STATE OF WISCONSIN
SUPREME COURT
NO. 2016AP1599

E. Glenn Porter, III and Highland Memorial Park, Inc.,
Plaintiffs-Appellants-Petitioners,

v.

State of Wisconsin, Laura Gutierrez 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' REPLY BRIEF

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INTRODUCTION

The State asks this Court to depart from well-established Wisconsin case law, proposing a rubber stamp rational basis test that fails to enforce the full protections of the Wisconsin Constitution. As noted by Texas Supreme Court Justice Don Willett, such a test sees "government power in the economic realm as infinitely elastic, and thus limited government as entirely fictive, troubling since economic freedom is no less vulnerable to majoritarian oppression than, say, religious freedom – perhaps more so." *Patel v. Texas Dept. of Regulation and Licensing*, 469 S.W.3d 69, 94 (Tex. 2015). It works to "sever 'rational' from 'rational basis,' loading the dice – relentlessly – in government's favor." *Id.* at 97.

This might not be of concern if there was no important constitutional freedom at stake. But as this Court has repeatedly held – and as the State *concedes in its brief* (Resp. Br. 3, 22) – economic liberty and the right to earn a living are constitutionally protected. This is a textualist position. The very first words of our Constitution say that 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. It is an originalist position. This language has never been regarded as merely

exhortatory; from the beginning our Constitution was understood to protect economic liberty and the right to earn a living.

While this protection has not been held to warrant strict scrutiny, the level of scrutiny urged by the State – essentially calling for upholding all laws that do not violate the established laws of physics – offers no protection at all. The State argues that protectionist statutes are valid *even if the facts show* that the purported justifications for the law are false or that, in light of those facts, it would be unreasonable to believe that the law serves them. It argues that a law be upheld so long as courts can merely speculate that what is demonstrably wrong might have been, conceivably, somehow correct. Hypothetical possibilities – however tenuous – must be accepted even if the facts establish that they are extremely unlikely. There is nothing rational about such an approach.

If this "test" – one the government can never fail – is the law, then the numerous cases in which this Court has articulated the "real and substantial" test for laws that restrict economic freedom are meaningless, and this Court should make it clear that all of them are being overruled. If that is the case, then economic liberty is now unprotected and retains no importance.

I. *LOCHNER* IS A DISTRACTION

The State says that the Plaintiffs want to return Wisconsin to the *Lochner* era, a time in which they say the federal courts were free to substitute their own judgments about public policy for decisions made by the legislature. (Resp. Br. 2-3, 15-16.) The "real and substantial" test – a test applied by this Court under state law both before and after *Lochner*[1] – does not do that. It does not require a court to decide what method best achieves a desired result. It does not even require a court to substitute its judgment as to whether a posited method *will* achieve a desired result. Rather, it requires only that a court determine whether, after a real inquiry that considers whatever evidence can be brought to bear, it is reasonable to believe that there is a real and substantial connection between the law and the benefits that the government claims justify it. Under that test, a hypothetical justification suffices until a plaintiff can demonstrate that the hypothetical assumption is most likely to be false.

The State says that "real and substantial" test articulated by the Wisconsin courts in cases that infringe economic freedom was an artifact of *Lochner* and that Wisconsin courts have followed the federal courts in their

[1] App. Br. 29-33.

retreat from that case, adopting the rational basis test as articulated in cases such as *F.C.C. v Beach Communications*, 508 U.S. 307 (1993). (Resp. Br. 21-22.) But whatever one makes of the current academic reassessment of *Lochner*, the case went well beyond the "real and substantial" test – in fact, Justice Harlan's *dissent* applied the "real and substantial" test and would have upheld the challenged law. *Lochner v. New York*, 198 U.S. 45, 65-74 (1905) (Harlan, J. dissenting). It is nonsense to think that *Lochner* enshrined a method that rejected the outcome in *Lochner*.

