the duty of the courts to give effect to the constitutional guarantee of liberty by striking it down. 114 N.W. at 141. It noted that complete deference to whatever purpose might be hypothesized to possibly serve some laudatory goal would result in:

> one [being] placed in such a straight–jacket, so to speak, that liberty and the pursuit of happiness, the incentive to industry,

> to the acquirement and enjoyment of property, – those things commonly supposed to make a nation intelligent, progressive, prosperous and great, – would be largely impaired and in some cases destroyed.

Id. Mere claims of serving some reasonable health or safety objective were insufficient; courts have the power to 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).

This meaningful review has not been abandoned. Throughout the twentieth and twenty-first centuries, Wisconsin courts have applied the real and substantial standard to strike down protectionist legislation designed to favor one class of competitors at the expense of another. In *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369 (1927), this Court dealt with the Legislature's decision, presumably at the behest of the dairy industry, to ban the sale of oleomargarine and other substitutes for butter in Wisconsin. This Court rejected the idea that the Legislature, "in order to protect the Wisconsin dairy industry from unfair competition, may prohibit the manufacture and sale of oleomargarine. There is no basis in the evidence

upon which a claim of unfair competition 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).

History may not repeat itself, but it often rhymes. Some twenty-five years after *Jelke*, the Wisconsin dairy industry sought the assistance of the State to ban a new soft-serve frozen dairy product called Dairy Queen. After this Court concluded that the health and safety statutes the State was attempting to enforce did not ban the sale of the product, *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 478, 51 N.W.2d 34 (1952), several *amicus* organizations, including about 85 Wisconsin ice cream manufacturers, sought rehearing. *See 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 reviewed the evidence, rejected their concerns, and reiterated the rule established in *Jelke*. *Id.* at 477-78.

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 Law, this ordinance was passed to protect "the little man" from "the big man," a purpose the court found to be illegitimate. *Id.* at 209-10 & n. 5. Reversing the Court of Appeals, this Court held the ordinance to be constitutionally infirm. 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, the 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 court further explained that the factual question of whether the law actually furthered its objectives was relevant, stating that to be reasonable, a law must actually "tend[] 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)). The court concluded that the evidence did not show that the law was rationally related to its proposed objectives. *Id.* at 214.

In *Wisconsin Wine & Spirit Institute v. Ley*, 141 Wis. 2d 958, 416 N.W.2d 914 (Ct. App. 1987), after repeating this Court's admonition in *Grand Bazaar Liquors* that rational basis is "not toothless," the Court of Appeals struck down a grandfather clause in the liquor law, holding that, even when it comes to economic legislation, the state may not favor a privileged class without adequate justification. *Id.* at 968, 971. The court looked at whether the exception actually operated to further the purpose of the law, concluding that it did not. *Id.* at 969.

This Court's explanation of the rational basis test in the equal protection context also emphasizes the real and substantial inquiry that must be undertaken. In reviewing a legislative classification on non-

suspect grounds (say, excluding owners of cemeteries and no one else from becoming licensed funeral home directors), courts apply a five-part test:

> (1) All classifications must be based upon substantial distinctions which made one class really different from another.
> (2) The classification adopted must be germane to the purpose of the law.
> (3) The classification must not be based upon existing circumstances only and must not be so constituted as to preclude addition to the numbers included within a class.
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
> (5) The characteristics of each class could be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Milwaukee Brewers Baseball Club v. DHSS, 130 Wis. 2d 79, 96, 387 N.W.2d 254 (1986). The test looks at factual questions, such as what are "substantial distinctions," are the classes "really different," and whether the fit is good enough between means and ends.

Applying that test in *Milwaukee Brewers*, this Court made clear that where the constitutionality of a law depends upon facts, those facts are presumed to exist only until shown otherwise. *Id*. at 99. This Court explained that "[w]hat the legislature believes is not determinative; the test is not whether the legislature had a rationale. It will always have a rationale

for anything it does. The test is whether the rationale is rational." *Id.* at 103.

