No. 16AP1599

In the Supreme Court of Wisconsin

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 Appeal From The Waukesha County Circuit Court,
The Honorable Patrick C. Haughney, Presiding,
Case No. 2014CV1763

RESPONSE BRIEF OF THE STATE OF WISCONSIN, DAVE ROSS, AND THE WISCONSIN FUNERAL DIRECTORS EXAMINING BOARD

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ISSUE PRESENTED

To prevent anti-competitive behavior in the death-care industry and to discourage circumvention of certain trusting requirements, Wisconsin's anti-combination laws forbid funeral establishments from owning or controlling cemeteries, and vice versa. Wis. Stat. §§ 157.067; 445.12(6). Are these laws rationally related to a legitimate state purpose?

The circuit court and Court of Appeals answered yes.

INTRODUCTION

Viewed through the lens of established doctrine, this lawsuit is a long-shot challenge to a pair of 80-year-old Wisconsin statutes known as the anti-combination laws, forbidding funeral homes from owning or operating cemeteries, and vice versa. Wis. Stat. §§ 157.067; 445.12(6). Black-letter constitutional law provides that those laws must stand so long as they are rationally related to any conceivable legitimate government interest. For its part, the U.S. Supreme Court already has held that anti-combination laws directed to preventing "overreach" and possible "monopoly control" in the death-care industry are plainly reasonable. *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 222–24 (1949). The Second Circuit, the Massachusetts Supreme Court, and the Michigan Court of Appeals all agree. And if that were not enough to show that these statutes rest upon rational judgments, the State has introduced the report of a distinguished, Stanford-educated economist, who explains in detail the numerous ways in which Wisconsin's anti-combination laws reasonably relate to indisputably legitimate objectives. Plaintiffs protest that the statutes are unnecessary, under-inclusive, and insufficiently rooted in evidence, but case law is clear that even if these critiques are true, they are not fatal—at least under the traditional standard.

Yet, as it turns out, Plaintiffs are not interested in the traditional standard. Instead they ask this Court to review

laws implicating "economic freedom" under a reinvigorated form of heightened scrutiny, which would consider whether there are "real and substantial" connections between those statutes and their asserted purposes, as demonstrated by hard evidence that the State would need to produce in a circuit court and perhaps even marshal in a jury trial. Opening Br. 13, 48. Plaintiffs claim to have divined this framework from this Court's precedents. In truth, Plaintiff's test is the reapperance of *Lochner v. New York*, 198 U.S. 45 (1905), by a different name, and its effects would be just as sweeping. It is hard to think of a single commercial regulation that would not at least trigger this standard. Everything from wage-and-hour laws to business subsidies could literally be put on trial.

Rather than adopt Plaintiffs' far-reaching framework, this Court should reaffirm traditional rational-basis doctrine, reiterating that Wisconsin's "legislature has broad latitude to experiment with economic problems" and that judges should "not presume to second-guess its wisdom." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 119, 358 Wis. 2d 1, 851 N.W.2d 337. Economic liberty is certainly important, and rational basis should not save laws whose only possible rationale is "mere economic protectionism for the sake of economic protectionism." *Merrifield v. Lockyer*, 547 F.3d 978, 991 & n.15 (9th Cir. 2008). But the laws challenged here do not come close to fitting that description.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated that the case is appropriate for oral argument, which it has scheduled, and publication.

STATEMENT OF THE CASE

A. Legal Background

1. Federal And State Antitrust Prohibitions On "Combinations In Restraint Of Trade"

Echoing the Sherman Act of 1890, 15 U.S.C. § 1, the Wisconsin Antitrust Act of 1893 forbids "combination[s] . . . in restraint of trade or commerce," Wis. Stat. § 133.03(1); *see Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473 (1980) (construing Wisconsin antitrust law to accord with federal decisions interpreting Sherman Act), *overruled on other grounds by Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448. The purpose of this statute is to root out anti-competitive behavior in the market, *see Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 662, 529 N.W.2d 905 (1995), including by policing the sometimes exclusionary effects of a phenomenon known as vertical integration. "A firm is vertically integrated whenever it performs for itself some function that could otherwise be purchased on the market." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 505 (5th ed. 2016). For example, a firm might

integrate vertically "by acquiring another firm that is already operating in the secondary market," as when "a manufacturer [ ] acquire[s] its own retail outlets." *Id.* at 506. Or a firm might accomplish the same end by "enter[ing] into a long-term contract with another firm under which the two firms coordinate certain aspects of their behavior." *Id.* Of course, in many cases, these arrangements benefit consumers.

Yet "[o]ver the history of antitrust laws vertical integration has not fared particular[ly] well." *Id.* That is because, under certain circumstances, it can shut out competition, resulting in higher prices for consumers. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 333–34 (1962) (citing the Clayton Act, another federal antitrust law). When, for instance, a firm vertically integrates with a seller of a resource that is both necessary to the firm (as well as to its rivals) and scarce, it can obtain a strategic advantage over its competitors. Through a strategy identified in economics literature as "foreclosure" or "raising rivals' cost," the combined firm—with access to the scarce resource—can price discriminate between its own consumers and rival firms (or their customers), charging its own consumers a lower price for the resource and its rival firms (or their customers) a higher price, thus gaining market share. *See* Hovenkamp, *supra*, at 367. Later, as the non-combination firms exit the market, the combination firm can charge consumers even higher prices—and as long as the market's barriers to entry are sufficiently high, can maintain those higher prices over the long term. *See*

Phillip E. Areeda & Herbert Hovenkamp, IIIB *Antitrust Law* 20–22 (3d ed. 2008); *Brown Shoe*, 370 U.S. at 332–33; Michael H. Riordan, *Anticompetitive Vertical Integration by a Dominant Firm*, 88 Am. Econ. Rev. 1232 (1998). Because of these potentially monopolistic effects, vertical integration is susceptible to a variety of antitrust challenges. *See* Areeda & Hovenkamp, *supra*, at 5.

Just as the States and the federal government have an interest in rooting out actual monopolistic activity currently stifling competition, they have an interest in "'arrest[ing] apprehended consequences of intercorporate relationships before those relationships c[an] work their evil.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957)). In other words, antitrust policy favors "prophyla[xis]." *Id.* at 485 (describing the merger provisions of Section 7 of the Clayton Act as "prophylactic"). Hence Congress has empowered the Federal Trade Commission "to supplement and bolster the Sherman Act and the Clayton Act to stop in their incipiency acts and practices" that would *not* constitute "outright violation[s]" of antitrust law but that, "when full blown, would violate those Acts." *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (citation omitted).

2. State Laws Restricting Combinations Between Funeral Establishments And Cemeteries

It is against this legal backdrop that at least eight States have enacted prophylactic statutes discouraging or forbidding potentially anti-competitive vertical integrations in what is called the "death care industry."[1] Although these laws vary in detail, they typically forbid (1) cemeteries and funeral establishments from locating on the same premises; (2) firms from owning or having stakes in both funeral homes and cemeteries; and/or (3) cemeteries from employing or paying funeral directors and embalmers. *See* 24 Del. Code § 3119(2), (3) (funeral director can neither "[o]perate a mortuary or funeral establishment located within the confines of, or connected with, any cemetery" nor be paid in any way by a cemetery "in connection with the sale or transfer of any cemetery"); 32 Me. Stat. § 1403 (prohibiting employment by cemeteries of funeral directors and embalmers); Mich. Comp. Laws § 339.1812 (a person or entity that "owns or conducts, either directly or indirectly, a cemetery or burial ground in this state shall not own, manage, supervise, operate, or maintain, either directly or indirectly, a funeral establishment"); N.Y. Not-for-Profit Corp. Law §

[1] The term "death care industry" refers generally to providers of goods and services relating to transporting, caring for, and final disposition of the dead. *See* Keith E. Horton, Note, *Who's Watching the Cryptkeeper?: The Need for Regulation and Oversight in the Crematory Industry*, 11 Elder L.J. 425, 429 n.30 (2003).