Furthermore, this Court has never mindfully retreated from the "real and substantial" test. The State cites *Boden*, a case involving health and safety regulations, as saying "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.'" (Resp. Br. 19, *citing Boden v. City of Milwaukee*, 8 Wis. 2d 318, 324, 99 N.W.2d 156 (1959).) But only four years earlier, this Court specifically and clearly declined to follow the federal rule in a case that actually involved economic regulation and the real and substantial test. *Dairy Queen of Wis. v. McDowell*, 260

Wis. 471, 478, 52 N.W.2d 791 (1952) ("It is urged that the decisions of the United States Supreme Court in *Carolene Products Co. v. U. S*., and *Federal Security Adm'r v. Quaker Oats Co*., require us to hold sec. 97.025 valid. We prefer to abide by the rule of the *Jelke* case.") (citations omitted).

The State concedes that "a more searching form" of judicial review should be applied to laws that involve economic protectionism, but says that this comes into play only where the law exhibits a "desire to harm" a discrete group. (Resp. Br. 17.) But the level of scrutiny should depend on the interest that is impaired. While restraints on economic liberty and the right to earn a living have not warranted strict scrutiny, they have merited real and substantial review. Only after that review has been applied can courts conclude whether the restriction is justified.

II. THE PLAINTIFFS PRODUCED EVIDENCE THAT THE ANTI-COMBINATION LAWS DO NOT ACTUALLY FURTHER THE STATED AIMS OF THE GOVERNMENT, MAKING SUMMARY JUDGMENT INAPPROPRIATE.

A. Vertical Integration

The State's brief presents an overly simplified and shallow model of the modern economic understanding of vertical integration. It quotes, out of context, the Supreme Court's decision in *Brown Shoe v. United States*, 370 U.S. 294 (1962), in support of the proposition that "over the history of

the antitrust laws vertical integration has not fared particularly well." (Resp. Br. 5 (citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 506 (5th ed. 2016)).) If that is intended to suggest that vertical integration is somehow unusually dangerous or poses some special threat to competition, it is nonsense.

There are uncountable firms that are vertically integrated in some way. Tesla makes cars. It also makes the batteries that go into its cars. Amazon sells things. It also delivers them. Apple makes computers. It also sells them through a network of retail stores. Huge swaths of our economy – medical care or banking for example – are comprised of clusters of products or services offered together in ways designed to appeal to customers' needs and convenience.

It is certainly true that any firm that is vertically integrated could engage in conduct that violates the antitrust laws – as could those that are not. But the number of actual cases involving what the State describes as vertical foreclosure is small. It is also true that in rare cases authorities have challenged mergers involving vertical integration (based on the particular dangers posed by that particular merger), as in *Brown Shoe*. But those cases are exceedingly rare as well. *Brown Shoe* itself noted that

mergers and vertical integration could be pro-competitive and each must be "functionally viewed, in the context of its particular industry." 370 U.S. at 321-22.

The State's implication that that vertical integration poses some special and inherent danger has it exactly backwards:

> A general presumption that vertical integration is pro-competitive is warranted by a substantial economics literature identifying efficiency benefits of vertical integration, including empirical studies demonstrating positive effects of vertical integration in various industries…Thus, a task for legal and economic analysis to identify those particular (and perhaps relatively few) circumstances in which vertical mergers reduce, or regulatory restraints on vertically integrated firms increase, consumer welfare.

Michael H. Riordan, *Competitive Effects of Vertical Integration*, Columbia Univ. Dept. of Econ. Discussion Paper No. 0506-11, 48 (Nov. 2005).[2]

The State's argument rests on the idea that vertical integration is so inherently dangerous that it is appropriate to ban any and all vertical integration between cemeteries and funeral homes, whether or not any particular combination would pose any danger to competition based on the actual facts and circumstances of the individual market involved. But

[2] Available at https://academiccommons.columbia.edu/download/fedora_content/download/ac:115099/content/econ_0506_11.pdf.

vertical integration is not always or even often dangerous – it is widely and beneficially practiced.