Wisconsin courts have described this evidence-based standard as "rational basis with teeth," "rational basis with bite," or "meaningful rational basis." At a minimum, a rule that incorporates the "real and substantial" test for protectionist statutes would be similar to rational basis with bite.

The rational basis with bite methodology 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. But *Ferdon* was by no means the first case to articulate or apply this standard. In *Doering v. WEA Ins. Group*, after noting that 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 Liquors*, 105 Wis. 2d at 209 (using the phrase). The proper test, the Court stated, "allows the court to probe beneath the claims of the government." *Doering*, 193 Wis. 2d at 143.

In *Ferdon*, after reciting the familiar deferential language 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 in the nature of the class singled out 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. This Court identified an over-arching objective of the cap and five underlying, interconnected objectives. *Id.*, ¶¶85-96. It then exhaustively analyzed each of those six objectives, concluding that <u>in practice</u>, the cap furthered none of them. *Id.*, ¶¶97-176. In doing so, this Court relied on state and federal government reports, scientific studies and papers, and individual testimony. The analysis is replete with statements such as "<u>[b]ased on the available evidence</u>, we cannot conclude that [the cap] is rationally related to the [claimed] objective." *See, e.g.*, *Id.*, ¶171 (emphasis added). This Court even noted that while it was a plausible <u>theory</u> 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, the *Ferdon* court invalidated the law. *Id.*, ¶188.

The outcome in *Ferdon* has drawn substantial criticism. And this Court will review a Court of Appeals decision striking down another version of those same caps in *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2017 WI App 52, 377 Wis. 2d 566, 901 N.W.2d 782. Plaintiffs take no position on whether *Ferdon* and *Mayo* were correctly decided. They assert only that the *methodology* in those cases correctly sets forth the constitutional analysis that should apply in cases such as this one. *Ferdon* acknowledged that a plaintiff bears the burden of proof and that a law is entitled to a presumption of constitutionality.[5] It even repeated this Court's oft-used language about the need to prove a law unconstitutional beyond a reasonable doubt and the need for courts to supply a rationale if the legislature has not offered a sufficient one.[6] But this did not preclude examining the facts to determine whether, in light of

[5] Whether or not the plaintiff should bear the burden of proof is not raised by this litigation.

[6] It is unclear why this should be part of a court's review of regulation interfering with the right to earn a living. It is, to say the least, unusual for courts to act as advocates for one side of a controversy.

the evidence, it was reasonable to believe that the law furthered its intended purpose.

Whether that methodology should have been applied in *Ferdon* and *Mayo* is yet another matter, as the real and substantial test involves laws that impair the liberty guaranteed by – and the limits on the police power implicit in – Art. I, sec. 1 of the Wisconsin Constitution. The laws at issue in *Ferdon* and *Mayo* were enacted to protect a government system of umbrella insurance for malpractice claims, and the State may have greater leeway to define the terms on which it will provide a benefit as opposed to imposing a restriction on liberty.

C) Beyond a Reasonable Doubt Does Not Mean Beyond All Doubt

This Court often says that a law must be proven unconstitutional beyond a reasonable doubt. *See, e.g., Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶13, 258 Wis. 2d 1, 851 N.W.2d 337. This Court has also noted the incongruity of applying an evidentiary standard to what is often a legal question,[7] but in this case it seems that some evaluation of a factual assertion – that there is a real and substantial relationship between a law and its legitimate purpose – is required. *See, e.g.*, *Ferdon*, 2005 WI 125,

[7] *State v. Williams*, 2002 WI 1, ¶6, 249 Wis. 2d 492, 637 N.W.2d 733.

¶68, n. 71. Seen in that way, the reasonable doubt burden seems to overstate the degree of deference that ought to be afforded the state on constitutional questions. The evidentiary standard in criminal cases is often said to be rooted in Blackstone's observation that "it is better that ten guilty persons escape than one innocent suffer."[8] But it is certainly no better that the supreme law of our state – its Constitution – be violated ten times lest one constitutional law be stricken. While substantial deference to the state is warranted, it is not clear that it is captured by the evidentiary standard in criminal cases.