1506-a (forbidding cemeteries from combining in any way with "funeral entit[ies]"); N.H. Stat. § 325:48 (no licensed funeral director or embalmer "shall be employed as a funeral home, funeral establishment, funeral director or embalmer by a cemetery, cemetery association, or cemetery corporation, nor shall such person own or control a cemetery, cemetery association, or cemetery corporation"); N.J. Stat. § 45:27-16c(4) (no person "engaged in the management, operation or control of a cemetery" can engage in "the conduct of any funeral home or the business or profession of mortuary science"); 5 R.I. Gen. Laws § 5-33.2-9 ("Any person or persons, association or corporation having charge of or conducting a cemetery shall not engage in the business of funeral directing. No funeral home will be licensed, nor be permitted to operate as a funeral home if it is located on property owned by a cemetery, or is contiguous with cemetery property.").

Wisconsin is one such State. As relevant here, its anti-combination laws bar a "licensed funeral director or operator of a funeral establishment" from operating a mortuary or funeral establishment that is (a) "located in a cemetery" or (b) "financially, through an ownership or operation interest or otherwise, connected with a cemetery." Wis. Stat. § 445.12(6). "[C]emetery authorit[ies]" cannot "permit a funeral establishment to be located in the cemetery." *Id.* § 157.067(2). No "employee or agent of the cemetery" can have "any ownership, operation or other financial interest in a funeral establishment." *Id.* In addition, cemeteries cannot accept

"fee[s] or remuneration" from any "funeral establishment" unless it is "a payment . . . for a burial in the cemetery" "made on behalf of the person" "paying for the funeral establishment's services," and the funeral establishment charges the person for the exact amount of the fee. *Id.* § 157.067(2m)(a)–(c).

The history of Wisconsin's anti-combination laws stretches back decades. The Legislature enacted Wis. Stat. § 156.12(6), the predecessor to § 445.12(6), in 1939. *See* § 4, ch. 93, Laws of 1939. That law prevented any "connect[ion]" between a "cemetery" and "mortuary or funeral establishment." *Id.* In 1993, the Legislature created Wis. Stat. § 157.067 to make clear that it also prevented cemetery authorities from owning or operating a funeral establishment in Wisconsin. 1993 Wis. Act. 100, § 1; *see also Cemetery Servs., Inc. v. Wis. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 830, 586 N.W.2d 191 (Ct. App. 1998) (Roggensack, J.) (these laws "give[ ] fair notice that funeral establishments and cemeteries are not to have financial connections to one another, either through ownership, operations or otherwise").

3. Other Features Of The Extensive Federal And State Regulatory Scheme Governing The Death-Care Industry

Partly because of the unique vulnerabilities of consumers whom tragedy forces into this market, "[t]he death care industry is highly regulated in the United States" and a frequent target of consumer-protection efforts. Daniel Sutter,

Casket Sales Restrictions and the Funeral Market, 3 J.L. Econ. & Pol'y 219, 219 (2007). For one thing, "the purchase of a funeral is the third largest single expenditure many consumers will ever have to make, after a home and a car." FTC, *Trade Regulation Rule; Funeral Industry Practices*, 47 Fed Reg. 42260-01, 42660. Yet decisions about that purchase "must often be made while under the emotional strain of bereavement." *Id.* Adding to their burden, "consumers lack familiarity with the funeral transaction: close to fifty percent of all consumers have never arranged a funeral before, while another twenty-five percent have done so only once. Further, consumers are called upon to make several important and potentially costly decisions under tight time constraints"—even "[w]ithin hours of death." *Id.* As the FTC has found, "[t]he combination of emotional stress, lack of experience, lack of information and tight time strictures results in the funeral consumer being very susceptible to influence from the funeral director's advice and counsel." *Id.* at 42266; *see also* Steven W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. Consumer Aff. 150 (2007); Joshua L. Slocum, *The Funeral Rule: Where It Came From, Why It Matters, and How to Bring It to the 21st Century*, 8 Wake Forest J.L. & Pol'y 89, 92–99 (2018).

Accordingly, under state and federal law, owners of funeral homes and cemeteries must comply with a host of consumer-protection rules. *See* 16 C.F.R. Part 453 (the Federal Trade Commission's "Funeral Rule"); *Staff*

Compliance Guidelines for the Funeral Industry Practices Rule, 50 Fed. Reg. 28062 (July 9, 1985); Wis. Stat. §§ 445.12, 157.067. For example, funeral directors cannot "solicit the sale of a burial agreement" by "contacting a relative of a person whose death is imminent." *Id.* § 445.12(3g)(a)2. And funeral directors cannot "[r]equire a person who enters into a burial agreement" "to purchase a life insurance policy used to fund the agreement from an insurance intermediary . . . who is specified by the funeral director." *Id.* § 445.12(3r)(a).

In addition, to protect consumers from the negative consequences of financial insolvency in the death-care market, Wisconsin imposes upon different types of sales within the death-care industry requirements that certain percentages of funds used to make "pre-need" purchases be held in trust. For example, caskets purchased pre-need are subject to a 100-percent trusting requirement, meaning all funds paid for a casket before death must be held until the death of the beneficiary. Wis. Stat. § 445.125(1)(a)1. "[M]onuments, markers, nameplates, vases, and urns" are subject to a 40-percent trusting requirement. *See* Wis. Stat. §§ 440.92(3)(a), 157.061(3). And a seller of cemetery plots must place in trust 15 percent of the principal paid for the plot, to cover perpetual-care expenses. *See* Wis. Stat. § 157.11(9g)(c).

B. Procedural History

E. Glenn Porter, III, brings two facial challenges to Wis. Stat. § 445.12(6) and § 157.067(2), Wisconsin's anti-combination laws, under the Wisconsin Constitution. *See* Wis. Const. art. I, § 1. Porter is the president and one of the principal owners of Highland Memorial Park, a cemetery in New Berlin, Wisconsin. Petitioners' App. 103. (cited hereinafter as "A._"). Porter wishes to acquire and operate a funeral home in conjunction with the cemetery. A.103. He, along with Highland Memorial Park, Inc. (hereinafter "Porter"), filed a complaint in Waukesha County Circuit Court alleging that the anti-combination laws violate (1) substantive due process, because they interfere with his right to pursue business opportunities; and (2) equal protection, because they create arbitrary classes of citizens: those who are owners of cemeteries or funeral establishments and those who are not. R. 1:13–14; *see* Wis. Const. art. I, § 1. Porter argued that the anti-combination laws trigger a standard of review more rigorous than the traditional rational-basis test on the theory that the anti-combination laws are mere protectionist measures. *See* R. 1:13–14.