The State's expert – who has not studied the death care industry (*see* R. 21:29-35) – says that, as a matter of theory, vertical foreclosure "could" or "might" happen. But he has no evidence that it ever has actually been a problem in the overwhelming majority of states where combinations firms are legal. The Plaintiffs' expert – who has intensively studied the death care industry for twenty years (R. 29:3) – says that he has never seen any evidence of a combination firm attempting vertical foreclosure, and that given his understanding of the economics that underpin the funeral business, he does not believe that such an attempt would even be possible.[3] And he unequivocally states that in his opinion the existence of combination firms leads to economies of scale and scope that benefit consumers. (R. 29:5.)

The State's expert in fact concedes that vertical integration can be procompetitive and benefit consumers by permitting a combination firm to

[3] The Court of Appeals dismissed his conclusion based on a prefatory remark that Dr. Harrington had not specifically conducted a study of foreclosure. (Ct. App. Dec. ¶39, P. App. 21-22.) But he has studied the death care services industry for more than 20 years (R. 29:3), and the fact that he has never seen any evidence of attempted vertical foreclosure should be given considerable weight. The State's argument goes, at best, to the weight to be accorded to his opinion – something that ought not be resolved on summary judgment.

realize economies of scale. (R. 21:7-8.) He says that foreclosure might be possible depending upon conditions in the individual markets involved. The only possibility he mentions is one in which cemetery plots are "scarce" and cemetery firms therefore have some level of market power. (*Id.* at 13-14.) But the State offers no evidence that cemetery plots are scarce. The only evidence in the record is that they are not – cemeteries cannot sell the inventory that they have. (R. 28:1-2.) They are the losers in the trend toward cremation as an alternative to burial, and given that trend, they simply do not have the market power they would need to make vertical foreclosure possible. (R. 28:1-4.)

Perhaps there are limited circumstances in which vertical integration could be used to harm competition. Antitrust regulation addresses this by preventing conduct that restrains trade while permitting conduct that achieves efficiencies and thus encourages vigorous competition. But the need to evaluate particular market conditions highlights the flaws in the State's blunderbuss approach. While restrictions on the right to earn a living may not need to be "necessary" in the strict scrutiny sense, the State has no interest in prohibiting vertical integration under circumstances – the great run of circumstances – where it poses no risk.

Assume, for example, that the State was concerned that supermarkets might sell popular staples like milk as a "loss leader." One way of protecting consumers from the "danger" of milk as a loss leader would be to prohibit that conduct – for example by prohibiting sales below costs. Another way of solving this "problem" would be to forbid supermarkets from selling milk at all. Would such a law pass the test? As this Court recognized in *Grand Bazaar*, blunderbuss attacks on economic liberty cannot be justified. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 212-14, 313 N.W.2d 805 (1982).

B. The Existence of the FTC Rule Demonstrates the Absurdity of the Anti-Combination Laws

The State's invocation of the FTC's intervention to address serial abuses in the death services industry as an excuse to justify any and all government intervention is ironic. (*See* Resp. Br. 10.) Putting aside the fact that, should Plaintiff Porter be permitted to become a licensed funeral home he will be subject to the FTC rule, the FTC's actions were necessitated by the abusive behavior of funeral homes, not cemeteries. Funeral directors' practices have been so unfair and deceptive that the FTC promulgated a special rule to address them. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 218-19 (5th Cir. 2013). The FTC has never

indicated any concern about the existence of combinations firms as a general matter. To the contrary, the agency favors innovation and the introduction of new competitors into the market. *Id.* at 218.

The State's argument about the danger of vertical integration and arresting threats to competition in their incipiency is exactly backwards. (*See* Resp. Br. 6-8.) They point out the "danger" of combination firms and then trumpet the fact that the FTC has been given authority to address threats to competition. Yet not only has the FTC done nothing about the "danger" of combination firms, it believes as a general rule they are procompetitive. The FTC has thus consistently taken the position that it is Anti-Combination Laws, including Wisconsin's, that pose a true danger to competition. FTC Comment Letter V930024 (Sept. 13, 1993) (R. 29:18).