But even if "reasonable doubt" is the standard, it is a commonplace observation that a reasonable doubt is not equivalent to any doubt and is not raised by a criminal defendant who demonstrates that his or her innocence is theoretically possible or who offers any exculpatory evidence without the need to test or weigh it. A criminal defendant is not acquitted simply because he has offered a plausible story – even one supported by some evidence – that might create a reasonable doubt. The evidence must still be tested at trial and the trier of fact must consider it when applying the "beyond a reasonable doubt" standard. A criminal defendant is not entitled

[8] 4 WILLIAM BLACKSTONE, COMMENTARIES *358. *See also Genesis* 18:23-32 (in which Abraham pleads with God to not destroy the wicked of Sodom for sake of the righteous within its walls).

to acquittal because he can articulate a theory of his innocence no matter how unlikely the evidence suggests that theory might be. None of those things should be true for a government defendant arguing in favor of a law that infringes on people's right to earn a living.

D) Plaintiffs Are Not Trying to "Revitalize" *Lochner*

The State argued below that the Plaintiffs are trying to "reinvigorate" and "revitalize" *Lochner v. New York*, 198 U.S. 45 (1905), a case in which the U.S. Supreme Court struck down a state law capping the number of hours bakers could work in a week. In some legal circles, *Lochne*r has become a talisman employed ham-handedly to end discussion and shortcut reasoned analysis. Its invocation here is a red herring. Plaintiffs are not arguing that courts ought to substitute their social and economic beliefs for the judgment of legislative bodies.[9] Wisconsin's real and substantial test does not do that. And it was never based on *Lochner*.

1. Wisconsin's Test Has Remained Distinct from the Federal Test

[9] Recent scholarship has called into question the common caricature of *Lochner* and associated cases as involving such judicial activism. Even in the *Lochner* era, most economic regulation was upheld, and courts did not substitute their policy views for those of legislatures. *See generally* David E. Bernstein, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

The interpretation of Wisconsin's Constitution to protect the fundamental right to earn a living and require laws infringing that right to bear a real and substantial relationship to their purpose predates *Lochner*. *See, e.g.*, *Kreutzberg*, 114 Wis. 530; *Taylor v. State*, 35 Wis. 298. Nor did *Lochner* affect the ongoing development of Wisconsin's constitutional jurisprudence. The case has been cited a mere handful of times in Wisconsin cases. *See Benz v. Kremer*, 142 Wis. 1, 125 N.W. 99, 102 (1910) (citing to *Lochner* only to distinguish it); *State v. Buer*, 174 Wis. 120, 182 N.W. 855, 860-61 (1921) (using *Lochner* and the case that overruled it to demonstrate that societal and scientific changes can change the constitutionality of a law). On two occasions the case was invoked by dissenting justices to dismiss (as the dissenters saw it) aggressive rational basis analyses. *See Ferdon*, 2005 WI 125, ¶220 (Prosser, J., dissenting) (criticizing the majority for using a *Lochner*-like analysis); *Milwaukee Brewers*, 130 Wis. 2d at 135 (Abrahamson, J., dissenting) (same).

As federal courts moved away from the *Lochner* era and began applying what came to be known as the "rational basis test," Wisconsin courts began borrowing their more deferential language. But, as we have seen, that language has often been combined with admonitions that rational

basis review is not "toothless" and that the State's justifications must be evaluated in light of the evidence. This Court has never overruled or repudiated its own real and substantial basis test. In fact, the very first Wisconsin case to use the phrase "rational basis" in a constitutional challenge still reviewed the underlying evidence to test rationality. *Onsrud v. Kenyon*, 238 Wis. 496, 300 N.W. 359, 361 (1941) (citing *So. Carolina State Hwy Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938)) (looking at "considerable proof" in the record supporting a law changing how mortgages were foreclosed). This Court noted that although courts could presume facts that would support a legislative decision, those facts could be precluded by facts "judicially known or proven." *Id.* (emphasis added).[10]