The State moved for summary judgment, noting that rational-basis review applied to both claims. A.104. The State contended, among other things, that the anti-combination laws are rationally related to legitimate government interests: ensuring competition in the death-care services industry, protecting consumers from higher prices,

and reducing the potential for evasion of Wisconsin's death-care trusting requirements. A.104. Economist Dr. Jeffrey Sundberg, the State's expert, opined that the anti-combination laws do indeed serve the State's interests. A.104. He explained that combination firms—those with both cemeteries and funeral homes—could "create a disadvantage for rival firms" by preferring burials arranged through its own funeral home over those arranged through rival funeral homes. A.120. Dr. Sundberg also concluded that the anti-combination laws could protect against commingling of trust funds between cemeteries and funeral homes. Supplemental App. 51 (cited hereinafter as "SA.__"). He explained that combination firms could raise prices on merchandise subject to a lower trusting requirement and reduce its prices on merchandise subject to higher trusting requirements. SA.51. That would give combination firms immediate access to a higher percentage of liquid funds to use as they see fit, increasing the risk that those funds would not be available when the pre-need purchaser dies and needs the paid-for merchandise. SA.51. In turn, Porter relied on a report from economist Dr. David Harrington, who attempted to rebut Dr. Sundberg's assertions. A.104–05.

The circuit court granted summary judgment in the State's favor, concluding that the anti-combination laws are rationally related to legitimate government interests in "preserving competition, avoiding commingling of funds,

preserving consumer choices, [and] avoiding higher prices." A.105.

The Court of Appeals affirmed. A.127. Noting that "Porter does not dispute" that the State's asserted "bases for the anti-combination laws are legitimate government interests," the court held that "the legislature could have reasonably believed [that] the anti-combination laws would advance . . . the State's claimed interests." A.118. The Court of Appeals also concluded that the anti-combination laws were constitutional even under rational basis "with bite," the stricter standard, and that Porter did not establish beyond a reasonable doubt that the anti-combination laws failed to advance the State's legitimate interests. *See* A.125. Dr. Sundberg "sharply disputed" Dr. Harrington's "assertion that the anti-combination laws increase the cost of death care services in Wisconsin," by "raising several specific and reasonable criticisms of [Dr.] Harrington's methodology." A.121. And Dr. Harrington's observation that he had not found any evidence of exclusionary behavior in States with combination firms was due little weight because he had not actively looked for such evidence. A.121–22.

This Court granted Porter's petition for review. Order, *Porter v. State*, No. 16AP1599 (Wis. Jan. 9, 2018).

STANDARD OF REVIEW

This Court independently reviews a statute's constitutionality. *Blake v. Jossart*, 2016 WI 57, ¶ 26, 370 Wis.

2d 1, 884 N.W.2d 484. Summary judgment is appropriate if the records indicate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2).

To prevail on an argument that a law is unconstitutional on its face, a "challenger must demonstrate that the State cannot enforce the law under any circumstances." *Blake*, 2016 WI 57, ¶ 26. This Court presumes that statutes are constitutional. Claimants can overcome this "strong" presumption only by demonstrating that the law is unconstitutional "beyond a reasonable doubt." *Id.* ¶ 27. Any doubt is resolved in favor of upholding the statute. *Id.*

SUMMARY OF ARGUMENT

I. Because "economic freedom" is not a fundamental right under Article I, Section 1 of the Wisconsin Constitution, laws regulating commercial activity trigger mere rational-basis review. There was a time when the U.S. Supreme Court, as well as this Court, held commercial regulations to heightened scrutiny, but the so-called *Lochner* era has long since passed. Since then, this Court has made clear that Wisconsin's "legislature has broad latitude to experiment with economic problems" and that courts should "not presume to second-guess its wisdom." *Madison Teachers*, 2014 WI 99, ¶ 119 (citing case that overruled *Lochner*). Although Porter ultimately concedes that commercial regulations are subject

to some version of the rational-basis test, he begins his argument with a lengthy discussion of cases that he reads to confer fundamental-right status on economic freedom. But the cases he cites are either entirely consistent with post-*Lochner* law or are artifacts of *Lochner*'s outmoded jurisprudence.

II. As the U.S. Supreme Court and several lower courts have held, anti-combination laws are rationally related to the State's indisputably legitimate interests in preventing anti-competitive market behavior and protecting consumers. First, they impose prophylactic antitrust rules forbidding the formation of potentially monopolistic vertically integrated firms. Under certain conditions, a cemetery that owned a funeral home could get away with charging a lower price for burials from its partner home and a higher price for burials from other funeral homes. This would help the combination firm achieve a higher market share and create a disadvantage for rival firms, eventually driving those competitors from the market altogether. The combination firm could then raise prices even on consumers from its own partner home. *See* SA.47.

Second, the anti-combination laws bolster the consumer-protection-driven trusting requirements that the Legislature has seen fit to apply to the death-care industry. Providers of goods and services in this market must hold a certain percentage of the amount of each sale in trust, allowing customers to pay "pre-need" for items with assurance

that the necessary funds will exist when the need arises. But combination firms could easily undermine the manifest end of these rules. For example, "[b]y providing funeral services as well as cemetery plots, a firm could potentially exploit [the trusting requirement for cemetery plots] by increasing the price of something like burial vaults and reducing the price of the plot itself." SA.51. This would allow it to "collect[ ] the same amount of revenue while being required to set aside less money for perpetual care, without actually reducing the actual expenses of perpetual care." SA.51.

III. "When a law exhibits [ ] a desire to harm" a discrete group, courts sometimes apply "a more searching form of rational basis review," *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment), known as rational basis "with bite." Courts apply this standard in the commercial context rarely and only to void laws whose only "justification" is "mere economic protectionism for the sake of economic protectionism," rather than service of the public good. *E.g.*, *Merrifield*, 547 F.3d at 984, 991 & n.15.

IV. Even under rational basis with bite, the anti-combination laws would withstand scrutiny. Not only is it clear that the laws do not prevent Porter from making a living or pursuing his profession, but Porter simply fails to show beyond a reasonable doubt that Wisconsin's anti-combination laws do not actually serve either of the State's asserted interests.

ARGUMENT

I. The Rational-Basis Test Governs Review Of Commercial Regulations Allegedly Burdening "Economic Freedom"

A. Although the Wisconsin Constitution contains no analog to the United States Constitution's Fifth or Fourteenth Amendments, this Court has long read it to secure rights to "substantive due process" and "equal protection." *E.g.*, *State v. Smith*, 2010 WI 16, ¶¶ 12, 14, 323 Wis. 2d 377, 780 N.W.2d 90.[2] Case law locates those protections in Article I, Section 1, which "but phrases the Declaration of Independence." *State v. Currans*, 111 Wis. 431, 87 N.W. 561, 562 (1901). It states: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." Wis. Const. art. I, § 1. In dozens of cases dating back to 1901, this Court has made clear that Wisconsin's due-process and equal-protection guarantees "are of the same effect" as the respective federal constitutional provisions. *Chicago & N.W. Ry. Co. v. La Follette*, 43 Wis. 2d 631, 643, 169 N.W.2d 441 (1969); *see also, e.g.*, *Smith*, 2010 WI 16, ¶¶ 12, 14; *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 35 n.11, 235 Wis. 2d 610, 612 N.W.2d 59; *State ex rel. Cresci v. Schmidt,* 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974); *Boden v. City of Milwaukee*, 8 Wis. 2d 318, 324, 99 N.W.2d 156

[2] The text of the Wisconsin Constitution does protect "due process," but only in "criminal" actions. Wis. Const. art. I, § 8. In contrast to the federal Constitution, it does not explicitly afford due process rights to anyone deprived of "life, liberty, or property." U.S. Const. amend. XIV.