C. The Equal Protection Elephant in the Room

The State avoids an issue that is central to the Plaintiffs' Equal Protection challenge. That challenge asks, even if the Anti-Combination Laws do bear a real and substantial relationship to a legitimate government purpose, does the choice to apply such restrictions to some classes of participants in the funeral business – and not to others – have a rational justification?

If the concern is that someone might use presumed market power in one area to raise costs in another or to tinker with prices to avoid trusting requirements, why doesn't the State prohibit burial vault or casket manufacturers from having an interest in a funeral home or a cemetery? Why doesn't it prohibit cremation firms – firms that on this record have as much or more market power than cemeteries – from having an interest in a funeral home? All of the dangers the State says are associated with combination firms would be present there as well.

As we pointed out in our opening brief, funeral home directors are the ones who have a scarce and valuable asset. They are placed in a legally privileged position that makes them a gatekeeper in the death care industry. (App. Br. 43-44.) Cemetery owners like Plaintiff Porter are willing to take the necessary steps to have access to this privileged position so that they can offer something that some consumers might want. The Anti-Combination Laws are nothing but an effort to deny them – and their customers – that opportunity.

III. FEDERAL AND FOREIGN JURISDICTION CASES APPROVING RESTRICTIONS ON THE DEATH CARE INDUSTRY ARE IRRELEVANT OR INAPPLICABLE

Defendants make much of the Supreme Court's ruling in *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949), as well as state and lower court decisions upholding what Defendants claim are anti-combination laws. (Resp. Br. 29-31.) *Daniel* is easily distinguishable in that there the Court concluded that the arrangements in question could permit insurance proceeds to be effectively paid in hard-to-value services instead of cash, something that was already unlawful under South Carolina insurance law. *Id.* at 222-23. The case has nothing to do with competition or with the trusting requirements that the State proposes as justifications for Wisconsin's Anti-Combination Laws.

The *Blue Hills* and *Deepdale* cases apply the kind of rubber stamping review that Wisconsin courts have rejected. *See Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 471, 474-75 (Mass. 1979) (applying the lower "any conceivable basis" standard); *Deepdale Mem'l Gardens v. Administrative Sec'y of Cemetery Regulations*, 426 N.W.2d 785, 789 (Mich. App. 1988) (rejecting a higher "substantial relation" test). They asked no questions about how

the laws operated or whether they actually advanced the purported aims suggested by the State. They therefore offer no guidance on Wisconsin's constitutional protection of the right to earn a living.

CONCLUSION

There are two possible stories here. One is that during the late 1930s the Wisconsin legislature decided that vertical integration was a big problem. But only in the funeral industry, and only between funeral homes and cemeteries. And it decided that that kind of vertical integration is so uniquely dangerous that it was necessary to ban it altogether.

The other possible story is that in 1939 Wisconsin funeral directors saw a new competitive threat from the invention of combination firms in California and talked their friends in the legislature into putting an end to it.

Plaintiffs have introduced sufficient evidence to call into question the first story – to suggest that it is simply not rational to believe it – and to raise the possibility that the second story is the true one. They are entitled to a "more searching form" of judicial review – review that involves consideration of the evidence and that does not involve resolving all disputed questions of fact in favor of the State.

The decision of the Circuit Court granting the Defendants' motion for summary judgment should therefore be reversed.

Dated this 23rd day of March, 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 2,966 words, calculated using the Word Count function of Microsoft Word 2010.

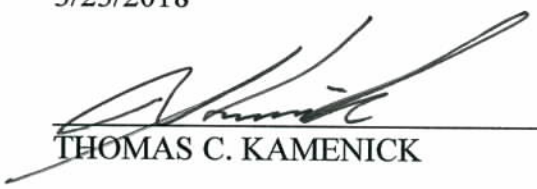
Dated: 3/23/2018

THOMAS C. KAMENICK

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, 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: 3/23/2018



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