In *Dairy Queen*, the dairy industry urged this Court to adopt the reasoning of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (the first case to clearly delineate between rational basis review and something stricter for laws affecting "discrete and insular minorities"). 260 Wis. 2d at 478. This Court refused, explicitly hewing to "the rule of the *Jelke* case." *Id.; see also Ritholz v. Johnson*, 244 Wis. 494, 504, 12 N.W.2d 738 (1944) (in a rational basis case, '[i]f there is a dispute as to the

[10] *See also State ex rel. Hippler v. City of Baraboo*, 47 Wis. 2d 603, 614, 178 N.W.2d 1 (1970); *Chicago & N.W. Ry. Co. v. La Follette*, 27 Wis. 2d 505, 521-23, 135 N.W.2d 269 (1965).

facts, the facts should be ascertained by a judicial investigation in the trial courts."). The government is allowed a presumption, not a conclusion, that facts exist supporting a plausible rationale, and courts must review any facts raised to challenge that presumption while applying a rational basis[11] test. *See, e.g.*, *Ferdon*, 2005 WI 125, ¶¶ 75-77; *Milwaukee Brewers*, 387 N.W.2d 254, 263 (1986); *Grand Bazaar Liquors*, 105 Wis. 2d 203, 208-09 (1982); *see also Clark Oil & Refining Corp. v. City of Tomah*, 30 Wis. 2d 547, 554-58, 141 N.W. 2d 299 (1966) (reviewing written and oral testimony showing that limiting the size of tankers would increase the number of trucks necessary to deliver the same amount of gasoline, actually increasing the risk of vehicular accidents).

Wisconsin's use of the real and substantial basis test did not come from *Lochner*, was not influenced by *Lochner*, and continued to be applied long after *Lochner* was discarded. Plaintiffs are not asking for *Lochner* to be revived, reinvigorated, or revitalized. Plaintiffs are asking for continued

[11] Even the phrase "rational basis" itself connotes an evidentiary conclusion. Its earliest appearances in Wisconsin case law revolve around factual conclusions. *See, e.g.*, *In re Shanks' Will*, 172 Wis. 621, 179 N.W. 747, 747 (1920) (no "rational basis" for testator's belief wife was having an affair); *Sattler v. Neiderkorn*, 190 Wis. 464, 209 N.W. 607 (1926) (construing a contract to give it a "rational basis" to exist). "Rational basis" did not become a common phrase used in constitutional disputes in Wisconsin courts until the 1960s.

application of a test that, whatever it is labeled, views the actual evidence to determine whether a law actually achieves its claimed objectives.

2. Federal Rational Basis Review Is Not as Forgiving as the State Claims

Even if this Court concludes that Wisconsin should abandon its own jurisprudence and walk in lockstep with federal courts, Plaintiffs' case is not lost. Relying on *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993), the State has argued that a statute must be upheld even if it is based only on "rational" speculation unsupported by evidence or empirical data. (Ct. App. Resp. Br. 18, 20.) To be sure, language can be pulled from many federal cases to support this assertion. The full story is not so simple. As more than one commentator has noted, defining the rational basis test in this exaggerated and formalistic way does not accurately describe what federal courts actually do.[12] This Court has noticed as well. *See Ferdon*, 2005 WI 125, ¶¶77-79. As one commentator recently observed, plaintiffs

[12] *See, e.g.*, Robert G. Natelson, *Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1175-76 (2004); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512-18 (2004); Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1055, n.35 (1979) (citing cases); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416-17 (1999) (same).

have won rational basis challenges many times.[13] The United States Supreme Court has examined evidence – not stopping at "any conceivable basis" – on a number of occasions. *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