(1959); *Currans*, 87 N.W. at 562. Consistent with those cases, this Court has in the past been unable to identify a single "decision of this court which has determined that sec. 1, art. I, of the Wisconsin constitution[ ] imposes any greater restriction on the exercise of the police power than do the due process and equal protection of the laws clauses of the Fourteenth amendment." *Boden*, 8 Wis. 2d at 324; *see also La Follette*, 43 Wis. 2d at 643 (same).

The basic content of the due-process and equal-protection guarantees is straightforward. Due process protects individuals "against arbitrary action of government," *Smith*, 2010 WI 16, ¶ 14, and the doctrine of substantive due process addresses "the content of what government may do to people under the guise of the law," *In re Termination of Parental Rights to Diana P.*, 2005 WI 32, ¶ 19, 279 Wis. 2d 169, 694 N.W.2d 344 (citation omitted). As for equal protection, it requires not that "similarly situated classes be treated identically" but rather that any "distinction[s] made in treatment have some relevance to the purpose for which classification . . . is made." *Blake*, 2016 WI 57, ¶ 30 (citations omitted).

The first step in evaluating a substantive-due-process or equal-protection challenge is to determine which level of judicial scrutiny applies. *In re Commitment of Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346. "[T]he threshold question is whether a fundamental right is implicated or whether a suspect class is disadvantaged by the challenged

legislation." *Smith*, 2010 WI 16, ¶ 12. If a fundamental right is implicated or suspect class disadvantaged, courts apply a heightened standard of review, either intermediate scrutiny or strict scrutiny. *See, e.g.*, *Gerhardt v. Estate of Moore*, 150 Wis. 2d 563, 570, 441 N.W.2d 734 (1989). In all other cases, courts apply rational-basis review. *Smith*, 2010 WI 16, ¶ 12.

B. While all agree that the challenged laws here do not disadvantage any suspect class and thus do not trigger heightened review under equal-protection doctrine, there is some dispute over whether the anti-combination statutes burden a fundamental right to "economic freedom" under the doctrine of substantive due process and so call for more demanding scrutiny. *See* Opening Br. 14.

Settled precedent clearly answers this question. Although there was a time when the U.S. Supreme Court employed substantive due process to scrutinize laws burdening economic liberty, *Lochner,* 198 U.S. 45, "the days of *Lochner* [ ] have passed," *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995). And in the wake of *Lochner*'s demise, few decisions have been as widely condemned. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011) (placing *Lochner* in the "American anticanon"); *see also* Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 Cornell L. Rev. 527, 560–65 (2015) (collecting critiques of *Lochner*, including by Attorney General Edwin Meese, Judge Robert Bork, Justice Antonin Scalia, and Justice Clarence Thomas); Steven

Calabresi, *Text vs. Precedent in Constitutional Law*, 31 Harv. J. L. & Pub. Pol'y 947, 952 (2008) ("The Supreme Court abandoned the *Lochner*-era doctrine of economic substantive due process in the face of a withering textualist and originalist critique."). For over 80 years, it has been well-settled law that freedom of contract is *not* a fundamental due-process right, and thus "statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements," are generally well within a State's traditional police power. *Nebbia v. New York*, 291 U.S. 502, 524–30 (1934). In the opinion making *Lochner*'s demise official, the Court reaffirmed the "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

This Court also has returned its due-process jurisprudence back to the original constitutional understanding. Noting "[t]he trend of decisions of the United States supreme court . . . refusing to invalidate state regulatory legislation on the ground of violation of due process," this Court held almost 60 years ago that freedom of contract is not a fundamental due-process right, and that in general "questions of economic wisdom . . . are for the legislature and not for the courts." *White House Milk Co. v. Reynolds*, 12 Wis. 2d 143, 149, 151, 106 N.W.2d 441 (1960) (interpreting federal Constitution); *see supra* pp. 18–19

(Wisconsin due-process doctrine tracks federal jurisprudence). That principle holds today. Indeed, as recently as *Madison Teachers,* this Court declared—with a telling citation of the canonical case that explicitly overruled *Lochner*—that Wisconsin's "legislature has broad latitude to experiment with economic problems" and that courts should "not presume to second-guess its wisdom." 2014 WI 99, ¶ 119 (interpreting Wisconsin Constitution).

None of this is to say that the Wisconsin Constitution offers no protection at all to the right to contract, for surely it retains importance. *See, e.g.*, *In re F.T.R.*, 2013 WI 66, ¶ 56, 349 Wis. 2d 84, 833 N.W.2d 634.[3] Yet just as clearly, it does not rank among the "fundamental" freedoms whose restriction triggers heightened scrutiny under substantive due process.[4] Rather, laws burdening economic freedom are subject to rational-basis review.

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[3] A number of cases, including *In re F.T.R.*, describe "freedom of contract" favorably and expansively as a right "to govern [one's] own affairs without governmental interference," but the legal context for this language is not the doctrine of substantive due process but the law of contracts, where this principle is invoked to ensure that "promises will be performed." 2013 WI 66, ¶ 56 (citations omitted).

[4] In 2006, this Court favorably quoted language from the *Lochner*-era case *Fairmont Creamery Co. v. Minnesota,* 274 U.S. 1 (1927), discussing "[the] freedom of contract guaranteed by the Fourteenth Amendment," *id.* at 11. *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 70, 295 Wis. 2d 1, 719 N.W.2d 408. But *Fairmont* had been overruled by the time *Dairyland Greyhound Park* was decided. Indeed, 46 years earlier in *White House Milk*, this Court had set aside *Fairmont* in a case presenting facts materially indistinguishable from *Fairmont*, concluding that *Fairmont* was no longer good law. *White House Milk*, 12 Wis. 2d at 148–49 (1960).

C. Although Porter appears ultimately to concede this proposition, *see e.g.*, Opening Br. 13, 17–18; A.109, he opens his argument with a lengthy discussion of cases that he reads to confer fundamental-right status on economic liberty. But those precedents do not help him. The holdings of several of his early cases are entirely consistent with current law. *See, e.g.*, *Taylor v. State*, 35 Wis. 298, 302 (1874) (State has power to regulate trades "considered dangerous or unhealthy"); *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172, 76 N.W. 345, 346 (1898) ("[T]he business of plumbing may be regulated by reasonable laws."). Others are remants of the bygone *Lochner* era. *Compare, e.g.*, *State v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1101 (1902) (invoking the "conception of civil liberty" defended in Herbert Spencer's Social Statics), *with Lochner*, 198 U.S. at 75, (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."). And none holds that economic freedom in any form ranks among the fundamental rights protected under substantive due process.

Porter suggests, almost as an aside, that it is only "Wisconsin cases that matter" in determining the meaning and scope of the alleged constitutional right to economic freedom, "not federal cases." Opening Br. 14. Yet while Porter is certainly correct that nothing requires that these state constitutional principles be understood as equivalent to their federal equivalents, he overlooks that this is exactly the approach this Court has adopted, as reflected in the numerous

cases cited *supra* pp. 18–19. If Porter thinks this Court should overrule those dozens of cases, he should explain why. And if he would prefer that this Court focus solely on the text of the Wisconsin Constitution without conflating it with federal doctrines, he should explain why he presumably thinks that, as a matter of original meaning, Article I, Section 1 implicitly adopts substantive due process—even though the words "due process" do not appear there, and even if they did, they might not have been understood originally to confer *substantive* protection. *See, e.g.*, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").