It has even done so in cases involving economic regulation. For example, in *Metropolitan Life Insurance v. Ward*, 470 U.S. 869 (1985), the Court held that promotion of domestic businesses by discriminating against non-residents was not a legitimate state purpose and remanded for an *evidentiary* hearing on whether or not the law could be justified in some other way. As Justice Kennedy remarked in a different context, "[a] court confronted with a plausible accusation of impermissible favoritism to private parties ought to treat the objection as a serious one and review the record to see if it has merit." *Kelo v. New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

In two relatively recent cases involving (like this one) regulation of competition in the death care industry, federal circuit courts struck down

[13] Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary Perplexity*, 25 GEO MASON CIV. RTS. J. 1, 8 (2013). Sandefur notes that "Robert McNamara and Clark Neily of the Institute for Justice estimate that the United States Supreme Court has ruled in favor of plaintiffs in 21 out of105 rational basis cases filed between 1970 and 2010, which is about 17 percent of the cases."

economic regulations under rational basis scrutiny. In *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2015), the Fifth Circuit struck down a Louisiana law providing that only licensed funeral directors could sell caskets. The court engaged in a careful examination of the State's post-hoc justification for the restriction and concluded that it lacked a rational basis. While it acknowledged the value of judicial deference, the Fifth Circuit observed that "the principle we protect from the hand of the State today protects an equally vital core principle – the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good, but as "economic" protection of the rulemakers' pockets." *Id.* at 226-27.

The Sixth Circuit took a similar approach to reach the same conclusion in *Craigmiles v. Gilbert*, 312 F.3d 220 (6th Cir. 2004), striking down Tennessee's prohibition of casket sales by anyone other than funeral directors. It, too, engaged in real scrutiny of the State's claimed justifications. *Id.* at 225-29; *see also Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000) (finding no rational relationship between the licensure requirement and stated goals of prompt human remains disposal and consumer protection).

The justifications offered by the states in *St. Joseph Abbey* and *Craigmiles* were similar to those offered here. Limiting casket sales to funeral directors, the states argued, was justified because they, and not others, are subject to the Federal Trade Commission's Funeral Rule. *St. Joseph Abbey*, 712 F.3d at 225; *Craigmiles*, 312 F.3d at 227. It was argued that funeral directors, by virtue of their training and expertise, might be better at advising on casket selection. *St. Joseph Abbey*, 712 F.3d at 225-26; *Craigmiles*, 312 F.3d at 226-28.

Of course, these things might be true – they are "conceivable" – but both courts did what the State argues may not be done in cases like this. They rejected claims that "unregulated" sellers would engage in sharp practices because these sellers were already subject to consumer protection rules or could be more closely regulated if the state so desired. *St. Joseph Abbey*, 712 F.3d at 224-26; *Craigmiles*, 312 F.3d at 226-28. In other words, they required a real and substantial connection between the challenged law and its supposed objective. *See St. Joseph Abbey*, 712 F.3d at 223 ("Of course, this is a perfectly rational statement of hypothesized footings for the challenged law. But it is betrayed by the undisputed

facts.”). And, in making those determinations, they took and examined evidence.

A number of other federal courts have engaged in more exacting rational basis scrutiny of economic regulations alleged to be protectionist. *See Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (striking down a California licensing requirement for “non-pesticide animal damage prevention and bird control” for failing to satisfy the rational basis standard); *Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) (state regulations of entry into a profession must be not merely related to a legitimate state interest, but also specifically related to the applicant’s fitness or capacity to practice the profession); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (overturning Kentucky law establishing a license requirement for new moving companies); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (overturning California law requiring African hair braiders to obtain full cosmetology license). The federal standard, even if less protective than Wisconsin’s, is no pushover.