II. The Anti-Combination Laws Satisfy Traditional Rational-Basis Review Because They Are Related To The State's Legitimate Interests In Preventing Anti-Competitive Behavior And Protecting Consumers

A. The standard formulation of the traditional rational-basis test is familiar. It provides that a legislative enactment must be sustained so long as there is (1) some "legitimate government interest" (2) to which the law "bears [a] rational relationship." *Blake*, 2016 WI 57, ¶ 32; *State v. Luedtke*, 2015 WI 42, ¶ 76, 362 Wis. 2d 1, 863 N.W.2d 592.

"Without exception," the U.S. Supreme Court's "cases have defined th[e] concept [of public purpose] broadly, reflecting [its] longstanding policy of deference to legislative judgments in this field." *Kelo v. City of New London, Conn.*,

545 U.S. 469, 480 (2005); *see La Follette*, 43 Wis. 2d at 644. The list of government interests that courts have upheld as legitimate is quite long. It includes counteracting "monopolistic tendencies" in the market. *Borden Co. v. McDowell*, 8 Wis. 2d 246, 262, 99 N.W.2d 146 (1959). It also includes "prevent[ing] fraud" and "promot[ing] the public welfare." *John F. Jelke Co. v. Emery*, 193 Wis. 311, 214 N.W. 369, 372 (1927).

The legitimate-interest standard is unconcerned with legislative intent. As long as "any reasonably conceivable state of facts could provide a rational basis for the classification"—regardless of whether the Legislature harbored or expressed that basis as its purpose—it must be upheld. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *Madison Teachers*, 2014 WI 99, ¶ 77; *State v. Radke*, 2003 WI 7, ¶ 27, 259 Wis. 2d 13, 657 N.W.2d 66. Indeed, "those attacking the rationality of the legislative classification" have the burden "to negative every conceivable basis which might support it." *Beach Commc'ns, Inc.*, 508 U.S. at 315 (citation omitted). While attempting to do so, the challengers must also keep in mind that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Indeed, as this Court put it, "[t]he rationale which the court locates or constructs is not likely to be indisputable. But it is not our task to determine the wisdom of the rationale or the legislation. The legislature assays the data available

and decides the course to follow." *Racine Steel Castings, Div. of Evans Prod. Co. v. Hardy*, 144 Wis. 2d 553, 560–61, 426 N.W.2d 33 (1988).

As for the "reasonable relationship" between the government interest and the means chosen, only some tendency to promote the interest is required. The law can be substantially under-inclusive: the Legislature need not address all sources of an alleged evil and may ignore ones that "may be even greater." *Ry. Exp. Agency v. New York*, 336 U.S. 106, 110 (1949). Likewise, the law can be substantially over-inclusive. That is, just as it can exclude some individuals whose inclusion arguably would advance the government's interest, it can include in its ambit more individuals than necessary to further its goal. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979); *see also Vance v. Bradley*, 440 U.S. 93, 108 (1979).

B. Under this well-established standard, Wisconsin's anti-combination laws easily pass muster.

To begin with, there is no dispute here that the asserted government interests behind the anti-combination laws are legitimate. It is clearly established that States have strong interests in reducing anti-competitive behavior. *See, e.g.*, *Borden*, 8 Wis. 2d at 262. It is also settled that States have important interests in consumer protection. *See, e.g.*, *Anderson v. Aul*, 2015 WI 19, ¶ 81, 361 Wis. 2d 63, 862 N.W.2d 304. Porter does not contest either point. *See* A.118.

The anti-combination laws are also rationally related to each of those interests.

First, they reasonably restrict anti-competitive commercial activity through prophylactic antitrust-like rules forbidding the formation of potentially monopolistic firms. This link between the laws and their interests rests upon a well-accepted economic insight—underpinning much of antitrust law—concerning the possible monopolistic perils of vertical integration. Vertical integration occurs when a company merges with another company that provides a necessary input in the product supply chain. *See supra* pp. 4–5. Economics teaches that vertical integration results in higher prices for consumers under certain circumstances, *see* Areeda & Hovenkamp, *supra*, at 20; *Brown Shoe*, 370 U.S. at 334, specifically when a company combines with a firm that provides a scarce resource and when other would-be sellers of that scarce resource face high barriers to entry. Through a strategy recognized in the economics literature as "foreclosure" or "raising rivals' cost," a combined firm—one with access to the resource through ownership—can charge its consumers a lower price for the resource and charge rival firms a higher price, thus gaining market share. *See* Hovenkamp, *supra*, at 367. Then, as other non-combination firms exit the market, the combination firm can charge all consumers higher prices. *See* Areeda & Hovenkamp, *supra*, at 20–22.

Even with no evidence or empirical data before it, the Legislature could have rationally concluded that the death-care industry is vulnerable to this threat of anti-competitive behavior and thus would benefit from a prophylactic rule forbidding combination firms. *See supra* p. 6 (explaining that antitrust law favors prophylaxis.) That is because cemeteries provide a relatively scarce good (burial plots), and it is difficult for would-be cemetery operators to break into this market. SA.47. This means that a funeral home integrated with a cemetery, having access to the scarce resource of burial plots, would be well positioned to use its market share to set inflated burial-plot prices for consumers coming through competitors' standalone funeral homes while charging its own consumers reduced prices. Later, as the non-combination firms exit the market, the combination firm could then charge its consumers higher prices—and could maintain those higher prices over the long term, so long as the barriers to entry into the cemetery business are sufficiently high.

Not only were the Legislature's conclusions rational—they also find support in expert opinion. As economist Dr. Sundberg explained, "[g]iven the land, capital, and regulatory requirements, it is reasonable to believe that entering the cemetery industry is much more difficult than starting a new funeral home." SA.47. Consequently, "a funeral home that is owned by, or owns, a cemetery has access to a scarce resource, one that gives it an advantage over other funeral homes." SA.47. "As other firms exit the market it becomes

advantageous for the combination to use its market power to extract more money from consumers." SA.47. In turn, "[t]he small number of cemeteries and the barriers to creating new ones, especially in urban areas, give a special advantage to well-capitalized large firms that can afford to purchase multiple funeral homes. With enough funeral homes, it may be profitable for a cemetery to completely exclude burials from funeral homes owned by others." SA.47. Although this strategy of "foreclosure" is not "common," it "is most likely to work in a case where one part of the integrated firm is a special resource, one that cannot easily be replicated by others," and "[t]his is likely to be the case with cemeteries." SA.47.

Drawing upon similar logic, the U.S. Supreme Court *already has upheld* certain death-care-specific anti-combination laws. *See Daniel*, 336 U.S. 220; *see also White House Milk*, 12 Wis. 2d at 150 (favorably citing *Daniel*); *La Follette*, 43 Wis. 2d at 644 & n.5 (same). *Daniel* involved a substantive-due-process challenge to a South Carolina statute forbidding life-insurance companies from operating funeral homes. The Court supposed that the legislature "might well have concluded that" such arrangements would embolden combination firms to pressure life-insurance beneficiaries—perhaps through discounts or sheer manipulation—to "deliver the [insurance] policy's proceeds to the agent-undertaker." *Daniel*, 336 U.S. at 222–23. The Court had little trouble concluding that the State's legitimate

consumer-protection interests in preventing "overreach on the part of insurance companies" and possible "monopoly control" were more than enough to sustain the law. *Id.* at 223 (noting also that several other States had "invok[ed their] police powers to combat" these evils). Although the plaintiff protested that the law had been the work of self-interested industry lobbyists, the Court would not hear it. *Id.* at 224. "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop." *Id.* at 224.

Lower courts also have rejected rational-basis challenges to death-care anti-combination laws. The Massachusetts Supreme Court upheld a law permitting a corporation to engage in the business of funeral directing only if it engaged in no other business. *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing,* 398 N.E.2d 471, 473, 476 (Mass. 1979). Likewise, the Michigan Court of Appeals approved that State's statute prohibiting cemetery owners from owning or managing a funeral establishment—finding "an ample, rational basis to conclude that competition in the cemetery and funeral businesses was preserved by prohibiting one agency from both owning and operating a cemetery and acting as a mortician." *Deepdale Mem'l Gardens v. Admin. Sec'y of Cemetery Regulations,* 426 N.W.2d 785, 789 (Mich. Ct. App. 1988). And—in a case so straightforward that the opinion did not even merit

publication—the Second Circuit upheld New York's statute forbidding business combinations between funeral establishments and cemeteries, concluding that the law reasonably addressed "harms that business combinations between funeral entities and cemeteries can cause," including competitive harms. *New York State Ass'n of Cemeteries, Inc. v. Fishman*, 116 F. App'x 310, 313 (2d Cir. 2004); SA 70–72.

Second, the anti-combination laws are also rationally related to the State's interest in limiting the manipulation of funds required to be held in trust. Certain goods and services in the death-care industry are subject to trusting requirements so that individuals can pay for them "pre-need" with assurance that the necessary funds will exist when the need arises. For example, 100 percent of funds paid for a casket before death must be held in trust until the "death of the potential decedent." Wis. Stat. § 445.125(1)(a)1. This requirement serves "the public interest in securing the performance of such arrangements," including "burial." *Grant Cnty. Serv. Bureau, Inc. v. Treweek*, 19 Wis. 2d 548, 551, 120 N.W.2d 634 (1963). Other "cemetery merchandise," including "monuments, markers, nameplates, vases, and urns," is subject to a 40-percent trusting requirement. Wis. Stat. § 440.92(3)(a); § 157.061(3). In addition, sales of cemetery plots require sellers to entrust 15 percent of the principal paid to cover perpetual care expenses. *Id.* § 157.11(9g)(c).

Forbidding combination firms discourages circumvention of these trusting requirements. *Anderson*, 2015 WI 19, ¶ 81 (suggesting that the State has an interest in preventing the "circumvent[ion]" of "consumer protection" laws). The problem with a combination firm—which, by definition, is more likely to sell merchandise subject to different trusting requirements—is that it could free up a higher percentage of its cash by, for example, charging an artificially low price for a casket (an item subject to a high trusting requirement) and an artificially high price for a cemetery plot (subject to a lower trusting requirement). Critically, this would allow the firm to "collect[ ] the *same amount of revenue* while being required to set aside *less money* for perpetual care" of the burial plots, "without actually reducing the actual expenses of perpetual care." SA.51 (emphasis added). As the Second Circuit explained, this would mean that "combinations between funeral entities and cemeteries [could] bring about financial abuses that [would] result in cemeteries becoming dilapidated and falling into disrepair." *Fishman*, 116 F. App'x at 312. Similarly, as to other merchandise subject to trusting, the threatened behavior would increase the risk that the paid-for good would be unavailable when the customer needs it.[5]

[5] These harm-adjacent laws are a common feature of modern regulation. For example, although theft and embezzlement laws already forbid attorneys from stealing funds from their clients, Wisconsin has added to these direct prohibitions a law preventing lawyers even from

C. Porter suggests that, because the Wisconsin Funeral Directors and Embalmers Association "requested and sponsored" the law that became Wis. Stat. § 445.12(6), the law is more constitutionally questionable and thus warrants a more demanding form of scrutiny. Opening Br. 11.[6] But Porter overlooks that that provision also imposes requirements on funeral directors arguably adverse to their self-interest. *See* § 10, ch. 433, Laws of 1943; 35 Wis. Op. Att'y Gen. 186, 187–88 (1946) (stating that the law forbids funeral directors from receiving "kickback[s]" from cemeteries). More to the point, if Porter were correct that laws drafted with input from regulated parties were automatically suspect, no legislative enactment would be safe. Conferring with industry is often part of the lawmaking process. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873, 925–26 (1987). Anyway, the U.S. Supreme Court explicitly rejected this lobbyist-as-poison-pill theory almost 70 years ago in *Daniel*. *See* 336 U.S. at 224 (irrelevant under rational basis whether "the 'insurance lobby' obtained this statute from the South Carolina legislature").

Porter next claims that the anti-combination laws lack a rational basis because "raising rivals' cost" is merely a

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keeping client funds in their own accounts. *See* Wis. Stat. § 757.293. The obvious goal of this law is to curb even the risk that attorneys will steal.

[6] Porter does not allege that funeral directors drafted the law preventing cemetery owners from owning funeral homes. *See* Wis. Stat. § 157.067(2).

"theoretical possibility" and that Dr. Harrington could not find "direct evidence" that exclusionary behavior was occurring in the majority of States without anti-combination laws. Opening Br. 41–42. But even a "theoretical possibility" of such behavior is more than enough under rational basis. *Beach Commc'ns, Inc.*, 508 U.S. at 315; *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies . . . with foresight rather than reactively. . . ."). A well-accepted theory in economic literature—the phenomenon of raising rivals' cost or foreclosure—qualifies at the very least as "rational speculation." *Beach Commc'ns, Inc.*, 508 U.S. at 315. In any event, Dr. Harrington's failure to find direct evidence of exclusionary behavior in States with combination firms has little meaning. First, he admits he was not looking for such evidence. A.121–22. Second, it is possible that combination firms in other States did not engage in such behavior because they feared prosecution under "[s]tate and federal antitrust laws." Opening Br. 45. Porter himself admits that those laws prohibit "tying or predatory pricing arrangements that are likely to have actual anticompetitive consequences." Opening Br. 45.

Relatedly, Porter argues that the State's anti-combination laws are unnecessary because the antitrust laws already prohibit the feared anti-competitive behavior, Opening Br. 45, and because funeral directors and cemetery owners can already sidestep Wisconsin's trusting

requirements by commingling funds they get from selling different products, Opening Br. 49–50. But "unnecessary" is not the standard. That two laws protect against the same harm does not make either one of them unconstitutional. *See Ry. Exp. Agency*, 336 U.S. at 110; *Beazer*, 440 U.S. at 592; *Vance*, 440 U.S. at 106. As the Sixth Circuit has explained, a "belt-and-suspenders approach to regulation passes muster, because the redundant nature of [a] statute does not preclude its being rationally related to" its ends. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 440 (6th Cir. 2000). As for Porter's under-inclusivity objection, courts owe legislatures "leeway to approach a perceived problem incrementally." *Beach Commc'ns, Inc.*, 508 U.S. at 316. So whether the State's interest in avoiding circumvention of the trusting requirements counsels in favor of forbidding funeral homes from combining with flower shops (to use his example, A.123) is a question for the Legislature.