II) THE PLAINTIFFS HAVE PRODUCED SUFFICIENT EVIDENCE TO RAISE A GENUINE DISPUTE AS TO WHETHER THE ANTI-COMBINATION LAW FURTHERS ITS CLAIMED OBJECTIVES

The Court of Appeals declined to decide whether to apply what it called traditional rational basis review or rational basis with bite. Plaintiffs do not offer a comprehensive analysis of when stricter review is required, observing only that it applies when the government infringes the liberty protected by Art. I, sec. 1 of the Wisconsin Constitution, including the right to earn a living. But, although the Court of Appeals purported to apply a meaningful rational basis review, it did not. It resolved all factual disputes in favor of the party moving for summary judgment, the State. And it did so by applying the wrong standard. The question before it was not whether there was a *possible* relationship between that Anti-Combination Law and the State's objectives, but a "real and substantial" one. It should have viewed the evidence in the light most favorable to the Plaintiffs in light of *that* standard and reversed the circuit court's summary judgment.[14]

It is telling that over the course of this litigation the State has advanced a number of interests that the Anti-Combination Law is intended to further, only to abandon them along the way. At the outset of the case, for example, the State said that the primary justification for the Anti-Combination Law was to keep large out-of-state companies from entering

[14]*See Strasser v. Transtech Mobile Fleet Service, Inc*., 2000 WI 87, ¶30, 236 Wis. 2d 435, 613 N.W.2d 142 (on summary judgment court examines record to determine if material facts are in dispute that entitle opposing party to a trial).

the funeral services business in Wisconsin. Of course, fencing off out-of-state competitors is an illegitimate interest, *Jelke,* 193 Wis. at 373, and the *Grand Bazaar Liquors* court rejected the notion that the state can privilege the "little guy" over the "big guy," 105 Wis. 2d at 209-10. In any event, the law does nothing to accomplish this purpose. It does not prevent a large out-of-state company from owning all of the funeral establishments in the State or all of the cemeteries. (*See, e,g.*, R. 19:2.) It does not require them to be small or family-owned. But it does restrict the options of a genuinely small, family-owned business like Highland Memorial.

So those arguments were jettisoned. Although it is not dispositive, the State's evolving concoction of justifications over the course of this litigation illustrates why the standard the Court of Appeals applied was incorrect. As the *Grand Bazaar Liquors c*ourt recognized, a pattern of the state saying "well, that didn't stick, let's try another" suggests that there may not be a real and substantial relationship between a law and a legitimate purpose. 105 Wis. 2d at 210-11. Such a relationship should not be so hard to find. In addition, it is effectively impossible for a plaintiff to anticipate every possible justification and then demonstrate that each is wrong. Placing such a Sisyphean burden on plaintiffs results in no real

review by the courts. The State should not be permitted to invent justifications for significant restrictions on economic liberty as it goes along, replacing them by something new whenever they begin leaking oil.

By the time the case arrived at the Court of Appeals, only two of the State's justifications for the Anti-Combination Law remained. 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 might have an easier time than other death care firms cheating on trusting and record keeping requirements. The Plaintiffs' evidence shows that the laws do not serve either of these purposes.

A) The Anti-Combination Law Is Not Procompetitive, but Rather Restricts Competition by Favoring One Class of Competitors over Another

The Anti-Combination Law does what it was intended to do. As the Court of Appeals acknowledged, it was enacted at the behest of the funeral home industry in the 1930s. (Ct. App. Dec. ¶19, P. App. 110.) And it does its job well. It protects one class of competitors in the death care industry – funeral directors – from new competition by another – cemeteries.

The Defendants say that they fear 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 State's expert, Dr. Sundberg, 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. This would "foreclose competition" and might allow the combination firm to raise its prices to consumers. (R.21: 9-15.)

However, Dr. Sundberg admitted during his deposition that such behavior and its hypothesized effect was merely a theoretical possibility. (R. 29:26-27.) Even if a theoretical possibility could create a presumption of constitutionality, that presumption cannot stand in the face of contradictory evidence. In a country where combination firms have been allowed in 39 states for decades, such a theoretical possibility should have real-world evidence to support it. But it doesn't.

The Plaintiffs' expert, Dr. Harrington, an expert in the death care industry, testified that there is no evidence of exclusionary behavior by combination firms in the states where they operate. (R. 26:1.) The State's

expert agreed. Dr. Sundberg acknowledged that, although 39 states allow combinations, there is no evidence that the effects he says might happen have *ever* happened anywhere:

> Q: I don't know what Professor Harrington did or didn't do. I'm asking what you did. Did you do anything to determine whether any combination firms in any of those 38 or 39 states have ever engaged in this sort of conduct?
> A: **I was unable to find any evidence of that.**
> . . .
> Q: In your investigation of what happens in other states apart from -- you didn't find any evidence that any other state enforcement authority had taken any action against any combination firm anywhere for engaging in exclusionary conduct, did you?
> A: **No, I did not.**
> . . .
> Q: . . . We don't see it occurring -- as far as you know we don't see it occurring anywhere, right, in the places where combination firms are allowed to exist?
> A: **We don't have direct evidence that it's occurring.**

(*Id.* (emphasis added).)

It is true, as a traditional Scottish prayer puts it, that we often fear "ghoulies and ghosties/ And long-leggedy beasties/And things that go bump in the night." But it is not rational to continue to do so once the evidence shows that our fears are imaginary.

The fact that there is no evidence that foreclosure from combination firms has happened at any place at any time is not surprising. The absence

of evidence is consistent with the nature of the death care industry. Contrary to the State's assertions, it is undisputed that licensed funeral home directors occupy a legally privileged position. Only a licensed funeral director may embalm a body for viewing. Wis. Admin. Code § DHS 135.05(1)(b). Even if a family wishes to skip such a service, it must have the deceased's body transported. But only the immediate family, a licensed funeral director, or another authorized person (such as the medical examiner) may do so. The law prohibits the family from using a common carrier to do so unless (with very limited exceptions), the body has been embalmed. DHS 135.05(1)(d).

Thus, for legal reasons and by custom (*see* R. 28:3; R. 27:2), the funeral director is likely to be the first point of contact with a consumer. Families often must make decisions quickly. (R. 29:8.) Under those circumstances, being the first provider with the option to provide these services and products (all of which can be offered by funeral homes) 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 that wants to effectively compete in the death care market might rationally conclude that it needs to be in a position to attract

customers at their point of need. This is particularly true today 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, and cemeteries increasingly cannot sell the land that they have. (R. 28:1-2, 4.) Unlike funeral homes, cemeteries cannot simply go out of business. (*Id.*) They must, to put it starkly, cut the grass forever.[15]

The Anti-Combination Law, therefore, has had almost the precise effect that the State speculated would be caused by its repeal. It is the Anti-Combination Law that forecloses 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 what is, as a practical matter, the initial point of contact with consumers. If, as the State argues, grieving families are particularly vulnerable to unfair pressure, the Anti-Combination Law actually worsens that problem by insulating funeral homes from competition. The Anti-

[15] 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; *see also Hanauer v. Republic Building Co.*, 216 Wis. 49, 255 N.W.136, 139-40 (1934) (changing situation may no longer support law against constitutional challenge).

Combination Law gives funeral homes more opportunity to pressure grieving families, at less risk to their own bottom line.

There is another – and even simpler – reason for the absence of real world evidence that combination firms have not foreclosed stand-alone competitors, even assuming they might have the power to do so. Exclusionary behavior of that kind is already illegal in all of those states – and would be in 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.[16] 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.[17]

[16] *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.").

[17] *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

It is of course equally the case that large and powerful stand-alone funeral homes could, if criminally inclined, engage in exclusionary conduct that violates the antitrust laws. But Wisconsin does not outlaw large stand-alone funeral homes. It instead prohibits the competition feared by the politically-powerful funeral homes.

By comparison, in *Grand Bazaar Liquors*, this Court noted that the government produced no evidence that the dangers supposedly abated by an ordinance actually existed, and for that reason, the law lacked a rational basis. 105 Wis. 2d at 214. That is the case here as well. It is irrational to believe that the absence of a law will cause certain problems when those problems do not occur in states that do not have that law.