III. This Case Does Not Trigger Rational Basis "With Bite"

A. "When a law exhibits [ ] a desire to harm" a discrete group, courts sometimes apply "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment). In 1972, a commentator nicknamed this standard rational basis with "bite." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 21 (1972). In decisions

applying this more stringent standard, the Justices have understood certain challenged laws to reflect nothing more than "a bare [governmental] desire to harm a politically unpopular group," *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), or to single it out for "moral disapproval," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in the judgment); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985); *Plyler v. Doe*, 457 U.S. 202, 229–30 (1982); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972). As the Court has explained, not only are such ends illegitimate, but their very presence renders inappropriate the typical rational-basis exercise of judicially constructed "justifying rationales." Gunther, *supra*, at 21. And in these cases, the Court typically will demand that the government's proffered interests find support "in the record," *Plyler*, 457 U.S. at 228, which also must show that those interests actually motivated the law, *see Moreno*, 413 U.S. at 534.

Similarly, this Court and others have invalidated laws that have no conceivable public purpose and that exist solely to benefit one group and harm another. *See State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 313 N.W.2d 805 (1982); *Dairy Queen of Wis. v. McDowell*, 260 Wis. 471, 52 N.W.2d 791 (1952); *Jelke*, 193 Wis. 311; *Merrifield*, 547 F.3d at 992; *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). In the commercial context, courts often characterize such laws as "mere economic protectionism for

the sake of economic protectionism" and have deemed them "irrational with respect to determining if a classification survives rational basis review." *Merrifield*, 547 F.3d at 991 & n.15; *Craigmiles*, 312 F.3d at 224; *St. Joseph Abbey*, 712 F.3d at 222–23.[7]

Nonetheless, those courts do not reflexively apply special scrutiny to (much less throw out) any law that happens to be "protectionist" in effect. Nor could they. After all, every commercial regulation in a free-market system is in some sense "protectionist." A minimum wage arguably favors relatively skilled workers over relatively unskilled ones. A tariff benefits a taxed commodity's domestic producers and harms its domestic consumers. Subsidies and tax benefits enrich hand-picked market participants and disadvantage others.

The reason that these and thousands of other commonplace economic regulations are lawful (and do not warrant special scrutiny) is that they conceivably promote a vision of the common good. They do not represent "economic protectionism for its own sake." *Merrifield*, 547 F.3d at 991 n.15. Rather, they use protectionist means to promote a

[7] The Second and Tenth Circuits have stated that—even if the sole conceivable purpose for legislation is economic protectionism—the law should be upheld under the rational-basis test. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (dicta); *Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004). This is a well-supported view, but the State does not defend it here. Still, it is possible to reconcile these cases with the ones discussed in text, which hold that "protectionism" in service of the public good is permissible.

public end, as determined by the Legislature. *See, e.g.*, *Craigmiles*, 312 F.3d at 229; *see also St. Joseph Abbey*, 712 F.3d at 222–23; *Sensational Smiles*, 793 F.3d at 285 ("*some* evidence" that a Connecticut law prohibiting a type of teeth whitening by non-dentists could prevent "*some* harm" to consumers was sufficient); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689 (1984).

The U.S. Supreme Court agrees. Hence New Orleans could favor established pushcart vendors at the expense of newer ones to further its legitimate interest in maintaining the French Quarter's historic character. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Iowa could tax riverboat slot machine revenues at lower rates than racetrack slot machines in the legitimate interest of preserving the riverboat industry. *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003). California could give tax breaks to long-established residents—again, at the expense of newer ones—to serve its "legitimate interest in local neighborhood preservation, continuity, and stability." *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992). And Virginia could order the destruction of red cedar trees to save nearby apple trees from a communicable parasite because this served the legitimate interest in preserving apple orchards thought to be more important to the state economy. *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) (takings claim).

This Court also has consistently recognized the distinction between naked preferentialism and lawmaking directed to the common good. In *Grand Bazaar*, it voided an ordinance preventing certain liquor establishments from receiving Class "A" liquor licenses because the majority of their revenue did not come from alcohol. *Grand Bazaar*, 105 Wis. 2d at 208–09. Critically, the evidence had "require[d]" the Court to conclude that the ordinance's sole purpose was to harm "large retail stores," *id.* at 209–10 & n.5, and that there was "a glaring absence in the record of any public health, safety, morals, or general welfare 'problem' or concern," *id.* at 212. After considering the State's post hoc rationalizations of the law "somewhat skeptically," *id.* at 211, the Court determined that the *sole* conceivable reason for the law had been mere protectionism, *id.* at 214. The law adopted a preference *not* in the service of the common good but as an end in itself. Similarly, in *Jelke*, this Court struck down a law banning oleomargarine because it could conceive of no public purpose for it. 214 N.W. at 373. And in *Dairy Queen*, following *Jelke*, this Court struck down a law "encourag[ing] monopoly by preventing the introduction of a wholesome product." 260 Wis. at 478. Again, this Court could not think of a single legitimate reason—such as preventing fraud or protecting public health—for the law. *Id.*

B. Wisconsin's anti-combination laws do not trigger rational basis with bite. Plainly, they do not reflect a bare desire to harm a particular group. Nor do they amount to

protectionism for protectionism's sake, as discussed at length above, *supra* pp. 26–33. Rather, the laws are part of a broader consumer-protection effort in the death-care industry. They discourage monopolistic behavior and promote compliance with the consumer-protection spirit of Wisconsin's trusting requirements. Supported by bedrock principles of the economics of antitrust law, the Legislature reasonably believed that preventing combination firms decreases the risk of exclusionary behavior and associated price increases. *See supra* pp. 27–31. It also reasonably concluded that sidestepping trusting requirements is easier when a company sells products subject to different rules and that combination firms are more likely to sell different products subject to different trusting requirements. *See supra* pp. 31–33. Hence the laws conceivably serve the public good and are not merely protectionist. *See supra* pp. 26–33.

C. Porter claims to discern a Wisconsin-specific version of the rational-basis-with-bite test in certain state cases, which he reads to require in every due-process challenge a "real and substantial relation" between a challenged law and its underlying interests. *E.g.*, Opening Br. 27, 29, 30. He further asserts that this "real and substantial" test grew up entirely independently of *Lochner*. Opening Br. 29. He is incorrect on both counts. In fact, this Court borrowed this language directly from the U.S. Supreme Court, consistent with its long tradition of following federal precedent in this area, *see supra* pp. 18–19. *See Coffee-Rich, Inc. v. Wis. Dep't*

of Agric., 70 Wis. 2d 265, 272–73, 234 N.W.2d 270 (1975) (quoting U.S. Supreme Court). Yet the standard's source turns out to be an ill-famed *Lochner* era due-process case, which evaluated whether a statute had a "real and substantial relation" to its purported "public health" end. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111–12 (1928). Just as the Supreme Court eventually discarded *Lochner*, however, it overruled *Liggett* as well—specifically noting its invention of the "real and substantial" standard. *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 166–67 (1973) ("The *Liggett* case, being a derelict in the stream of the law, is hereby overruled."). To the extent it prescribes *Lochner*-style scrutiny of commercial regulations, the "real and substantial relation" test is a relic.

Porter also claims to find support for his favored "real and substantial" test in this Court's equal-protection jurisprudence, which sometimes invokes "a five-part test" that considers (among other things) whether a challenged classification rests on "substantial distinctions" and is a good means-ends fit. Opening Br. 22–23 (citing *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 79, 96, 387 N.W.2d 254 (1986)). But that five-part test is not at all inconsistent with the traditional rational-basis standard. To the contrary, in the very case that Porter cites, this Court made clear that the "test is not the exclusive standard" and that it is a "useful analytical tool" *only* to the extent that it helps with the outcome-determinative question whether "*any*

statement of facts reasonably can be conceived which will sustain [the law]." *Milwaukee Brewers*, 130 Wis. 2d at 97–98 (emphasis added); *see also Metro. Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 97 n.9, 332 Wis. 2d 85, 796 N.W.2d 717 (Abrahamson, J., dissenting) (explaining that the five-part test is "derived from cases involving a challenge to a law on the grounds that it is a special law" under Article IV, Section 31 of the Wisconsin Constitution, and that the dispositive rational-basis standard for equal-protection cases long precedes those cases).

Porter also contends that, on several occasions, the U.S. Supreme Court has declined to accept any "conceivable" basis for a challenged law, and so this Court should too. Opening Br. 34. But Porter's U.S. Supreme Court cases are easily distinguishable. Concerns that animus and "irrational prejudice" toward a politically disfavored group were behind the laws motivated the Supreme Court's decisions in *Cleburne*, *Romer*, and *Lawrence*. *See Romer v. Evans*, 517 U.S. 620, 635 (1996); *Lawrence*, 539 U.S. at 574; *Cleburne*, 473 U.S. at 435. Here, Porter does not allege that animus toward a disfavored group or a desire to stigmatize individuals who might own both cemeteries and funeral homes motivated Wisconsin's anti-combination laws. *Metropolitan Life* is also not on point. That case implicated issues of interstate discrimination. Although a State has "broad authority" "to promote and regulate its own economy"—it could not "impos[e] discriminatorily higher taxes on nonresident

corporations" to promote domestic business. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 n.10 (1985). There is no suggestion of interstate discrimination here.

Finally, Porter relies heavily on the rational-basis-with-bite analysis in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, which invalidated the $350,000 statutory cap on noneconomic damages in medical malpractice actions. But *Ferdon* was wrongly decided and should be overruled. *See* State's Amicus Br. at 8–13, *Mayo v. Wisconsin Injured Patients and Families Compensation Fund*, No. 14AP2812 (Jan. 16, 2018) ("State Mayo Br."); *see also State v. Reyes Fuerte*, 2017 WI 104, ¶ 3, 378 Wis. 2d 504, 904 N.W.2d 773 (stare decisis does not protect "objectively wrong" decisions); *see also State v. City of Oak Creek*, 2000 WI 9, ¶ 85, 232 Wis. 2d 612, 605 N.W.2d 526 (Abrahamson, C.J., dissenting) ("Stare decisis does not mean that the court should continue to adhere to unexplained and unpersuasive prior statements of this court."). In any event, *Ferdon*'s fate should not affect what standard of review applies here. *Ferdon* involved the very different question of what level of scrutiny applies when the Legislature places a limitation on a state-law cause of action thought to touch upon "important" enumerated constitutional "right[s] to a jury . . . [and] to a remedy." 2009 WI 9, ¶¶ 66, 69; State *Mayo* Br. at 8–13. In stark contrast, this case raises the question of what standard applies when the Legislature imposes commonplace regulations on

commerce. Historically, both of these questions have been subject to traditional rational-basis review (without bite). *Ferdon* is an anomaly. *See, e.g.*, *Blake*, 2016 WI 57 (applying traditional rational basis); *Madison Teachers*, 2014 WI 99 (same); *Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 2006 WI 88, 293 Wis. 2d 202, 717 N.W.2d 280 (same). Even if this Court were to conclude that *Ferdon* correctly held that with-bite review is appropriate in the damages-cap context, that determination would say nothing about whether such an approach should also apply to ordinary economic regulations.

IV. The Anti-Combination Laws Are Constitutional Even Under Rational Basis With Bite

Even if this Court were to apply a version of rational basis with bite, it should uphold Wisconsin's anti-combination laws, as the Court of Appeals did. A.119–25.

Although confusion remains about what exactly rational basis with bite entails, courts applying it seem to examine more closely the State's showing that the law serves a legitimate state interest, which involves an independent weighing of the costs and benefits of the law. *See, e.g.*, *Grand Bazaar*, 105 Wis. 2d at 209–10; *supra* p. 36.

First, on the "cost" side of the ledger, it is clear that the laws do not prevent Porter from making a living or pursuing his profession. *See Conn v. Gabbert*, 526 U.S. 286, 292 (1999); *cf. Craigmiles*, 312 F.3d 220; *St. Joseph Abbey*, 712 F.3d 215. Porter owns an established cemetery, Highland Park Memorial. A.103. The anti-combination laws merely prevent

an "ordinary commercial transaction[ ]": his investing in another venture, a funeral home. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 680 (2012) (citation omitted). Porter retains plenty of other options to expand his business.

As for the "benefits" side of the ledger, Porter fails to show beyond a reasonable doubt that Wisconsin's anti-combination laws do not actually serve either of the State's asserted interests. *See Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶¶ 19, 27, 237 Wis. 2d 99, 613 N.W.2d 849. His expert, Dr. Harrington, opined that the anti-combination laws increase costs for consumers in Wisconsin by $192 per death. A.121. But, as the Court of Appeals pointed out, his methodology is vulnerable to several reasonable criticisms. A.121–22. For example, Dr. Harrington provided no empirical evidence for his assertion that combination firms operate at lower costs. SA.54. Dr. Harrington's analysis of "expenditures per death" used "state level data" but did not include a "local price index." SA.56. Thus, his figure failed to account for variation in real estate prices and wages across the country that would have a "significant effect on the cost structure of funeral homes and cemeteries" and the "prices charged in different states." SA.56. And Dr. Harrington's assertion that "expenditures per death" were lower in States with more combinations was undermined by evidence showing that "combinations actually appear to charge higher prices." SA.56. In addition, while Dr. Harrington stated that he did not find evidence of

exclusionary behavior in States with combination firms, he admitted that he was not looking for such evidence. A.121–22. Porter himself suggests that exclusionary behavior might not be occurring because combination firms fear prosecution under state and federal antitrust laws. Opening Br. 45. Dr. Harrington also argued that vertical integration would not result in foreclosure in the death-care industry because the demand for cemeteries is declining. Opening Br. 44 (citing R. 29:9). But Dr. Harrington did not show that cemeteries were not a relatively scarce resource. Indeed, "there are far fewer cemeteries in the United States than funeral homes," A.120, and the barriers to entry are arguably higher for cemeteries than funeral homes, especially in urban areas, A.121. Additional research shows that vertical integration is likely to be anti-competitive when the integrating firm faces many competitors, as is the case in the funeral-home industry. A.122 n.14.

Porter does not establish beyond a reasonable doubt that the anti-combination laws do not actually advance the State's interest in "limiting the potential for abuse of trusting requirements." A.123. Dr. Harrington opined that standalone cemeteries and funeral homes can violate the spirit of the trusting requirements with the products that they already sell. A.123. But Porter did not dispute that "having more categories of merchandise makes the commingling of funds with different trusting requirements easier to disguise and more difficult to detect," A.123, and the

Legislature could reasonably believe that combination firms were more likely than standalone firms to have more categories of merchandise. Thus, even under Porter's "close and substantial relationship" test, his evidence does not negate the rationality of the State's expert or conclusively establish that the anti-combination laws do not actually advance the State's interests. A.126.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: March 9, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,891 words.

Dated: March 9, 2018.

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Dated: March 9, 2018.

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