Taylor v. State, one of the earliest cases on the issue, addressed the question as well. This Court upheld limitations on the location of slaughterhouses as reasonable, because the "business of slaughtering animals for the market is ordinarily and usually a noxious business, deleterious to the health of people." 35 Wis. 298, 301 (1874). In contrast, it noted that limitations on businesses that in fact posed no such danger would be unreasonable and impermissible, stating "Here we have two

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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.").

classes of business equally lawful, the one absolutely safe, the other absolutely dangerous . . . and between these two the limit of legislative authority to regulate and restrict necessarily is." *Id.* The Plaintiffs, in essence, are offering evidence that combination firms fall on the "safe" side of that line, and pointing out that the Defendants have no evidence that they are "dangerous."

But the courts below accepted the Defendants' claims at face value, deciding that regardless of any contrary evidence, it is enough that the government can find one person to say combination firms may be dangerous. It noted that Dr. Harrington could not prove that foreclosure "did not" happen, *i.e.*, he did not show it was impossible. (Ct. App. Dec. ¶¶36-37, P. App. 119-20.) Dr. Harrington testified it was unlikely and there was not a trace of it to be found, but, in the Court's view, it remained theoretically possible in that Dr. Sundberg would not give up his "could be." In doing so, the Court of Appeals resolved a dispute of material fact in favor of the moving party.

And it applied the wrong standard. The question here is whether there is a "real and substantial" relationship between the anti-foreclosure objective and the Anti-Combination Law. It is whether it is reasonable –

not merely possible – to believe that the Plaintiffs' right to earn a living should be restricted to prevent a real risk of foreclosure. The Plaintiffs introduced enough evidence – actually more than enough – to permit a trier of fact to conclude that it is not.

The Court of Appeals also concluded that 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, n. 13, P. App. 118-19.) But that is not what the Legislature has done. The Anti-Combination Law does not regulate exclusionary conduct. It prevents a certain kind of firm from existing at all, solely because that kind of a firm might engage in conduct that is already illegal. This goes much too far. Fear in the face of contrary evidence cannot establish a real and substantial basis for the Anti-Combination Law. *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).

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

Second, the Defendants argue that the Anti-Combination Law is justified because combination firms might take advantage of the combined nature of their business to cheat on the Wisconsin 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. (*See* R. 22.)

The Court of Appeals said it is "possible" that selling more merchandise might make it more difficult to enforce trusting requirements. (Ct. App. Dec. ¶42, P. App. 123.) But the State offered no explanation why this is so. As Mr. Porter pointed out in his affidavit, both the State and Mr. Krause appear to 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 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.*) *See also* Wis. Stat. §§ 445.125(1), 440.90(8), 440.92(3).

As Mr. Porter pointed out, existing firms in Wisconsin – including licensed funeral home directors – already sell products or services involving different trusting requirements, and existing firms could violate the law by cheating on those requirements in exactly the manner that the State says it fears. 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. (*Id.*) The effect of the Anti-Combination Law is only to deny cemeteries an equal opportunity to sell the wide variety of products – each bearing different or no trusting requirements – that licensed funeral home directors already can and do sell.

CONCLUSION

This court should rule that the Anti-Combination law infringes the economic liberty of Wisconsin citizens. It should rule that statutes that

protect one class of competitors from another are highly suspect and can be upheld only where there exists a real and substantial connection between the law and some legitimate governmental purpose. And it should rule that the real and substantial test presents an evidentiary question that cannot be resolved in favor of the government where there is a genuine dispute as to the validity of its claims. The Court of Appeals should be reversed.

Dated this 8th day of February, 2018

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,759 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: 2/8/2018

THOMAS C. KAMENICK

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, and appendix, 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 the court and served on all opposing parties.

Dated: 2/8/2018

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